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&
Judicial Commissioner's Court, N.-W.F.P., Peshawar
AUTHOR OF
"The Punjab References," and "The Punjab Ready Referencer" Series,
"The Privy Council References" also
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# PREFACE

The author has great pleasure in submitting the Second and Third Volumes of his work on the Law of Limitation and Prescription for the appreciation of the learned Profession to which he has the honour to belong, and which he has been serving, to the best of his ability, for the past nearly 25 years as a writer of some works of reference in connection with Punjab Cases, and recently of some commentaries on subjects of all-India importance.

The plan and scheme of the present work remains the same as in Vol. I, dealing with the sections, of the Indian Limitation Act, IX of 1908. The Second and Third Volumes Complete the subject by a minute, and detailed discussion, of the Articles of the Schedule I, to the Limitation Act.

The object aimed at, throughout, has been to place a clear and comprehensive Commentary, on the statutory provisions in the light of the entire case-law, bearing on the subject, contained in official, or non-official publications and reports, as thoroughly and exhaustively as the author's research and industry permitted. No pains have been spared to perform this self-imposed task, in the spirit of a humble-student of law under a strong urge to be of some use to the profession at large. The conflict of views in several High Courts, has been noticed very closely from the practical stand point of an intelligent investigator of the true legal position, with its ratio decidendi, its shades of differences, the principles deducible, aided by illustrative cases, where those principles have received practical application, with the result of reaching safe conclusions, stated as far as possible in the words of Judges themselves to secure the utmost lucidity and accuracy and at the same time distinct authority for the propositions for which the author has assumed his responsibility. This has necessitated sometimes a prolonged discussion, which has been conveniently noticed in separate paragraphs dealing with the case-law grouped according to different High Courts, instead of the usual method of formulating brief dry notes, as in ordinary Commentaries, with a long list of heaped up footnoted cases, more or less bearing on the topic, with or without any discriminating remarks, for the reader's own independent research and investigation. The author trusts that the help which he has ungrudgingly provided in this Volume by first-hand references to citable observations of the direct individual authority, or selected group of cases, will prove a considerable time-saver to the busy practitioner, or the over-worked Judge, and will be appreciated especially in mofussil stations not enjoying the benefits of a big law library. The Exhaustive Subject-Index or Ready-Referencer, remains a special feature of the author's publications.

The Author ventures to thank his subscribers for the encouragement which they have afforded in the past, and in anticipation of the support which may be meted out to this work which he intends to be his last.

In conclusion the author expresses his grateful thanks to his law-printers, the Madras Law Journal Press, for the extremely neat and attractive printing which is quite up to the level of best work possible in India. The Price of the book has been fixed advisedly low to meet present economic conditions.

DIWAN CHAND OBHRAI.

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# SUPPLEMENTARY NOTES.

## PART II.

### Article 2.

91. *Add* to **§ 926: Scope of the article,** at p. 993:—

Article 2, applies only to suits for compensation and damages for tortious acts of public officer purporting to act in pursuance of statutory power.[9-a] It has no application to suits to recover compensation independently of any question of tort.[9-b] The object of Art. 2 is the protection of public officials who, while *bona fide* purporting to act in the exercise of a statutory power, have exceeded that power, and have committed a Tortious Act; it resembles in this respect the English Public Authorities Protection Act.[9-c] The protection is needed when an actionable wrong has been committed and to secure the protection there must be (1) a *bona fide* belief by the official that the act complained of was justified by the statute, (2) the act must have been performed under colour of a statutory duty, and (3) the act must be in itself a tort in order to give rise to a cause of action.[9-d] When a public officer acts *bona fide* in the exercise of his lawful authority, but needlessly exceeds his authority, then a suit would lie, and be governed by Art. 2, Limitation Act.[9-e]

### Article 7.

92. *Add* to **§ 969,** p. 1030, F.-n. (4):—

(4) *Khagendra Nath Chatterjee* v. *Kanti Bhushan,* 1936 Cal. 808 (809) and *Sitaram* v. *Jaganath Singh,* 1936 Lah. 661=160 I.C. 1042.

### Article 14.

93. *Add* to **§ 1090,** at p. 1132:—

Article 14 does not apply where no order was passed by the collector on the merits, on the application by the mortgagor praying

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[9-a] *Secretary of State* v. *Lodna Colliery Company, Limited,* 1936 Pat. 513=15 Pat. 510=17 P.L.T. 279=164 I.C. 860.

[9-b] *Ibid.*

[9-c] *Ibid.,* 1936 Pat. 513; Diss. 1934 Pat. 507=13 Pat. 752=151 I.C. 995=16 P.L.T. 61.

[9-d] *Ibid.*

[9-e] *Jacques* v. *Narendralal,* 1936 Cal. 653 (655).

that the land might be redeemed under S. 4 of the Redemption of Mortgages Act, 1913.[28-a]

### Article 22.

94. *Add* to **§ 1122,** at p. 1156:—

In the matter of seduction the case of a wife stands on a different footing from that of a servant or daughter. A suit by the husband for damages for enticement of his wife, which affects the contract of marriage, is governed not by Art. 22, but by **Art. 120,** Limitation Act.[38-a]

### Articles 31 and 49.

95. *Add* to **§ 1172,** at pp. 1190 and 1191:—

A suit for compensation for non-delivery of goods must be brought within one year of non-delivery, no matter what the circumstances are which occasion the non-delivery.[20-a]

### Article 32.

96. **§ 1185: Perverted user,** at p. 1204:—

*Illustrations.*

(4) Where the defendant was allowed use of water for a particular purpose, but the defendant used it for another purpose which was illegal, a suit to recover damages for the wrongful act of the defendant lay in tort under **Art. 36,** and Art. 32 did not apply, as there was no perversion of the land within the meaning of the article.[31-a]

### Article 36.

97. *Add* to **§ 1191,** at p. 1207:—

**Suits for compensation.**

Article 36, is a general article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere.[34-a]

*Illustrations.*

(1) A suit to recover damages for wrongful use of water, which the defendant contracted to use only for particular purpose falls under **Art. 36,** and not under Arts. 32, 48, 49 or 115 of the Act.[34-b]

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28-a. *Ali Muhd.* v. *Shah Tamaz Khan,* (1936) 165 I.C. 739=1936 Lah. 692=38 P.L.R. 917.

38-a. *Sobharam* v. *Tikaram,* (1936) 164 I.C. 974=1936 All. 454=1936 A.L.J. 574.

20-a. *Ramlal* v. *B. N. Ry. Co.,* 1936 Nag. 21 (22)=161 I.C. 867.

31-a. *Manga Reddi* v. *Venkata Raghava,* 1936 Mad. 250=1936 M.W.N. 196=70 M.L.J. 255=43 L.W. 429=61 I.C. 538.

34-a. *Manga Reddi* v. *Venkata Raghava,* 61 I.C. 538=1936 Mad. 250.

34-b. *Ibid.*

**(2)** Where ward headmen of municipality executed mutual guarantee bond for due collection and credit of revenue by each of them; and subsequently, one of them *M* was guilty of defalcations, and on a petition to the President of the Municipality by the headman that they would no longer stand guarantee for *M*, no action was taken, and the Municipality sued the President for the recovery of loss, the case was held to be governed by Art. 36.[34-c]

### Article 44.

98. *Add* to **§ 1245: Article applied.**—*Illustrative Cases,* at pp. 1247-1249:—

(11) Art. 44 applies to a suit brought by a ward to set aside alienations made during minority by the guardian *de jure,* but it does not apply to suits by minors to set aside alienations made by *de facto* guardians.[10-a]

99. *Add* to **§ 1246: Article not applied**: *Illustrative Cases*:—

(13) In a case of improper or an unauthorised alienation by a *de facto* guardian, the minors, when they come of age, need not get the alienations set aside, and **Art. 144** would apply to a suit by them for possession.[33-a]

100. *Add* to **§ 100: Starting point of limitation**:—

**Alienation by mother of joint family property of her minor sons.**

A suit by a younger brother in a joint Hindu family on behalf of himself and his minor brothers, to set aside an alienation of the joint family property by their mother during their minority, when instituted more than three years of their eldest brother attaining his majority, is barred by S. 7 and Art. 44, Limitation Act, although brought within three years of the plaintiff attaining his majority. Time runs from the date on which the eldest brother attained his majority.[4-a]

### Article 47.

101. *Add* to **§ 1263: Suit to set aside summary order,** at p. 1262:—

Article 47 read with S. 145, Criminal Procedure Code, shows that the article applies only to those cases in which the Magistrate has declared one of the parties to be entitled to possession until

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[34-c] *Tavoy Municipal Committee* v. *U Khoo Zun,* 1936 Rang. 310 (312); Reld. 1920 P.C. 35; 1930 Rang. 173; and 22 Mad. 342; Dist. 1924 All. 467 and 1924 Lah. 435.

[10-a] *Koya Ankamma* v. *Kameshwaramma,* 1936 Mad. 346 (347)=1936 M.W.N. 74=161 I.C. 797=70 M.L.J. 352.

[33-a] *Ponnamal* v. *Gomathi Ammal,* (1936) 165 I.C. 287=71 M.L.J. 366=44 L.W. 543=1936 M.W.N. 1032.

[4-a] *Annia Pillai, In re,* 1936 Mad. 914=165 I.C. 656=44 M.L.W. 479=1936 M.W.N. 1128; Folld. 1915 Mad. 1201; 1928 Mad. 42; and 1934 Mad. 469; Dist. 1926 P.C. 16.

evicted therefrom in due course of law, or has restored possession to a party found to have been forcibly or wrongly dispossessed within two months of his initial order. The essential requirement for the application of the article is the order of the Magistrate in respect of possession of the property. When this is wanting, Art. 47 will not govern the case.[48-a] This article has no application where the Magistrate dropped the proceedings under S. 145, Criminal Procedure Code, after simply ordering the demarcation of the boundary in accordance with the previously settled boundary line.[48-b]

102. *Add* to § **1268,** at p. 1266:—

It is not contemplated by the provision in Art. 47, that the title of the co-sharer of any joint property must be held to be extinguished to bar any claim for joint possession or for partition.[28-a]

103. *Add* to § 1269: **Suit to recover property,** at p. 1267, Foot-note (30):—

30. *Mungalal* v. *Sagarmal,* 1936 Pat. 629= 166 I.C. 29=15 Pat. 481 =17 P.L.T. 726.

104. *Add* to §1269, at p. 1267:—

The provisions of Art. 47, Limitation Act, are applicable to a suit for possession of an undivided share of the property in respect of the whole of which there was a final order under S. 145, Criminal Procedure Code.[32-a]

105. *Add* to § **1271: Parties bound by the order,** at p. 1269:—

There is no justification for holding that it is only the particular trustee who was a party to a proceeding under S. 145, Criminal Procedure Code, that must be held bound by that order, or by the limitation prescribed in Art. 47, Limitation Act.[2-a]

## Article 48.

106. *Add* to § **1277: Article explained,** at p. 1272:—

Article 49 must be read with Art. 48. Reading the two articles together, it is clear that if the property in suit falls within the des-

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[48-a] *Partab Bahadur Singh* v. *Jagutjit Singh,* (1936) 164 I.C. 118= 1936 Oudh 387 (393)=1936 O.L.R. 412=1936 O.W.N. 784=1936 R.D. 416.

[48-b] *Ibid.*

[28-a] *Jogesh Chander* v. *Suresh Chandra,* 163 I.C. 370=39 C.W.N. 863.

[32-a] *Ibid.,* 163 I.C. 370=39 C.W.N. 863.

[2-a] *Jagathambal Anni* v. *Periathambi,* 1936 Mad. 188=161 I.C. 234.

cription under Art. 48, it would be excluded from the operation of Art. 49, which seems to be a residuary article.[15-a]

107. Add to § 1283: **Article not applied:** *Illustrations*:—

(4) Where plaintiff sued to recover damages for wrongful use of water contracted to be supplied for a particular purpose only, the suit was governed by Art. 36, and Arts. 48 and 49 had no application.[4-a]

108. *Add* § **1283-A: Starting point of limitation,** at p. 1276:—

The knowledge referred to in Art. 48 is the knowledge of the taking away of the property. A mistaken belief by the plaintiff that the property removed was not his, will not affect the running of the period of limitation, unless, of course, the knowledge of the fact was kept back from him by the fraudulent conduct of the defendant.[4-b] The Legislature has not imposed a condition as to the plaintiff being reasonably diligent in discovering particular facts, the knowledge of which starts limitation under Art. 48, Limitation Act.[4-c]

### Article 49.

109. *Add* to § **1289: Scope of Arts. 48 and 49,** at pp. 1280-1281:—

The Bombay High Court has taken a similar view, in *Kaikhusroo* v. *Gangdas.*[14-a] It has been observed that

> "Art. 49 must be read with Art. 48. Reading the two articles together, it is clear that Art. 49 would apply to a suit for recovery of specific moveable property which is *other* than the specific moveable property described in Art. 48; and, if the property in suit falls within the description under Art. 48, it is clear, it would be excluded from the operation of Art. 49, which seems to be a residuary article governing suits for specific moveable property not lost to the owner as a result of theft or dishonest misappropriation or conversion."[14-b]

110. *Add* to § **1290: Art. 49 explained,** at p. 1282:—

**(ii-a) Conversion.**

The detention of property amounts to conversion within Art. 49 only when it is adverse to the owner or other person entitled to possession that is to say, the defendant must have shown an intention to

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[15-a] *Kaikhusroo* v. *Ganga Das,* 1936 Bom. 322=38 Bom.L.R. 712.

[4-a] *Manga Reddi* v. *Venkataraghava,* 1936 Mad. 250=1936 M.W.N. 196=43 M.L.W. 429.

[4-b] *Sirish Chander Nandy* v. *Ramji Bechar Das,* 1936 Pat. 179=161 I.C. 855.

[4-c] *Kaikhusroo* v. *Ganga Das,* 1936 Bom. 322 (324)=38 Bom.L.R. 712.

[14-a] 1936 Bom. 322=38 Bom.L.R. 712=165 I.C. 184 (187).

[14-b] *Ibid.*

keep the property in fraud of the plaintiff.[19-a] The principle is clear that where there have been successive conversions of the same property by different persons, each of these conversions is an independent cause of action, and the barring of one of them by the statute of limitation has no effect on the others.[19-b] Therefore, if *A* converts goods belonging to *B*, it is no defence that formerly and more than three years before suit was brought they were converted by *C* also.[19-c]

**Successive conversions.**

### Article 54.

111. *Add* **§1311-A: Application of Art. 54,** at p. 1298:—

For Art. 54, Limitation Act, to apply, it must be alleged that the Hundis were not executed as promised. If the defendants wish to make this allegation, it is for them to make it in their written statement or their pleadings clearly, and without any attempt to mislead the plaintiffs.[28-a]

**Allegation of non-execution of Hundis.**

### Articles 59 and 60.

112. *Add* to **§ 1327: Art. 59 explained,** at p. 1309:—

A suit for the recovery of money deposited with a banker and repayable on demand is governed by Art. 60, and not by Art. 59.[45-a]

113. *Add* to **§ 1334: "Loan" and "deposit payable on demand":—**

Their lordships of the Privy Council have explained that the two terms "loan" and "deposit payable on demand" are not mutually exclusive.

**The Privy Council.**

"A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps most obvious is that the deposit not for a fixed term does not impose an immediate obligation on the depositee to seek out the deposit and re-pay him. He is to keep the money till asked for. A demand by the depositor would, therefore, seem to be a normal condition of the obligation of the depositee to pay."[26-a]

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[19-a] *Kaikhusroo* v. *Gangadas,* 1936 Bom. 322=165 I.C. 184.

[19-b] *Ibid.*

[19-c] *Ibid.*

[28-a] *Northern Forest Company* v. *Ram Singh Kabuli and Co.,* 1936 Lah. 328=162 I.C. 302.

[45-a] *Kantichandra Mukerji* v. *Badri Das,* 1936 Lah. 718 (720)=17 Lah. 481.

[26-a] *Muhd. Akbar Khan* v. *Attar Singh,* (1936) 162 I.C. 454 (P.C.).

114. *Add* to **§ 1335: Article explained,** at p. 1316:—

**Deposit is not a trust.**

For purpose of Art. 60, in ordinary and popular language the money of a customer standing to his credit in the accounts of a banker is money *"deposited"*, although for certain other purposes, the term "deposit" is limited to goods which are placed in the custody of a person with a view to their being returned in specie. The test is to see whether money is placed in a sort of current account with a banker, and specific use of such word is not necessary.[41-a]

**"So payable."**

115. The **Rangoon High Court** has held that the words "so payable" mean payable on demand.[43-a] Where a deposit is for a fixed period, the money is payable at the specified time, namely, at the expiry of the fixed period, and **Art. 66, or 115,** applies.[43-b]

116. *Add* to **§ 1338: Payable on demand,** at p. 1319:—
F. N. (13) at p. 1319: *Add*:—
*Muhd. Akbar Khan* v. *Attar Singh,* (1936) 162 I.C. 454 (P.C.).

117. *Add* to F. N. (14) at p. 1319:—
*Seema* v. *Banerjee,* 1936 Rang. 338 (339)=164 I.C. 412.

118. *Add* to **§ 1340: Starting point,** at p. 1320.

**Demand against one of partners.**

Where there is no evidence that the dissolution of partnership is notified to customers of the firm, then on the customer's demanding payment from either of the partners his cause of action has arisen against them all.[22-a]

### Article 61.

119. *Add* to **§ 1350: Article applied:** *Illustrative cases*:—

(14) Where *R* and *N*, borrowed money on a promissory note from *J* and *M*, and *J* alone realized amount by draft on *R* and *N*, and in a suit by *J* and *M* against *R* and *N* for recovery of amount due on the pro-note, the Courts decreed the suit in favour of *M* only for half the amount, and *M*, having recovered part of the amount in execution, *R* and *N* sued against *J*, for recovery of the amount realised by him, it was held that the suit was governed by either Art. 61, or **Art. 96, or Art. 120,** Limitation Act.[47-a]

120. *Add* to **§ 1351: Article not applied:** *Illustrative cases*:—

**Debtor and creditor.**

(10) Where *A* sued for money against *B*, and the suit was compromised by which *C* executed a promissory note in favour of *A*, and *C* having paid off the amount to *A*, subsequently sued *B*, for the amount, it was held that the relationship between the parties was not

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[41-a] *Balabux* v. *Inder Kumar,* 1936 Pat. 539=165 I.C. 593.

[43-a] *Seema* v. *Banerjee,* 1936 Rang. 338 (339)=164 I.C. 412.

[43-b] *Ibid.,* 1936 Rang. 338 (340); Reld. on 1915 All. 78; 1919 Mad. 825; 1920 L.B. 74; 10 I.C. 1033; 1914 Mad. 51; and 1931 Lah. 59.

[22-a] *Balabux* v. *Inder Kumar,* 1936 Pat. 539 (542).

[47-a] *Jiwan Singh* v. *Radhakishen,* 1936 Lah. 747.

that of debtor and creditor and as such the suit was not governed by Art. 61, but by **Art. 83** of the Limitation Act.[8-a]

121. *Add* to **§ 1352: Starting point of limitation,** at p. 1333:

A person who makes a payment into Court to set aside a sale does not continue to have dominion over that money until the sale is set aside. But, the Court has dominion over the money from the time when he paid the money into Court until the time when it is paid out to decree-holder.[10-a]

### Article 62.

122. *Add* to **§ 1370: Article not applied:** *Illustrative cases,* at pp. 1356-1358:—

**Art. 116 or Art. 120.**

(3) In a suit for recovery of money, under S. 68, Transfer of Property Act, limitation is governed by **Art. 116,** or **Art. 120,** and not by Art. 62, Limitation Act.[32-a]

### Article 64.

123. *Add* to **§ 1383: Account stated:—**

**Calcutta.**

Where on settlement of an account in respect of a debt on a promissory note, a certain amount is found due on a particular date on calculation of interest at a reduced rate, and an endorsement to that effect made on the back of the promissory note is signed by the debtor, such an endorsement amounts to an account stated between the parties within the meaning of Art. 64.[43-a]

124. *Add* to **§ 1390: Starting point of limitation,** at p. 1380:

The starting point of limitation for a suit to enforce the liability was not earlier than the date on which the account was stated under Art. 64.[32-a]

### Article 65.

125. *Add* to **§ 1392: Applicability,** at p. 1381:—

A suit by the lessee for refund of premium paid under a void lease is not governed by Art. 65 or **Art. 97,** but by **Art. 116,** where the lease was given under a registered document to the defendant.[34-a]

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[8-a] *Rangappa* v. *Venkataswami,* 1936 Mad. 334=163 I.C. 177=1936 M.W.N. 422=70 M.L.J. 537=43 M.L.W. 503.

[10-a] *Meghavarnam* v. *Mohideen,* 1936 Mad. 782 (783)=1936 M.W.N. 658=44 M.L.W. 135; Diss. 1928 Cal. 361; and 1917 Cal. 203.

[32-a] *Ma Pwa Thein* v. *Ma Me Tha,* 1936 Rang. 80 (81)=161 I.C. 461; Folld. 1925 Rang. 223.

[43-a] *Prosunna Kumari Mozumdar* v. *Tripuracharan,* 1936 Cal. 470 (472); Reld. on 1934 P.C. 144 and 147 (P.C.).

[32-a] *The Benares Bank, Ltd.* v. *Masudenlal,* (1936) 163 I.C. 178.

[34-a] *Rajendra Narain Singh* v. *Lal Mohan Tribeni,* 1936 Pat. 462 (465).

## Article 66.

126. *Add* to **§ 1402: Single bond:** *Illustrations,* at pp. 1389-1390:—

(8) Where a bond containing a promise to repay the loan with interest in two years provides that interest will be paid month by month and in case of non-payment of interest monthly, the creditor will have a right to sue for his money within or after the stipulated period, the bond becomes payable on the occurrence of the first default in payment of interest and limitation begins to run from that date under Art. 80, Limitation Act.[49-a]

## Article 68.

127. *Add* to **§ 1411: Administration Bond:—**

A suit to enforce an administration bond which has been taken in the name of officers for the security of those interested in the due administration of the estate under the provisions of Ss. 291, 292, Succession Act, is not a suit merely on the bond, but is a **suit on a bond coupled with the statutory assignment,** or proof of title to the estate, and the case falls under **Art. 120,** and not under Art. 68.[8-a]

## Article 75.

128. *Add* to **§ 1443: Waiver of default:—**

**Oudh.**

Where the obligee of an instalment bond is given the right to sue for the whole amount on occurrence of default in payment of any instalment, it is open to him to waive the benefit of that provision on the occurrence of default in payment of an instalment, and yet to avail himself of that provision when a similar default takes place in payment of a subsequent instalment.[38-a]

## Article 80.

129. *Add* to **§ 1468: Scope and application,** at p. 1451:—

*Illustrative cases.*

(16) Where a bond containing a promise to repay the loan with interest in two years, provides that **interest** will be paid **month by month,** and in case of non-payment of interest monthly, the creditor will have a right to sue for his money within or after the stipulated period, the bond becomes payable on the occurrence of the first default in payment of interest, and limitation begins to run from that date under Art. 80.[22-a]

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[49-a] *Shiv Narain* v. *Badal,* (1936) 162 I.C. 459 (Oudh).

[8-a] *Manubhai Chunilal* v. *General Accident Assce. Corporation, Ltd.,* (1936) 165 I.C. 672=1936 Bom. 363=38 Bom.L.R. 632.

[38-a] *Jagatjit Singh* v. *Manodat,* 1936 Oudh 384 (385)=1936 O.W.N. 665; Relied on 1936 Lah. 570=164 I.C. 431.

[22-a] *Shiv Narain* v. *Badal,* (1936) 162 I.C. 459 (Oudh); Cf. Art. 66.

## Article 83.

130. *Add* to §§ 1480-1482: **Applicability:** *Illustrations,* at p. 1462:—

(2-a) Where a suit for money by *A* against *B*, was compromised by which *C* executed a promissory note in favour of *A*, and *C*, having subsequently paid off the amount to *A*, sued *B* for the amount, it was held that the suit was governed by Art. 83, and limitation ran from the date of payment under promissory note by *C*, to *A*.[40-a]

131.

(7) Where the plaintiffs executed a sale-deed in respect of certain property in favour of the defendants, leaving a sum in their hands for the discharge of a previous mortgage subsisting on the property, but the defendants failed to discharge the mortgage, and the mortgagee having brought a suit on his mortgage, the plaintiffs were required to pay off the mortgage in order to save the property from sale; held that a **claim to enforce personal liability** on account of a **statutory charge on property transferred for purchase-money not paid,** brought within three years of the date on which the plaintiff had been required to pay off the mortgage, was within time under Art. 83, Limitation Act.[45-a]

132. *Add* to § 1486: **Starting point of limitation,** at p. 1465:—

In a contract of indemnity, the cause of action by virtue of right of indemnity arises on date of payment.[13-a]

## Article 85.

133. *Add* to § 1504: **Reciprocal demands,** at pp. 1480-1481:—

The expression "*where there have been reciprocal demands between the parties*", in Art. 85, does not mean that there must have been an actual demand by each party from the other, but means that the article applies only to cases where the course of business between the parties has been of such a nature as to give rise to reciprocal demands between them, that is of such a nature that the balance might sometimes be in favour of one party and sometimes in favour of the other.[34-a]

## Article 89.

134. *Add* to § 1521: **Suit for accounts:**—

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[40-a] *Rangappa* v. *Venkataswami,* 1936 Mad. 334=43 L.W. 503=70 M.L.J. 537=1936 M.W.N. 422; Cf. Art. 61.

[45-a] *Ram Chander* (*Pandit*) v. *Ram Chander,* 1936 All. 870; Reld. on 1934 All. 406.

[13-a] *Valianath* v. *Gobinda,* 1936 Mad. 655=1936 M.W.N. 350; also see *Ramchander* v. *Pandit Ramchander,* 1936 All. 80; Reld. on 1934 All. 406; Ref. 19 I.C. 676; 1926 All. 605; 1927 All. 435 and 1933 All. 386; Dist. 1929 All. 121.

[34-a] *Bejoy Kumar Bhattacharjee* v. *Satish Chandra,* 1936 Cal. 382 (385)=166 I.C. 134.

In a case where a Hundi was vested in the defendant for payment of debts of third person, the defendant's obligation to account is **equitable, and** the suit for accounts against the defendant **regarded as an agent of** such third person would fall under Art. **89; if not Art. 120** would apply.[50-a] **The starting point** in both **cases being the date at which** the defendant denied such third person's claim or in any other manner infringed or threatened to infringe his right.[50-b]

**Suit for account by successful party.**

135. In the case of a dispute as to property, where there was an agreement between parties that one of them may collect rents and account to the rightful claimant, held that there was no properly constituted trust such as would bring the case within S. 10 of the Limitation Act, and there was also no contract of agency which would bring in Art. 89. The case was therefore held governed by **Art. 120,** Limitation Act.[50-c]

**Suit between co-sharers.**

136. A suit between two co-sharers for a share of the profits realised by the co-sharer in possession is governed by **Art. 120,** and not by Art. 89.[50-d]

## Article 91.

137. *Add* to § 1543: **Art. 91, when not applied:** *Illustrations,* at pp. 1526-1527:—

**Ancillary or incidental relief.**

(7) This article is not applicable to a suit to set aside a consent decree where fraud is not alleged or proved. **Art. 120,** therefore, applies.[22-a] In the generality of cases limitation in the case of a void transaction, where cancellation is non-essential, would run from the date of the deed, but exception is possible in cases where there are special circumstances showing that an agreement was discovered to be void at a later date.[22-b]

## Article 95.

138. *Add* to **§ 1570: Scope and applicability:—**

Article 95 applies to a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, *e.g.,* where the plaintiff has sustained loss or damage on account of the fraud of the defendant.[37-c]

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[50-a] *Vairavan Chetty* v. *Chettichi Achi,* 1936 Mad. 876 (878).

[50-b] *Ibid.*

[50-c] *Neelam Sitaramaswami* v. *Thummala Mahalakshmamma,* (1936) 161 I.C. 843.

[50-d] *Charan Singh* v. *Diwan Singh,* 1936 All. 706 (707)=165 I.C. 266=1936 A.L.J. 984.

[22-a] *Nibaran Chandra* v. *Matilal,* (1936) 164 I.C. 561=61 C.L.J. 193=39 C.W.N. 938=62 Cal. 642.

[22-b] *Bholanath* v. *Maharani Kuar,* 1936 O.W.N. 489=162 I.C. 362.

[37-c] *Kaikhosroo* v. *Ganga Das,* 1936 Bom. 322=165 I.C. 184 (Cf. **Art. 49**).

*e*

139. *Add* to p. 1552:—

**Suit to set aside a consent decree.**

*Nibaran Chandra* v. *Matilal,*[39-a] a suit to set aside a consent decree where fraud is not alleged or proved falls under **Art. 120,** and not Arts. 91 or 95, Limitation Act, similarly, a suit to set aside a decree on ground of gross neglect of the guardian is governed by **Art. 120,** and not by Art. 95.[39-b]

### Article 96.

140. *Add* to **§ 1578 and § 1583,** at pp. 1562 and 1566:—

**Money paid by mistake.**

**Starting point.**

Where *R* and *N* borrowed money on promissory note from *J* and *M*; and *J*, alone realized amount by draft on *R* and *N*, and in a suit by *J* and *M* for the amount due on the promissory note, the Court decreed claim for half the amount in favour of *M*, holding *J*, not authorised to receive payment on behalf of *M*, and *M* realized the amount in execution, and subsequently *R* and *N*, sued *J*, for recovery of the said amount, *held* that the suit was governed by Art. 61, or 96 or 120 the starting point being in each case from the date of **appellate decree** in favour of *M*.[3-a]

### Article 102.

141. *Add* to **§ 1615: Article explained:—**

*Add* to F. N. (5):—

*Sitaram* v. *Jagannath Singh,* 1936 Lah. 1661=160 I.C. 1042 (Motor-car driver).

142. *Add* to F. Ns. (14) and (15):—

*Shivram Joisha* v. *Nagappaya,* 1936 Mad. 149 (150) [**Archaka**].

143. *Add* to **§ 1615,** at p. 1605:—

**Special excludes the general.**

(3) Where the particular Art. 102 applies, the more general Art. 131 will be excluded.[17-a]

144. *Add* to **§ 1616: Starting point:—**

Where in a suit by a person for recovery of money alleged to be due from dismissed employee the defendant claims a set-off on

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[39-a] (1936) 164 I.C. 561=61 C.L.J. 193=39 C.W.N. 938=62 Cal. 642 (Cf. **Art. 120**).

[39-b] *Mathura Singh* v. *Rama Rudra Prasad Singh,* (1936) 162 I.C. 235=1936 Pat. 231=16 P.L.T. 484=14 Pat. 824.

[3-a] *Jiwan Singh* v. *Radhakishan,* 1936 Lah. 747; Reld. on 1934 Mad. 12; 1925 Oudh 719; 1921 Bom. 184; and 13 Cal. 155.

[17-a] *Shivram Joisha* v. *Nagappaya,* 1936 Mad. 149 (150)=161 I.C. 475.

account of arrears of his pay and the plaintiff in his plaint, which is filed within 3 years of the dismissal of the defendant, admits that the arrears are recoverable from him, and in fact deducts the amount from his claim in the suit, the defendant's claim for the arrears of pay cannot be said to have been barred at the date of the written statement which is filed within 3 years from the date of the filing of the plaint.[19-a]

### Article 106.

145. *Add* to § **1632**, at p. 1616:—

**Dissolution of partnership by death of a partner.**

Where a partnership is dissolved on the death of a partner, and it is sought to make the sons of the partner liable for debts due from him as a member of the partnership, a suit for recovery of the debts is governed by Art. 106, Limitation Act, and must be instituted within 3 years of the death of the partner.[30-a]

### Article 109.

146. *Add* to F. N. (44) at p. 1634:—

*Sundararaja Ayyangar* v. *Raghava*, 1936 Mad. 654=162 I.C. 771=1936 M.W.N. 410=43 M.L.W. 706 (**Art. 120** applied) **(Suit for profits of joint property).**

147. *Add* to § **1660**, at p. 1637:—

**Suit by Railway Company and Secretary of State for ejectment of licensee.**

Where the Railway Company, as the managing agent on behalf of the Government had transferred certain lands to a person for cultivation under a lease, a suit by the Railway Company, and the Secretary of State for ejectment of the licensee after the expiry of the licence and for rent and mesne profits is governed by **Art. 149**, and not **Art. 109 or Art. 116**, Limitation Act.[15-a]

148. *Add* to § **1663: Starting point,** at p. 1639:—

The **Rangoon High Court** has held that, in a suit for mesne profits under Art. 109, the starting point of limitation is the date from when the profits are received.[28-a]

### Article 110.

149. *Add* to § **1666: Applicability,** at p. 1641:—

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[19-a] *Jitendranath Roy* v. *Jnanada Kanta Das,* 1936 Cal. 277 (279).

[30-a] *Kanhayalal* v. *Devidyal-Brijlal,* 1936 Lah. 514 (519).

[15-a] *B. N. W. Ry. Co.* v. *Janki Prasad,* 1936 Pat. 362 (369)=17 P.L.T. 206=163 I.C. 525.

[28-a] *Ma Pwa Thein* v. *Ma Me Tha,* 1936 Rang. 80 (81).

*Illustrative Cases.*

**Suit for arrears of rent.**

(6) A suit for arrears of *kattubadi* is a suit for arrears of rent for the purposes of limitation and is governed by Art. 110, Limitation Act. It is immaterial for the purposes of limitation whether the *inamdar* is a grantee of the *melvaram* only or of both the *varams*.[50-a]

150.

**Suit to realise money due on settlement by auction of date and palm trees.**

(7) Money due on a settlement by auction of date and palm trees, under which the settlement holder obtains the right to collect the juice of the trees for the season, does not amount to *rent*, and a suit to realize such money is governed by Art. 110, Limitation Act. Such a suit is not one between a landlord and tenant, and does not come within the provisions of the Bengal Tenancy Act.[50-b]

151.

**Fee charged by a Municipality for use of Municipal land.**

(8) The fee charged by a Municipality for giving a permission for use of Municipal land under the provisions of S. 90, Bombay Municipal Boroughs Act is not *rent* within the meaning of Art. 110, and a suit for recovery of such fees is governed by **Art. 120.**[50-c]

## Article 113.

152. *Add* to **§ 1687: Suits within Art. 113,** at p. 1660:—

*Illustrations.*

**Suit to enforce contract for performing obligation.**

(4) A suit to enforce the rights arising under a contract comes under Art. 113. If no time is fixed for the purpose of enforcing the obligation in the contract, limitation runs from the date of refusal of the defendants to perform his part of the contract.[18-a]

153.

**Covenant under sale deed to pay off prior encumbrance.**

(5) Where by a covenant under a sale-deed the vendee agrees to pay off a prior encumbrance on the property out of the purchase-money left with him but he fails to pay off the prior encumbrance as per covenant in the sale, a suit by the vendor for specific performance of contract, falls under Art. 113, Limitation Act, and time runs from the date when there was failure to perform the contract.[18-b]

154.

**Deed of agreement to partition.**

(6) Where a deed of agreement to partition states that the partition should be effected within six months from the date of the agreement by getting the properties divided according to shares by calling certain gentlemen and get the partition deed

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[50-a] *Zemindar of Chikati* v. *Marella Venkatanarayanamurti,* (1936) 161 .C. 336 (Mad.).

[50-b] *Kameshwar Singh* v. *Mahabir Pasi,* 1936 Pat. 403=17 P.L.T. 363; Ref. 1927 Rang. 94; 1914 Mad. 362; 1936 Pat. 102; 1920 Cal. 733.

[50-c] *Masand Motiram* v. *Shikarpur Municipality,* 30 S.L.R. 146=1936 Sind 184=165 I.C. 369.

[18-a] *Sarafuddin Nurahmad* v. *Jibannessa Khatoon,* (1936) 163 I.C. 347=39 C.W.N. 716.

[18-b] *Ram Chander* v. *Pandit Ram Chander,* 1936 All. 870 (873); Rel. on 1934 All. 406.

executed and registered, the suit to specifically enforce the agreement is governed by Art. 113, Limitation Act, and time runs after the lapse of six months from the date of the agreement.[18-c]

### Article 115.

155. *Add* to § 1708: **Express contracts**—*Illustrative cases,* at pp. 1675-1679:—

**Document by drawee of hundi in favour of creditor.**

(28) Where a person owes money to another for which he executes a *hundi* drawn on a third person, in favour of the creditor, and the drawee accepts and obtains discharge subsequently by executing a document in favour of the creditor the suit falls more appropriately under Art. 115 than Art. 65, Limitation Act.[2-a]

156. *Add* to §1714-1718: **Starting point of limitation,** at p. 1684:—

**Suit for compensation for breach of contract.**

**1718-A.** What gives rise to a cause of action is the wrongful putting an end to a contract. The damage or loss is the consequence that follows from the wrongful act, and is a subsidiary matter. Consequently, in a suit for compensation for breach of contract, the breach of contract *per se,* gives rise to a cause of action, and hence time begins to run from the date of the breach and not from the date of the actual loss or damage.[50-a]

157. **1718-B.** Where the drawee of a Hundi obtained discharge by executing a document in favour of the creditor, and sued the debtor, the cause of action arose only when the drawee obtained a discharge and not from the date of acceptance of the Hundi.[50-b]

### Article 116.

158. *Add* to § 1737: **Generalised exception of Art. 116,** at p. 1698:—

The Nagpur Court has held that if there is a special law, and a general law, the special must prevail over the general. This principle is applicable to matters of tenancy where the question of limitation is involved.[26-a]

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[18-c] *Troilokyanath Das* v. *Kenaramdas,* (1936) 163 I.C. 663=61 C.L.J. 551.

[2-a] *Bodaram* v. *Devichand Harichand,* (1936) 163 I.C. 928=1936 Lah. 668=38 P.L.R. 276.

[50-a] *V. M. Gany* v. *Leong, Chye,* 1936 Rang. 510 (514); Diss. 1926 All. 605; Reld. on 34 All. 429 and 1924 Bom. 247.

[50-b] *Boda Ram* v. *Devidas-Harichand,* 1936 Lah. 668 (669)=38 P.L. R. 276.

[26-a] *Baburao* v. *Sandu,* 1936 Nag. 180=165 I.C. 122.

159. *Add* to §§ **1738-1756: Suits within Art. 116:—**

*Add* to § **1752,** at p. 1710:—

**Suit for compensation for breach of contract.**

Where by a covenant under a registered sale-deed, the vendee agrees to pay off a prior encumbrance on the property out of purchase-money left with him, but he fails to pay off the prior encumbrance as per covenant in the sale, a suit by the vendor for compensation for breach of contract is governed by Art. 116, and time runs from the time of breach on the defendant's failure to perform the contract.[18-a]

160. *Add* § **1756-A,** at p. 1715:—

**Suit for refund of money paid under a void lease.**

Where the lease of a certain piece of land is given under a registered document to the lessees on a consideration of a certain premium, but the lease is subsequently found to be void as the lessor had no capacity to make such a grant, a suit by the lessee for the refund of money is governed by Art. 116, and not by **Art. 66** or **Art. 97,** Limitation Act.[50-a]

161. *Add* to § **1757: Suits not within Art. 116,** at p. 1717:—

**Suit by assignee of right to maintenance under family agreement.**

A suit by a Court auction-purchaser or assignee under a private treaty of the arrears of maintenance due and payable to the junior members of a Malabar Tarwad under a family *karar* is not governed by Art. 116, but by **Art. 120,** Limitation Act.[14-a]

162. In a suit for recovery of money, under S. 68, Transfer of Property Act, limitation is governed by Art. 116 or **Art. 120,** and not by Art. 62, Limitation Act.[14-b]

## Article 120.

163. *Add* to § **1790: Residuary article,** at p. 1745—*Add* to Foot-note 35 at p. 1745:—

*Tavoy Municipal Committee* v. *U Khoo Zun,* 1936 Rang. 310 (313).

164. *Add* to § **1793: Suits for accounts,** at p. 1750:—

In a case where a *Hundi* was vested in the defendant for payment of debts of the third person, the defendant's obligation, if not

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[18-a] *Ramchandra* v. (*Pandit*) *Ram Chander,* 1936 All. 870 (873); Reld. on 1934 All. 406.

[50-a] *Rajendronarain Singh* v. *Lalmohan Tribeni,* 1936 Pat. 462 (465) =164 I.C. 277; Relied on 1927 Pat. 248; and 1916 P.C. 182 (P.C.).

[14-a] *Narayana Tirumun* v. *Valia Govinda,* (1936) 163 I.C. 190= 1936 M.W.N. 574=43 L.W. 711.

[14-b] *Ma Pwa Thein* v. *Ma Me Tha,* 1936 Rang. 80 (81); Folld. 1925 Rang. 223.

arising as agent of such third person, the suit for accounts would be governed by Art. 120, Limitation Act.[22-a]

165. *Add* to **§ 1813-A,** at p. 1769:—

See (94) *ante,* under **Art. 22,** Limitation Act, at p. 1156[38-a] **Suit by the husband** for damages for enticement of **his wife.**

166. *Add* to **§ 1824,** at p. 1777:—

See (122), *ante,* under **Art. 62,** at p. 1357.

**Suit** for recovery of money under S. 68, Transfer of Property Act.[32-a]

167. *Add* to **§ 1827,** at p. 1779:—

See (127), *ante,* under **Art. 68,** at p. 1398.

Suit on an administration bond coupled with statutory assignment.[8-a]

168. *Add* to **§ 1830,** at p. 1781:—

See (135), *ante,* under **Art. 89,** at p. 1501.

Suit for account by successful party.[50-c]

169. See (136), *ante,* under **Art. 89,** at p. 1501:—

Suit for share of profits between co-sharers.[50-d]

170. *Add* **§ 1832-A,** at p. 1781:—

See (137), *ante,* under **Art. 91,** at p. 1527.

Suit to set aside a consent decree without fraud.[22-a]

171. *Add* to **§ 1833,** at p. 1781. See (139), *ante,* under **Art. 95, at p. 1552:—**

Suit to set aside a consent decree.[39-a, b]

172. *Add* to **§ 1837,** at p. 1783. See (146), *ante,* under **Art. 109,** at p. 1634:—

Suits for profits of joint property.[44]

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[22-a] *Vairavan Chetty* v. *Chettichi Achi,* 1936 Mad. 876 (878).

[38-a] *Sobharam* v. *Tikaram,* (1936) 164 I.C. 974=1936 All. 454=1936 A.L.J. 574; Reversed 156 I.C. 556.

[32-a] *Ma Pwa Thein* v. *Ma Me Tha,* 1936 Rang. 80 (81)=161 I.C. 461.

[8-a] *Jagatjit Singh* v. *Manodat,* 1936 Oudh 384 (385)=1936 O.W.N. 665.

[50-c] *Neelam Sitaramaswami* v. *Thummala,* (1936) 161 I.C. 843.

[50-d] *Charan Singh* v. *Diwan Singh,* 1936 All. 706 (707).

[22-a] *Nibaran Chandra* v. *Matilal,* (1936) 164 I.C. 561=62 Cal. 642.

[39-a] *Nibaran Chandra* v. *Mutilal,* (1936) 164 I.C. 561=62 Cal. 642.

[39-b] *Mathura Singh* v. *Rama Rudra,* (1936) 162 I.C. 235=1936 Pat. 231=14 Pat. 824.

[44] *Sundararaja* v. *Raghava,* 1936 Mad. 654=162 I.C. 771=1936 M.W.N. 410.

173. *Add* to **§ 1838,** at p. 1784. See (151), *ante,* under Art. 110, at p. 1642:—

Suit for fees of Municipality for permission to use Municipal land.[50-c]

174. *Add* to § 1843, at p. 1787. See (161), *ante,* under **Art. 116,** at p. 1717:—

Suit by assignee of right to maintenance under family agreement.[14-a]

175. *Add* to **§ 1795: Declaratory suits** at pp. **1751,*et seq.*** **§ 1796-A**—*Illustrative cases* at pp. 1752-1765:—

**Suit for damages for alleged breach of trust in management.**

(14) A claim to damages for alleged breaches of trust in the management of the trust property is governed by Art. 120; and the **starting point** is the date of the breach and not the date of loss consequent thereon.[31-b]

176. *Add* to **§ 1796,** at p. 1752:—

*Add* to F. N. 42:—

*Partab Bahadur Singh* v. *Jagat Jit Singh,* 1936 Oudh 387 (394)=1936 O.L.R. 412=1936 O.W.N. 784=164 I.C. 118 [**Declaration of title to immoveable property**].

177. *Add* to **§ 1796-A** (5) to (7), at p. 1753:—

*Illustration.*

**Declaration against Government.**

(7-a) In a suit by a Zemindar against Government for a declaration that an enfranchisement by the Government is not valid and binding on the Zemindar, the period to be applied is not 12 years, and in general Art. 120 will apply to such suits.[50-a]

178. *Add* to **§ 1803,** at p. 1757-1758:—

**Suit by reversioner to have alienation by a female declared void.**

A suit by a Hindu for a declaration that the alienations made by a Hindu female holder of a life estate in possession by virtue of a grant, transfer, *inter vivos,* or by virtue of a bequest, are void, and are not binding on him, falls under the residuary Art. 120, and time would run from the date of transfer when the right to sue accrues.[38-a]

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50-c. *Masand Motiram* v. *Shikarpur Municipality,* 30 S.L.R. 146=1936 Sind 184=165 I.C. 369.

14-a. *Narayana Tiruman* v. *Valia Govinda,* (1936) 163 I.C. 190=1936 M.W.N. 574=43 L.W. 711.

31-b. *Shirinbai Dinshaw* v. *Naoroji Pestanji,* 1936 Bom. 30=37 Bom. L.R. 946.

50-a. *Parthasarthi Apparao* v. *Secretary of State,* (1936) 162 I.C. 661=1936 Mad. 313=68 M.L.J. 409=41 L.W. 689.

38-a. ***Kanhyalal*** v. ***Mt. Hirabibi,*** 1936 Pat. 322 (331, 332).

179. *Add* to F. N. 3 on p. 1760:—

Cf. *Govinda Jha* v. *Sitaram Jha*, 1936 Pat. 321 (322)=35 I.C. 433=1 P.L.J. 73; Dist. 1916 Pat. 408.

180. *Add* to **§ 1806,** at p. 1759-1760:—

A suit for declaration of exclusive title of plaintiff in possession and entry in record of rights to be wrong, is not barred after six years.[3-a]

181. A suit for a declaration of the plaintiff's title and that the settlement record is erroneous and fraudulent, without any claim for possession is governed by Art. 120, and the time runs from the final publication of the record of rights.[3-b]

182. *Add* 10 (*a*) at p. 1764:—

**Suit for declaration of ownership by reversioners.**

A suit by reversioners for a declaration of ownership, in respect of property alienated by a widow and decreed in favour of reversioners on payment of a certain amount held to have been taken by the alienor for legal necessity, not being a suit for possession does not fall under Art. 141, and is governed by the residuary Art. 120.[28-a]

183. *Add* to **§ 1810: Suits for pre-emption,** at pp. 1765-1767:—

Where a pre-emptor institutes a suit against another pre-emptor claiming his superior right of pre-emption and that the decree obtained by such other pre-emptor is based on fraud, the article applicable is Art. 120, Limitation Act.[4-a]

184. *Add* to **§ 1846,** at p. 1789:—

Where a deceased had made a gift of his land to certain person, and the property was registered in alienee's name inspite of the claim of the alienee in registration proceedings being contested by the deceased's daughter, the mere failure of the daughter to bring a title suit afterwards did not amount to constructive transfer within Art. 125, and the suit by the reversioners to set aside alienation was held governed by Art. 120, Limitation Act.[34-a]

185. Where after the death of the last male holder his widow in whom the property vested and her daughter made an alienation and after the death of the widow the plaintiff alleging that he was the adopted son of the daughter sued for a declaration that

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3-a. *Govinda Jha* v. *Sitaram Jha, supra.*

3-b. *Sudhakar Misra* v. *Nilkantha Das*, 1936 Pat. 129=161 I.C. 465.

28-a. *Ishardas* v. *Ghulam Mohd.*, 1936 *Lahore*, 835 (836)=38 P.L.R. 537=165 I.C. 149.

4-a. *Jahankhan* v. *Ditta*, (1936) 164 I.C. 366=1936 Lah. 503.

34-a. *Damar Mahton* v. *Jagdip Mahton*, 1936 Pat. 535=165 I.C. 21.

the alienation was void held that the suit was governed not by Art. 125, but by Art. 120, Limitation Act.[34-b]

186. *Add* § **1850-A,** at p. 1791:—

**Suit for ejectment of mortgagee of endowed property.**

A suit for ejectment against the mortgagees of property dedicated to an endowment is not governed by S. 10, or by **Art. 134,** but falls under Art. 120, Limitation Act, and it would be barred if brought more than six years after the date of the mortgages.[48-a]

187. *Add* § **1852-A,** at p. 1791:—

**Suit for possession by auction-purchaser of mortgaged land leased subsequently.**

In a suit by mortgagee-auction-purchaser for the possession of certain land which was leased out by the mortgagor, after its mortgage, it is not necessary for the plaintiff to sue or pray for cancellation of the lease, and this being so, the case is governed by Art. 144, and not by Art. 120, Limitation Act.[3-a]

188. *Add* to § **1854: Cause of action when arises,** at p. 1793:—

A declaratory suit in respect of an entry made in the record of rights is governed by Art. 120, Limitation Act. In all such cases, filed under S. 42, Specific Relief Act read with S. 45, Punjab Land Revenue Act, the cause of action accrues when the plaintiff feels aggrieved and not from the date of the entry.[14-a] Where a person continues in possession of proprietary rights inspite of an adverse entry in revenue papers, the question of limitation does not arise.[14-b]

189. *Add* to § **1859: Recurring cause of action,** at pp. 1796-1797:—

A suit by a husband for the restitution of conjugal rights brought within six years of the first refusal of the wife to return is within time under Art. 120, Limitation Act.[43-a]

190. *Add* to § **1858,** at pp. 1794-1796:—

**Suit by minor for declaration that decree is void.**

Where an adverse decree against the minor is passed through the gross negligence of his guardian *ad litem,* the suit by the minor for a declaration that the decree is not binding on him, is governed by Art. 120 and the starting

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[34-b] *Rajagopala Konar* v. *Ramanuja,* (1936) 165 I.C. 448=1936 M.W.N. 339=44 L.W. 208.

[48-a] *Dwarkadas* v. *Rikhi Ram,* 1936 Lah. 784.

[3-a] *Tulshi Ram* v. *Muna Kuar,* (1936) 162 I.C. 225=1936 O.W.N. 399=1936 R.D. 168.

[14-a] *Ghulam Muhd. Khan* v. *Sammada Khan,* (1936) 165 I.C. 626=1936 Lah. 37=38 P.L.R. 748.

[14-b] *Ibid.,* (1936) 165 I.C. 626=1936 Lah. 37=38 P.L.R. 748.

[43-a] *Basawanewa* v. *Balappa,* 1934 Bom. 289=38 Bom.L.R. 502.

point of limitation is the date when the gross negligence of his guardian became known to the minor.[36-a]

191. *Add* to § 1860, at p. 1801 :—

The **Lahore High Court** has held recently, *vide* note at p. 1793, *ante*, that in a declaratory suit in respect of an entry in the record of rights the cause of action accrues when the plaintiff feels aggrieved, and not from the date of the entry. Accordingly, where a person continues in possession of proprietary rights inspite of an adverse entry in revenue papers, the question of limitation does not arise.[19-a]

192. *Add* to § 1860: **Fresh cause of action**, at pp. 1799-1801 :—

Where the property is sold in execution of the decree on the basis of a mortgage, even though a *suit for declaration that the mortgage is void*, be barred by limitation, sale held under the mortgage gives a fresh right to sue provided the declaration is sought against those who purchase the property in execution-sale.[25-a]

193. *Add* to § 1860, at p. 1801 :—

**Oudh.**

A suit for declaration of title to immoveable property cannot be held to be time-barred so long as the plaintiff has a subsisting title to property. A mere making of adverse entry in the village records cannot be said to have actually disturbed the plaintiff's title if he still continues to be in possession.[25-b] In such a case each invasion of right gives a fresh cause of action, and a suit brought within six years of the last invasion is in time.[25-c]

194. *Add* to § 1860, at p. 1801 :—

**Suit by co-parceners to set aside mortgage.**

The cause of action for a suit by a co-parcener to set aside a mortgage by another co-parcener and a decree thereon on the ground that it was made without necessity arises at the time of the alienation, and is governed by Art. 120, Limitation Act. He cannot seek to get another cause of action on the date of the decree when he finds that the suit on the former cause of action is barred.[25-d]

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[36-a] *Swamikone* v. *Sankaravadia*, 1936 Mad. 804 (806)=1936 M.W.N. 351.

[19-a] *Ghulam Muhd. Khan* v. *Sammada Khan*, (1936) 165 I.C. 626=1936 Lah. 37=38 P.L.R. 748.

[25-a] *Kanhyalal* v. *Mt. Hirabibi*, 1936 Pat. 322 (332)=15 Pat. 151.

[25-b] *Partab Bahadur Singh* v. *Jagatjit Singh*, 1936 Oudh 387 (394)=1936 O.L.R. 412=1936 O.W.N. 784=164 I.C. 118=1936 R.D. 416; Reld. on 20 Cal. 906; 1914 All. 184; 1918 All. 175; 1929 All. 529 and 1928 Lah. 516.

[25-c] *Ibid.*

[25-d] *Visweswara Rao* v. *Suryarao*, (1936) 163 I.C. 712=1936 M.W.N. 163=70 M.L.J. 360=43 L.W. 349=1936 Mad. 440.

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# THE
# INDIAN LIMITATION ACT
# IX OF 1908

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## VOLUME II.

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## THE FIRST SCHEDULE.

(See Section 3.)

### *FIRST DIVISION: SUITS.*

### *Part I.—Thirty days.*

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 1. | To contest an award of the Board of Revenue under the Waste Lands (Claims) Act, 1863. | Thirty days. | When notice of the award is delivered to the plaintiff. |

**SYNOPSIS.**

920. Special Court.
921. Application of the Article.
922. Extension of period.
923. Corresponding provisions.

**NOTES.**

920. **SPECIAL COURT.**—This article contemplates a special Court, constituted under the Waste Lands (Claims) Act, XXIII of 1863, for entertaining *suits* under the Act. The suit will lie "to contest an award, etc.," after the award has been notified by the Collector to the Court, for a notice of the award being delivered to the claimant or objector. If no suit is brought, the order of the Board becomes *final* under **S. 5 of the Act.**[1]

921. **APPLICATION OF THE ARTICLE.**—The present article applies only to a ***suit,*** **by the claimant or objector,** to contest an adverse award, of the Board of Revenue, under Act XXIII of 1863. It has no application to a suit, *by the Government* to try claims to waste lands where such claims have been admitted by the Revenue authorities. (*See* S. 6, Act XXIII of 1863.)

922. **EXTENSION OF PERIOD.**—A suit of the nature specified in the present article, must be instituted within thirty

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[1] *Taranath Dutt* v. *The Collector of Sylhet,* (1866) 5 W.R. 1 (References).

days of the *delivery* of notice to the plaintiff. This period cannot be extended under S. 12, by excluding the time requisite for obtaining a copy of the award, inasmuch as the suit falling under this article is not *"an application to set aside an award"* within the meaning of S. 12, cl. 4, of the Act.

"The Court has no authority to extend the period allowed by the Act (XXIII of 1863), S. 5, for preferring suits to establish claims or objections in contravention of an award by the Board."[2]

923. **CORRESPONDING PROVISIONS.**—The corresponding provision in Act XV of 1877 was prescribed in Art. 1 of Second Schedule attached thereto. It was worded as follows:—

"To contest an award of the Board of Revenue under Act XXIII of 1863 (to provide for the adjudication of claims to waste lands)."

Article 1 in Act IX of 1871 was exactly the same.[2]

## *Part II.—Ninety days.*

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 2. | For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India. | Ninety days. | When the act or omission takes place. |

### SYNOPSIS.

924. Corresponding provisions.
925. Analogous provision.
926. Scope of the Article.
927. General provision.
928. *Bona fide* belief of statutory powers.
929. Suits for land.
930. Suits for breaches of contract.
931. Suits for compensation.
932. Claims for pecuniary relief.
933. Improper levy of taxes and tolls.
934. In pursuance of any enactment.
935. Illustrative cases.
936. Notice of suit.
937. Starting point of limitation.

### NOTES.

924. **CORRESPONDING PROVISIONS.—In Act XIV of 1859,** S. 1, sub-S. (2) contained a general provision for suits for pecuniary penalties or forfeitures for the breach of any law or regulation, etc.

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[2] *See* Dr. Pal's Limitation Act, p. 461.

This article has been the same since **Act IX of 1871**, except that the words *"compensation for"*, and *"alleged to be"*, did not appear in the corresponding article of Act IX of 1871.[3]

**925. ANALOGOUS PROVISION.**—In England, the **Public Authorities Protection Act, 1893**, S. 1, provides an analogous provision which runs as follows:—

> "Where after the commencement of this Aot (January 1, 1894) any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:
>
> "(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within *six months* next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . . ."

**926. SCOPE OF THE ARTICLE.**—The corresponding provision in English law does not apply to actions founded on contract,[4] but it applies in favour of any person, including local authorities, or corporations,[5] and their officers or other persons performing a statutory duty,[6] acting not in furtherance of their own gain,[7] but in the execution of statutory or other duties, or of a public office, in pursuance of the statute.[8]

**Suits for compensation.**

The Indian Limitation Act, Art. 2, applies *generally* to suits for compensation, for an act, or omission, alleged to be in pursuance of some enactment, that is, which purports to be an act or omission, in the *bona fide* exercise of a supposed statutory power, or under colour of law, which, however, gives rise to a cause of action. The policy of the law is that suits of this nature should be brought and investigated as promptly as possible.[9] ***See* S. 931, *post*.** Article 2 is not restricted to suits against public authorities and their servants, but applies in favour of *any person;* including corporations and their officers.[10]

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[3] Dr. Pal's Limitation Act, p. 462.

[4] *Milford Docks Co.* v. *Milford Haven District Council,* (1901) 65 J.P. 483 (C.A.). See Lightwood on "Time-limit on Actions," Ch. VIII, p. 388, *et seq.*

[5] *Greenwell* v. *Howell,* (1900) 1 Q.B. 535 (C.A.).

[6] *Salisbury* v. *Gould,* (1904) 68 J.P. 158; Dr. Pal's Limitation Act, p. 463.

[7] *Att.-Gen.* v. *Margate Pier Co.,* (1900) 1 Ch. 749; *Lyles* v. *Southend Corporation,* (1905) 2 K.B. 1 (C.A.); *English* v. *Metrop. Water Board,* (1907) 71 J.P. 313; Dr. Pal's Limitation Act, p. 463.

[8] *Affeck* v. *Mayor of Keighley,* (1886) 2 T.L.R. 864 (C.A.); Lightwood, pp. 393 and 394.

[9] *Mokat Lal* v. *Gopal Sarup,* (1918) 48 I.C. 815 (816)=41 A. 219=16 A.L.J. 1017.

927. Article 2 of the Schedule provides a period of limitation for a suit for compensation for the *doing* or *omitting* to do an act in pursuance of any enactment in force for the time being in British India. The period provided by the article is 90 days from the time when the act or omission takes place.[11] The terms of the article are wide and general, and would cover any act or omission done in pursuance of any enactment, *e.g.*, an illegal distress issued at the instance of the Secretary of a Municipal Board acting under orders, but there may be a special article providing a different period for the case of illegal distress, as in Art. 28. It was accordingly held by the **Allahabad High Court,** in *Municipal Board of Mussoorie* v. *H. B. Goodall,*[12]

**General provision.**

"that where the statute of limitation by an express article specifically provides a period of limitation for a suit in respect of an illegal distress, that article must be accepted as the governing article in such a case. The fact that another article framed in general terms, such as Art. 2, is wide enough to embrace a suit for compensation for illegal distress cannot be allowed to affect the operation of the article which was expressly framed to meet the case of such a suit".

**928.** The intention of Art. 2 is to meet those cases where a public official or a public authority or a private person does an act injuriously or possibly injurious to another under powers conferred or honestly believed to be conferred by some Act of the Legislature, and this specially short limitation is provided for such cases in order that such acts which are of a public nature shall not give rise to protracted litigation.[13] The principle was laid down in *Chunder Sikhur* v. *Obhoy Churn,*[14]

**Honest belief of statutory powers.**

"that S. 87 of Bengal Act III of 1864 is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise, or the honestly supposed exercise, of their statutory powers".

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[10] Halsbury, Vol. 23, p. 340; Lightwood, p. 391; Rustomji, p. 304; also see *Wali-ullah* v. *Raj Bahadur,* (1913) 21 I.C. 426 (Oudh).

[11] *Municipal Board of Mussoorie* v. *Goodall,* (1904) 26 A. 482 (487); also see *Wilson* v. *Mayor of Halifax,* (1868) L.R. 3 Ex. 119.

[12] 26 A. 482 (487, 488)=1 A.L.J. 195=A.W.N. (1904) 95; also see *Sundarji Shioji* v. *Secretary of State,* (1934) 151 I.C. 995=1934 Pat. 507 (Art. 2 does not apply to a suit for damages for conversion by Railway Company, in respect of goods wrongfully sold. The article which is properly applicable is Art. 48).

[13] *Wali-ullah* v. *Raja Bahadur,* (1913) 21 I.C. 426 (Oudh); also see *Mokat Lal* v. *Gopal Sarup,* (1918) 48 I.C. 815 (816)=41 A. 219.

[14] (1880) 6 Cal. 8 (F.B.); Folld. in *Panchanan* v. *Santosh,* 65 I.C. 105 (Cal.).

Under English law, it has been observed with reference to S. 264 of the Public Health Act, 1875, that the protection of the statute extended to everything done *bona fide* under the colour of the provisions of the statute; in other words, if a person *knows* that he has not under a statute authority to do a certain thing, yet ***intentionally*** does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute.[15] The substance of the matter is that, an act is to be regarded as done **in pursuance of a statute** if the doer had a reasonable and *bona fide* belief that he was so acting.[16] It is not enough, however, for the defendant pleading the article in bar of a suit to assert that he honestly believed the act to be in force, if it was not in force as a matter of fact.[17] Substantially the same view was taken by the Judicial Committee of the Privy Council in the case of *Richard Spooner* v. *Juddow*,[18] where Lord Campbell said that, if a party ***bona fide,*** and not absurdly believes that he is acting in pursuance of a statute and according to law, he is entitled to the special protection which the legislature intended for him, although he has done an illegal act. The statutory protection is intended for the benefit of persons who intend to act right but by mistake act wrong.[19]

The **Punjab Chief Court** has held in *Richard Watson* v. *The Municipal Corporation, Simla,*[20] that

> "Art. 2 of the Limitation Act does not apply only in those cases where the defendant at the time of doing the act informs the other party in so many words that he is acting under such and such a provision of law. It is sufficient for him to show that he is doing the act he was at the time under the honest belief that his act was authorized by statute".

In *Ganesh* v. *Elliot,*[21] it was held that the words "alleged to be" must be reasonably construed, and that the defendant is entitled to take advantage of Art. 2, if he honestly believed in the existence of a state of affairs which, if it had existed, would have justified him, under the enactment, in doing the thing complained of. *See* **S. 934, *post.*** The **Bombay High Court** has followed the English authorities in *Ranchordas Moorarji* v. *The Municipal Commissioners,*[22] for the proposition that

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[15] *Selmes* v. *Judge,* (1871) 6 Q.B. 724; 40 L.J.Q.B. 287; *Midland Railway Co.* v. *Withington L. Board,* (1883) 11 Q.B.D. 788; 52 L.J.Q.B. 689. Also see *Cress* v. *St. Pancras,* (1899) 1 Q.B. 693; 68 L.J.Q.B. 389.

[16] *Sasankar* v. *Sudhangsu,* (1911) 48 Cal. 45=59 I.C. 572=1921 C. 91.

[17] *Jai Ram* v. *Gurmukh,* 105 P.R. 1886.

[18] 4 M.I.A. 353 (P.C.).

[19] Lightwood, p. 392.

[20] 72 P.R. 1909.

[21] 160 P.R. 1883.

[22] (1901) 25 Bom. 387 (393).

"the person seeking the protection of the Act cannot claim that his conduct has any relation to the 'execution of the Act', if he knowingly and intentionally acts in contravention of its provisions".

In *Shariful Hassan* v. *Lachmi Narayan*,[23] the **Allahabad High Court** was of opinion that where the plaintiff sued for damages against a Sub-Inspector of Police, alleging malicious arrest, Art. 2 governed the suit where the defendant though found acting with malice, had a *bona fide* belief as to his statutory powers. The **Rangoon High Court** takes the view that Art. 2 is inapplicable where a person knowingly and intentionally acts in contravention of the provisions of a statute under which he claims protection.[24] In a suit for compensation arising out of an alleged illegal act, or omission of the defendant, the defendant pleading limitation should show that he acted *bona fide*, and in the belief that his action was justified.[25] The reasonableness of the belief is immaterial. The **Lahore High Court** has held in the case of *The Punjab Cotton Press Co.* v. *The Secretary of State*,[26] that all that is necessary in order to bring a suit within the purview of Art. 2 of Sch. I to the Limitation Act, is that a public officer should have done what he did with the honest intention of acting as the statute authorised.

**Suits for land.**

929. **Special or Local Acts** may provide a specific period of limitation for suits brought for damages for acts done under the authority of the Act.[27] But such provisions do not cover **suits for recovery of land, or declaration of title, or relief by way of injunction**, where there is no question of damages for the plaintiff's dispossession, etc. In *Chunder Sikhur* v. *Obhoy Churn*,[28] Garth, C.J., held that **S. 87 of Bengal Act III of 1864** did not apply to suits where the relief decreed was for the specific recovery of land, irrespective of any

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[23] 1931 A.L.J. 858=135 I.C. 558=1932 A. 16 (18); cf. *Wali-ullah* v. *Raj Bahadur*, (1913) 21 I.C. 426 (Oudh) (Where Art. 36 was applied to an act done in improper manner out of malice and carelessness); and *Mukat Lal* v. *Gopal Sarup*, (1918) 48 I.C. 815 (816)=41 A. 219=16 A.L.J. 1017.

[24] *Maung Kyaw Nyun* v. *Ma-Ubin*, (1925) 3 Rang. 268=89 I.C. 861=1925 Rang. 311; cf. *Mukat Lal* v. *Gopal Sarup*, (1918) 48 I.C. 815 (816) =41 A. 219=16 A.L.J. 1017; Dissented from in 3 Rang. 268.

[25] *Maung Kyaw Nyun* v. *Ma-Ubin*, (1925) 3 Rang. 268=89 I.C. 861=1925 Rang. 311; also see *Ganesh* v. *Elliot*, 124 P.R. 1881; 160 P.R. 1883; and *Narpat Rai* v. *Sirdar Kirpal Singh*, 65 P.R. 1886.

[26] (1924) 79 I.C. 208=4 Lah. 428=1924 Lah. 169.

[27] *See* S. 29, Limitation Act; also see *The Municipal Board* v. *Behari Lal & Bros.*, (1926) 95 I.C. 1030=48 A. 560=1926 A. 538=24 A.L.J. 682 (684) [Suit for compensation against municipality falling under Art. 2; governed by extended period of six months under S. 326 (3) of the U. P. Municipalities Act (II of 1916)].

[28] (1880) 6 Cal. 8 (F.B.); also see *Milford Dock Co.* v. *Milford Haven, etc.*, (1901) 65 J.P. 483 (C.A.) (An action for the price of goods sold and delivered).

damages for the plaintiff's dispossession. In *Joharmal* v. *The Municipality of Ahmednagar*,[29] the **Bombay High Court** held that **S. 86 of Bombay Act VI of 1873** is not applicable to suits in the nature of actions of ejectment, but only to suits for damages. By S. 25 of the **Madras Act, IV of 1889,** licenses may be cancelled; and, if the cancellation of the plaintiff's license was irregular and improper, but the act done was *bona fide* under the statutory powers of the defendant, the bar under **S. 87 of Act IV of 1889** arose after six months from the accrual of the cause of action, or from the date of the act or order complained of.[30] Similarly, it was held by the **Allahabad High Court,** in *Birj Mohan Singh* v. *The Collector of Allahabad*[31] that the limitation of three months provided by **S. 43 of the N.-W. P. and Oudh Municipalities Act, XV of 1873,** applies only to suits against a Municipal Committee for damages or pecuniary compensation in respect of anything done under the Act, and **does not apply to suits for a declaration of rights,** for an injunction and so forth, in which compensation is not claimed. The **Madras High Court** did not think that **S. 156 of the Madras Local Boards Act, V of 1884,** applied to suits brought against the President of a Taluk Board constituted under Local Boards Act, 1884, to recover land on which the Panchayat of a Union within the taluk had erected a public latrine. It was doubtful if S. 156 applied to suits other than suits for compensation for wrongful acts committed under colour of the Act.[32] The cases contemplated in **S. 261, Madras Act, IV of 1884,** are suits for compensation and for damages, and the principle is to allow public bodies time for tender of amends to the parties so as to avoid litigation.[33] The provisions of **S. 48 of the Bombay District Municipal Act, II of 1884,** do not apply to actions for possession of land brought against a Municipality. But, the minority of the Full Bench in *Manohar Ganesh* v. *The Dakor Municipality*,[34] **held** that the provisions of S. 48 apply only to actions for the possession of land whereof the plaintiff has been dispossessed by the Municipality acting or purporting to act under some section of the Municipal Act, which empowers them to take possession of, or oust any one from that land.[35] The **Full Bench** case was followed in *Shidmallappa* v. *The Gokak Municipality,*[36] where in a suit brought against a municipality to recover possession of a piece of land taken by it, the relief as to damages for pulling down a wall on the land came under S. 48 of the District Municipal Act, but as regards possession and injunction the section was not held applicable.

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[29] (1882) 6 Bom. 580; Reld. on *Sorabji Nassarvanji* v. *The Justices of the Peace,* 12 Bom. H. C. R. 250 (A case under S. 240 of Bombay Act II of 1865).

[30] *Kurram Batchayya* v. *Secretary of State,* (1905) 28 M. 551 (552).

[31] (1881) 4 A. 102=1 A.W.N. (1881) 148 (Art. 120 applied to suit for a declaration of right against municipal committee).

[32] *Syed Ameer Sahib* v. *Venkatarama,* (1892) 16 M. 296; Reld. on 6 C. 8 (F.B.); 6 Bom. 580 and 1 All. 269; also see *Govinda Pillai* v. *The Taluk Board,* (1908) 32 Mad. 371=19 M.L.J. 333=4 I.C. 32 (F.B.) [Period of limitation prescribed in S. 156 (3) not applicable to suits for injunction].

[33] *Srinivasa* v. *Rathnasabapathy,* (1893) 16 Mad. 474=3 M.L.J. 124; Reld. on *President of Taluk Board* v. *Narayanan,* 16 Mad. 317; also see 6 Cal. 8 (F.B.) and 6 Bom. 580.

[34] (1896) 22 Bom. 289 (F.B.).

**Suits for breaches of contract.**

930. The protection afforded by Art. 2 is against suits for compensation for *wrongs* of omission, as well as of commission[37]; but does not extend to suits for breaches of contract. In *Mayandi* v. *McQuhae,*[38] where a suit was brought to recover from the Municipal Commissioners the balance of a sum of money due for timber supplied under a contract duly made with them, it was held by the **Madras High Court** that the plaintiff was entitled to sue on the breach of contract without giving notice, such a suit not falling under the provisions of S. 168 of the Towns Improvement Act (III of 1871), Madras, *viz.,* suit for a *thing done* under the Act. The **Calcutta High Court** held in *Tullaram* v. *The Corporation of Calcutta,*[39] that the withdrawal of a sanction to build, given by a Municipal Corporation, was not done, nor did it purport to have been done under the Calcutta Municipal Consolidation Act (B. C. II of 1888); and that, the suit for damages having been based upon such withdrawal, the special limitation of three months as provided by S. 427 of the Act did not apply to it.

In England, the analogous provision does not apply to such actions as an action of wrongful dismissal founded on breach of contract of service.[40]

Halsbury states the legal position under the Public Authorities Protection Act in England thus:—

> "The protection is against proceedings for wrongs, and does not extend to proceedings in respect of breaches of contract or implied contract, but the substance of the action must be regarded, and the protection accorded to the defendant cannot be avoided by waiving the tort, where the substance of the claim is in tort."[41]

It has been pointed out by Ranade, J., in *Manohar Ganesh* v. *Dakor Municipality,*[42] that

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35. *Cf.* Parsons, J. and Ranade, J. :—22 Bom. 289 (F.B.).
36. (1897) 22 Bom. 605.
37. *Ambika* v. *Satish,* (1897) 2 C.W.N. 689.
38. (1878) 2 Mad. 124=3 Ind. Jur. 309.
39. (1906) 30 Cal. 317.
40. Lightwood, Time Limit on Actions, p. 389.
41. Halsbury, Vol. 23, S. 700, p. 345.
42. (1896) 22 Bom. 289 (301) (F.B.).

"claims based on contract can never be included (under S. 48 of Bombay Act II of 1884), for the simple reason that they are not claims 'for anything done or purporting to have been done in pursuance of the Act'."

Further, that,

"the true test is not so much the nature of the suit or of the subject-matter, but whether the cause of action was or was not connected with the exercise of the statutory powers conferred on the municipality".

The **Madras High Court** has taken a similar view in the case of *Municipal Council* v. *Veeraperumal,*[43] where the suit was one for damages in respect of a contract entered into between the Municipal Council and the contractor for the removal of the rubbish. It was held that the interference by the municipality giving rise to the breach was not an act "done or purporting to be done in pursuance or execution of this Act." In *Ranchordas Moorarji* v. *Municipal Commissioners,*[44] this point was considered and it was held as settled law that a suit on a specific contract was not within the section. The *ratio* of the decision is stated by the learned Chief Justice as follows:—

"Conduct leading to the action is a wrongful act or omission under the contract, as distinct from one in the execution of the Act, and it is the breach of a specific contract that is the occasion of the right to sue."

In a suit for specific performance of an alleged contract by the municipality under which the plaintiff permitted the municipality to pull down some constructions, they undertaking to rebuild them, there was a breach by the municipality giving rise to a suit for damage in addition to the suit for specific performance. But, the **Bombay High Court** held that **S. 48 of the Bombay Municipal Act of 1884** did not apply to suits for damages in respect of specific contracts.[45] Similarly, **S. 363 of the Bengal Municipal Act** has been held to have no application to a suit against the chairman of a municipality by an inspecting pundit of Patasalas or primary schools under the municipality to recover his pay. Such a suit is for breach of contract, and not for anything done under the Act.[46] The **Sind Judicial Commissioner's Court** has held following the Bombay view that **S. 167 of the Bombay District Municipalities Act, 1901,** does not apply to an action brought on a contract.[47] The **Punjab Chief Court** has followed the Calcutta view, in holding that where the plaintiff's claim was based merely on title to

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43. (1915) 28 I.C. 45 (Mad.).

44. (1901) 25 Bom. 387=3 Bom. L. R. 158.

45. *Municipality of Faizpur* v. *Manak Dulab,* (1897) 22 Bom. 637=1897 P.J. 140.

46. *Panchanan Chatterji* v. *Santosh Kumar Bose,* (1922) 65 I.C. 105 (Cal.); Reld. on *Mayandi* v. *McQuhae,* 2 Mad. 124 and *Municipality of Parola* v. *Lakshman Das,* 25 Bom. 142=2 Bom. L. R. 857; also see *Clarke* v. *Lewisham,* (1902) 19 T.L.R. 62 (An action for a wrongful dismissal).

47. *The Municipality of Tatta* v. *Assanmal Chandoomal,* (1915) 29 I.C. 597 (Sind) (Art. 115 applied).

reconstruct a roof which had been removed, but in which there was no allegation of a wrongful act committed by the defendant municipality, the suit was not one within the scope of **S. 19, Punjab Municipal Act, IV of 1873.**[48] To sum up, a public body is not entitled to the benefit of Art. 2, or a specific provision in a special or local Act, in an action based on contract notwithstanding that the contract was entered into in pursuance of a statutory duty.[49]

931. **SUITS FOR COMPENSATION.**—It has been noticed in S. 929, *ante* that the provision has been held as not applying to suits for land, either in the shape of claims in ejectment, for possession, or for a declaration of title, or injunction. The section is equally inapplicable to actions *ex contractu,* or suits for damages for breach of a contract, express or implied. The section is confined to suits for compensation founded on a wrongful act, or omission on the part of local authorities and of their officers acting under their direction.

**"Compensation."**

The word *compensation* has been taken by the **Madras High Court** to include a claim to recover the value of goods or moveable property wrongly seized by the defendant under legal process; and not only a claim by way of damages which are consequential on the wrongful seizure.[50] According to **Bombay High Court,** a suit to recover money wrongly taken under a decree is a suit for compensation: and, this includes a claim to recover damages for the loss of gain or interest upon the money.[1]

The **Allahabad High Court** has held that "a suit for compensation or damages is of a different nature" to a **claim for money** had and received by the defendant to his use, when it has been **wrongfully obtained by the defendant.**[2] A compensation for

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[48] *Sain Nahin Shah* v. *President, Municipal Council, Ludhiana,* 79 P.R. 1884.

[49] *Sharpington* v. *Fulham,* (1904) 2 Ch. 449 (An action by a builder for extra work done under a contract).

[50] *Murugesa Mudaliar* v. *Jittaram,* (1900) 23 Mad. 621 (626) (Art. 29 held applicable generally to all cases where the alleged wrongful seizure was made under legal process); also see *Damaraju Narasimha* v. *Thadinada Gangaraju,* (1908) 31 Mad. 431 (Art. 29 not construed as limited to claims for consequential damages, but applicable to cases where the plaintiff seeks only to recover the value of the property seized, or the sale-proceeds, if the property had been sold).

[1] *Jagjivan Javherdas* v. *Golam Jalani,* (1883) 8 Bom. 17 [Art. 29 applied to suit for money taken in execution of a decree; Not Foll. in (1916) 35 I.C. 86=38 All. 676; also see (1902) 30 Cal. 440].

[2] *Rajputana Malwa Railway* v. *Ajmere Municipal Board,* (1910) 32 All. 491 (496)=7 A.L.J. 496=6 I.C. 401 (Art. 62 applied to suit to recover from the Municipal Board money alleged to have been illegally levied as octroi duty); also see *Niader Singh* v. *Ganga Dei,* (1916) 35 I.C. 86=38 All. 676.

**wrongful seizure** is another way of saving damages for tort in detinue or trespass.[3] In a suit for compensation

> "the plaintiff does not seek for the return of a specific sum of money, but for damages to be assessed by the Court for a wrongful act".

**A suit for refund of octroi** legally taken by a municipality but **wrongfully refused** to be returned has been held not to be governed by Art. 2 of the First Schedule to the Limitation Act.[4] The **Bombay** decision in *Jagjivan* v. *Gulam Jilani*,[5] has been dissented from both by the **Allahabad High Court,** in *Niader Singh* v. *Ganga Dei*,[6] and by the **Calcutta High Court,** in *Lakshmi Priya* v. *Rama Kantha*,[7] where it was held that a suit to recover the surplus proceeds of a sale held under Reg. VIII of 1819, wrongfully taken out by the defendant in execution of a decree against a third party, does not come under Art. 29, Sch. II of Act XV of 1877.

**Claims for pecuniary relief.**

**932.** Article 2 is restricted to cases where plaintiff is claiming compensation or pecuniary relief for some wrongful act or omission in the honestly supposed exercise of the defendant's statutory powers.[8] Section 86 of the (Bombay) Municipal Act, VI of 1873, has been held as not confined to an action for damages, but is applicable to every claim of a pecuniary character arising out of the acts of municipal bodies or officers, who in the *bona fide* discharge of their public duties may have committed any illegalities not justified by their powers.[9] The word "damages" is not found in the clause, the language of which has been held merely pointing to an act for which redress may be afforded in money.[9]

**Improper levy of taxes and tolls.**

**933.** A suit for refund of improperly levied taxes and tolls may thus fall within this Art. 2. A suit for refund of income-tax paid twice over in two different districts was held barred by limitation where it was brought after three months from the accrual of the cause of action, whether the Collectors acted legally or illegally in collecting the tax.[10] The **Punjab Chief Court** has held in *Richard Watson* v. *The Municipal Corporation, Simla,*[11] that

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[3] *Niader Singh* v. *Ganga Dei*, (1916) 35 I.C. 86=38 All. 676=14 A.L.J. 728 (Art. 62 applied to suit for recovery of money paid as rent to the defendant under a decree of Court, in respect of property of which plaintiff was entitled to receive rent).

[4] *Municipal Board of Ghazipore* v. *Deoki Nandan Prasad*, (1914) 25 I.C. 943=36 All. 555 (Art. 120 applied to suit for refund of money paid on account of octroi); *also see* **S. 932,** ***post.***

[5] (1883) 8 Bom. 17.

[6] (1916) 35 I.C. 86=38 All. 676=14 A.L.J. 728.

[7] (1902) 30 Cal. 440.

[8] *Chunder Sikhur* v. *Obhoy Churn*, (1880) 6 Cal. 8 (F.B.) (A case under S. 87, Bengal Act, III of 1864); Relied on in *Panchanan* v. *Santosh*, 65 I.C. 105; and in *Sasanka* v. *Sudhangsu*, 59 I.C. 572=48 Cal. 45; *see* **S. 928,** *ante.*

[9] *Ranchhod Vatrajbhai* v. *The Dakor Municipality*, (1884) 8 Bom. 421.

> "Art. 2 is equally applicable to cases where plaintiff seeks compensation for damages resulting from *the consequences of acts* in pursuance of an enactment, as for such acts directly, and, *further,* that the mere fact that damage resulted not immediately, but after the lapse of some months does not affect the applicability of that article, though it does postpone the accrual of the cause of action until such time as the damage occurred."

Consequently, that when a plaintiff seeks compensation for damages in respect not of the original act done by a public body but of the consequences of such act which have resulted in injury to himself, he must under Art. 2 sue within 90 days from the date when such injury occurred. (S. 24, Act XV of 1877).[12] A suit for recovery of certain tolls which the defendant had taken from the plaintiffs, as the lessee and collector of tolls at a public ferry managed under Act XVII of 1878, was held governed by Art. 2 of the Limitation Act.[13] The suit was taken in substance to be one for "compensation" by refund of monies levied by defendant as lessee of tolls under the Ferries Act, in excess of the sums which he was authorised to levy on the true construction of his lease, and which sums he could not levy except under statutory authority, and which he was found to have levied under an honest mistake as to the extent of his statutory powers.[14] In *Rewachand Fatehchand* v. *Karachi Municipality,*[15] where a suit was brought against the defendant municipality, under **Bombay District Municipal Act, III of 1901,** to recover refund of house tax, which the Municipality refused to refund by reconsideration of its previous order, *held,* that the first refusal by the managing committee to grant a refund, and not its subsequent refusal to reconsider the matter was the act which afforded the plaintiff his cause of action.

**In pursuance of any enactment.**

**934.** In the corresponding English provision, the words "acting in the execution of statutory or other public duties," clearly indicate the restricted nature of the privilege which may be claimed by public authorities.

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[10] *The Collector* v. *Gooroo Dass,* (1866) 5 W.R. 137.

[11] 72 P.R. 1909 (Rattigan and Shahdin, JJ.).

[12] *Ibid.*; Relied upon 5 W.R. 137, *supra.*

[13] *Narpat Rai* v. *Sirdar Kirpal Singh,* 65 P.R. 1886; Disappd. in 32 All. 491=6 I.C. 401=7 A.L.J. 496; but followed in *Seth Karimji* v. *Sirdar Kirpal Singh,* 123 P.R. 1886.

[14] *Seth Karimji* v. *Sirdar Kirpal Singh,* 123 P.R. 1886; Followed in 65 P.R. 1886.

[15] (1925) 90 I.C. 44=1925 Sind 322; cf. *Rajputana Malwa Ry.* v. *Ajmere Municipal Board,* (1910) 32 All. 491 (496)=6 I.C. 401 (F. N. 46 above); and *The Municipal Board of Ghazipore* v. *Deoki Nandan,* (1914) 25 I.C. 943=36 All. 555 (F. N. 47 above).

**Alleged to be.**

The words "alleged to be" which precede "in pursuance of any enactment," indicate that the act or omission need not necessarily be one justified by the statute; but must be such which the public officer has done with the avowed intention of acting as the statute authorized or directed. *See* **S. 928,** *ante.* Dr. Pal in his work on Limitation observes that the language of the article has given rise to some difficulty as to its true meaning.

> "The word 'alleged' may be taken as qualifying the word 'act', or the words 'doing' and 'omitting'. If it qualifies the word 'act' then, when the suit is for 'doing or omitting to do' the act, this article would apply when the act in question is alleged to be in pursuance of some enactment. No question of defendant's justification of his action or omission on the strength of any enactment would arise. If however, the word qualify the words 'doing or omitting to do' the article comes into operation only when the 'action' or 'omission' purports to be in pursuance of some enactment, when the action or omission will be justified if really pursuant to the enactment. In case of positive action there may not be much difference between these two cases. But in the other case, according to one view the omission will be in pursuance of an enactment and according to the other, omission is not so justifiable, but the act of which the omission is the basis of the suit, is said to be the one required by a statute" (p. 464).

The learned author is of opinion that the use of the word "alleged" in the article is not quite happy; and he thinks that the word "purporting" would have been more appropriate.

### 935. ILLUSTRATIVE CASES.—

(1) In *Narpatrai* v. *Sardar Kirpal Singh,*[16] a suit for the recovery of certain tolls which the lessee of a Public Ferry, managed under Act XVII of 1878, had taken from the plaintiff, under an incorrect construction which he put on his rights, was held to be governed by Art. 2.

(2) A suit for refund of income-tax paid twice over in two different districts was held to be governed by Art. 2, and there was no question whether the collectors acted legally or illegally in collecting the tax.[17]

(3) An alleged damage caused by an order of a Magistrate purporting to act under S. 144, Criminal Procedure Code, falls within Art. 2.[18]

(4) A suit for damages for malicious arrest falls under Art. 2, where the act of arrest was not outside the statutory conferred on the defendant police officer.[19]

(5) A suit for compensation against a Municipal Corporation for loss caused by its servants by an alleged omission to repair a road quickly, and for closing the road at both ends, falls under Art. 2.[20]

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16. 65 P.R. 1886.

17. *The Collector* v. *Goroo Das,* 5 W.R. 137.

18. *Hari Charan Bose* v. *Surendra Nath Banerji,* (1913) 18 I.C. 84 (Cal.).

19. *Shariful Hassan* v. *Lachmi Narain,* 1931 A.L.J. 858=135 I.C. 558 =1932 All. 16 (18).

20. *Municipal Board* v. *Behari Lal,* (1926) 95 I.C. 1030=24 A.L.J. 682=1926 All. 538=48 All. 560.

(6) Where a Court officer improperly held an auction sale, after refusing the decretal amount tendered by the plaintiff, a suit for damages based on the alleged omission by the defendant to perform a duty imposed by Civil Procedure Code, was held governed by Art. 2.[21]

(7) A suit against a Municipal Committee for damages caused by the neglect of the committee in repairing a drain outside the plaintiff's house is governed by Art. 2.[22]

(8) Where the defendants under fraudulent and fictitious proceedings of distraint between a fictitious landlord and a fictitious tenant, seized standing crops belonging to the plaintiff, Art. 2 had no application to the suit for damages for the crops so seized.[23]

(9) Where sanction to build once given could not be withdrawn or revoked under the statutory provisions in the Municipal Act, such an act does not fall under the protection afforded by Art. 2.[24]

(10) Where the plaintiff instituted a suit against the Secretary of State to recover compensation for diversion of flood water by cutting the canal bank, and this action was done not for any purpose of protecting the canal, but only for the purpose of protecting the railway, and letting the water away which caused damage to plaintiff; it was held that the case did not fall within the purview of S. 15 of the Northern India Canal and Drainage Act, and that, therefore, the suit, on the face of it, was not governed by Art. 2.[25] Merely purporting to act under a statute may not, therefore, attract the operation of the statute.

(11) In every case the defendant must have acted in good faith in pursuance of some enactment. Actions for deceit or malicious prosecutions therefore may be commenced after the expiry of the limit under Art. 2.[26]

(12) The defendant, pleading a bar by limitation under Art. 2 "must have acted *color officii,* and not for his own benefit; and the act complained of must be in execution of duty and not merely contemporaneous with it".[27] The section does not apply to trading bodies, even if acting under statutory authority,[28] but it would apply to public bodies acting under statutory powers.[29]

**936. NOTICE OF SUIT.**—Section 80, Civil Procedure Code, provides for a notice of suit against a public officer in respect of any act purporting to be done by such public officer in his official capacity.

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[21] *Mukat Lal* v. *Gulab Sarup,* (1918) 48 I.C. 815=41 All. 219=16 A.L.J. 1017; cf. 17 A.L.J. 13 (Jour.).

[22] *Baiza Khan* v. *The Municipal Commissioner, Amritsar,* 122 I.C. 111=31 P.L.R. 159=12 L.L.J. 31.

[23] *Hari Charan* v. *Hari Kar,* (1905) 32 Cal. 459 (461)=9 C.W.N. 376.

[24] *Tala Ram* v. *Corporation,* (1903) 30 Cal. 317 (336).

[25] *The Punjab Cotton Press Company* v. *The Secretary of State,* (1927) 103 I.C. 1=1927 P.C. 72=10 Lah. 161=28 P.L.R. 453 (P.C.).

[26] *Halsbury,* Vol. 23, S. 696, p. 344; also see *Annaji* v. *Subramania,* (1890) 13 Mad. 442; and (1925) 3 Rang. 268 (Art. 2 not applied to suits for damages for malicious prosecution); Compare *Tula Ram* v. *Corporation,* (1903) 30 Cal. 317 (336).

[27] Halsbury, Vol. 23, S. 695, p. 344.

[28] Halsbury, Vol. 19, p. 176.

[29] *Cf.* Lightwood, p. 397.

The object of the legislature in requiring a notice under this section, or under other sections in Special and Local Acts concerning acts done under statutory powers by a public officer, or by a corporation, or its officers, is to afford the defendant an opportunity to reconsider his position with regard to the claim made, and to make amends or settle the claim, if so advised, without recourse to the trouble and cost of litigation.[30]

In respect of suits for compensation under Art. 2, a notice is necessary if the suit is in respect of any act done by any public officer purporting to be done in his official capacity. There is a conflict of view on the point. One set of rulings[31] holds that notice is only required if the act done is negligent or inadvertant, but not *mala fide.* The other set of authorities holds that the section applies to all acts of public officers whether done *bona fide* or *mala fide.*[32] Their Lordships of the Privy Council have observed in ***Bhag Chand* v. *Secretary of State,***[33] that the section does not admit of any implications or exceptions. The second set of rulings, therefore, are to be considered as good law.

As to suits against municipalities, there are specific provisions in several District Municipalities Acts of the various provinces. Where the suit before the Court is not brought for a tort or a *quasi-tort*[34]; or for damages, notice of action is not required.[35] Where the suit brought against the municipality included a claim for damages, and also a relief for possession and injunction, notice was held not necessary for reliefs other than damages.[36] An act done, whether in good faith or not, which is such as is ordinarily done by the officer in the course of his duties, the act is one *purporting* to be done by him in his official capacity.[37]

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[30] *Chunder Sikhur* v. *Obhoy Churn,* (1880) 6 Cal. 8 (10) (F.B.) (The notice in S. 87, Bengal Act III of 1864 "is meant to give the defendant the opportunity of making some pecuniary amends for the wrong without incurring the cost of litigation".)

[31] *Joshi Kalidas* v. *The Dakor Town Municipality,* (1883) 7 Bom. 399 (Bombay District Municipal Act, VI of 1873, S. 11, Cl. 1); *The Municipal Committee, Moradabad* v. *Chatri Singh,* (1876) 1 All. 269 (Notice of suit under S. 43, Act XV of 1873 is necessary, only when damages consequential on the Act done by the Municipal Committee are claimed in the suit); also see *Shahebzadi* v. *Fergusson,* (1881) 7 Cal. 499; *Ramchod* v. *The Municipality of Dakor,* (1884) 8 Bom. 421; *Birj Mohan Singh* v. *The Collector,* (1881) 4 All. 102=1 A.W.N. (1881) 148 (S. 43, Act XV of 1873); *Muhd. Saddiq Ahmad* v. *Panalal,* (1903) 26 All. 220 (Police Act V of 1861, S. 42—Malicious action of police officer: notice not necessary).

[32] *Jogendra Nath* v. *Price,* (1897) 24 Cal. 584; *Dakshina* v. *Ontar Chand,* (1923) 50 Cal. 992; *Jugal Kishore* v. *Jugal Kishore,* (1911) 10 I.C. 1 =33 All. 540=8 A.L.J. 509; *Ram Pitam Shah* v. *Shoobul Chunder,* (1888) 15 Cal. 259 (Bengal Act, IX of 1871, S. 27); *Abdul Rahim* v. *Abdul Rahman,* (1924) 46 All. 884=80 I.C. 72 (Tortious Act); also see *Koti Reddi* v. *Subbiah,* 41 Mad. 792 (F.B.); also see *Manohar Ganesh* v. *The Dakor,* (1896) 22 Bom. 289 (F.B.); *Sasanka* v. *Sudhangsu,* 59 I.C. 572 (Cal.).

[33] 1927 P.C. 176=104 I.C. 257=54 I.A. 338 (P.C.).

[34] *The Municipal Committee, Moradabad* v. *Chatri Singh,* (1876) 1 All. 269.

[35] *Poorno Chunder* v. *Balfour,* 9 W.R. 535.

[36] *Shidmallappa* v. *The Gokak Municipality,* (1897) 22 Bom. 605.

937. **STARTING POINT OF LIMITATION.**—Art. 2 gives 90 days from the time when the act or omission takes place.[38] This pre-supposes that the suit is maintainable on the ground that the act or omission is not actually authorised by law, though the defendant may have acted or omitted to act in a *bona fide* belief that he was so authorised when the act purporting to be done under colour of law,[39] which causes damage to plaintiff, is in fact contrary to law, a suit for compensation lies for which period of limitation is provided by this article.[40]

If the act complained of does not give rise to a cause of action until some special damage results therefrom, **S. 24 of the Limitation Act** would apply, and govern the period of limitation in col. 3. In *Dwarka Nath* v. *The Corporation of Calcutta,*[41] it was held that the cause of action in a suit for damages for injuries caused to plaintiff's house by the defendant's works, was the subsidence which caused a disturbance of the plaintiff's enjoyment of his house, if the subsidence was attributable to defendant's act or default. The cause of action was the happening of damage by reason of a subsidence arising from the defendant's act without damage no suit would lie.[42] The **Punjab Chief Court** has held in *Richard Watson* v. *The Municipal Corporation, Simla,*[43] that the mere fact that damage resulted not immediately, but after the lapse of some months does not affect the applicability of this article, though it does postpone the accrual of the cause of action until such time as the damage occurred; consequently, that when a plaintiff seeks compensation for damages in respect not of the original act done by a public body but of the consequences of such act which have resulted in injury to himself, he must under Art. 2 sue within 90 days from the date when such injury occurred (S. 24, Act XV of 1877). Article 2 was applied by the **Lahore High Court**, in the case of a suit for damages on account of construction of a branch Tail Distributory where the act of the Canal Officers in constructing the channel came under S. 6 of Act VIII of 1873 (N. I. Canal and Drainage Act): and the starting point was held to be the date of the damage.[44] But, on appeal, their Lordships of the Privy Council remanded the case observing that the plea of limitation would apply if *it was found* as a matter of fact that the operation was really for the protection of the canal, and that consequently it fell within S. 15 of the Canal Act.

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[37] *Abdul Rahim* v. *Abdul Rahman,* (1924) 46 All. 884=80 I.C. 72.

[38] *Municipal Board of Mussoorie* v. *Goodall,* (1904) 26 All. 482 (487).

[39] *Haji Ismail* v. *The Trustees, Harbour Trust,* 23 Mad. 380.

[40] *Gooroodas* v. *The Collector,* 5 W.R. 137.

[41] (1890) 18 Cal. 91.

[42] *Ibid.,* 18 Cal. 91 (97); citing *Smith* v. *Thackerah,* L.R. 1 C.P. 564.

[43] 72 P.R. 1909 (pp. 247-50); Relied on 98 L.T. 4 (H.L.J.) and 14 R.R. 335.

[44] *The Punjab Cotton Press Company* v. *Secretary of State,* 4 Lah.

## *Part III.—Six Months.*

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 3. | Under the Specific Relief Act, 1877, Sec. 9, to recover possession of immoveable property. | Six months. | When the dispossession occurs. |

### SYNOPSIS.

938. Specific Relief Act, S. 9.
939. Object of the provision.
940. Essential requirements of S. 9.
941. Possession—Classes of.
942. Judicial or legal possession.
943. "Corpus and animus."
944. A substantive right or interest.
945. Possessory title.
946. Value and import of possession.
947. Conclusion.
948. Possession actual or constructive.
949. Symbolical possession.
950. Dispossession.
951. "Otherwise than in due course of law."
952. Suits against Government.
953. Suits respecting easements and profits.

### NOTES.

938. **SPECIFIC RELIEF ACT, S. 9.**—Under S. 15 of the Limitation Act, 1859, it was provided that

> "If any person shall, without his consent, have been dispossessed of any immoveable property, otherwise than in due course of law, such person or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided that the suit is brought within six months from the date of such dispossession."

This section was replaced by S. 9, Act I of 1877, which runs as follows:—

> "If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may by suit (*instituted within six months from the date of dispossession*) recover possession thereof, notwithstanding any other title that may be set up in such suit."

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428 (430)=1924 Lah. 169; and 4 Lah. 432=1924 Lah. 192=79 I.C. 185; s.c. on appeal (1927) 103 I.C. 1=1927 P.C. 72=10 Lah. 161=28 P.L.R. 453 (P.C.) (*Held*, that on plaintiff's allegations the case did not fall within S. 15 of North Indian Canal and Drainage Act, and therefore was not governed by Art. 2); Followed in *Notified Area* v. *Ladaram*, 1935 Lah. 47 (1).

Originally the section contained the words, *"instituted within six months from the date of dispossession,"* but these words being superfluous, were repealed by the Repealing and Amending Act XII of 1891.

**Object of the provision.**

**939.** The objects of the provision in S. 9, Specific Relief Act, I of 1877, are the following, as stated by Mr. Lal Mohan Mukhopadhya, in his work on the "Indian Case-Law on Ejectment":—

"(1) To prevent any one from taking possession violently or without the consent of the party in possession or otherwise than in due course of law.[45]

"(2) To protect possession and to discourage people from taking law into their own hands and thereby deriving any benefit.[46]

"(3) To prevent the shifting of the burden of proof.[47]

"(4) To provide a special, summary and speedy remedy for a person who being, whatever his title may be, in possession of immoveable property is illegally ousted therefrom without his will and consent.[48]

"(5) To discourage proceedings calculated to lend to serious breaches of the peace and to provide against the person who has taken the law into his own hands deriving any benefit from the process."[49]

Section 9 provides a **summary remedy** for recovery of immoveable property **based on possessory title** for the recovery of his possession. This section is a piece of special protective legislation designed to put back the person in possession who has been dispossessed "otherwise than in due course of law," if he sues promptly. But, this section is **not applicable to title suits,** *i.e.,* suits for recovery of possession *on establishment of title,* though instituted within six months. In such suits plaintiff could not succeed on mere possessory title, without establishing the title alleged.[50]

**Essential requirements of S. 9.**

**940.** The essential requirements of S. 9 of the Specific Relief Act are:—

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[45] *Barada Mohun Bhattacharjee* v. *Chandra Kumar,* 1 C.L.J. 30 n.

[46] *Krishnarav* v. *Vasudev,* (1884) 8 Bom. 371 (*Held,* that plaintiff although suing more than six months after the date of dispossession, and without resorting to a possessory suit was entitled to rely on the possession previous to his dispossession as against a person who has no title); *Kunhi* v. *Changarachan,* 2 M.H.C.R. 313; and *Khajah Enaetulla* v. *Kishen Sunder,* (1867) 8 W.R. 386.

[47] *Kalee* v. *Adoo,* 9 W.R. 602 (603).

[48] *Tarini* v. *Gunga,* 14 Cal. 649; *Wali* v. *Ajudhia,* 13 All. 537 (F.B.); *Ram* v. *Sheodial,* 15 All. 384; *Hanumant Ray* v. *Secretary of State,* (1900) 25 Bom. 287; cf. *Rudrappa* v. *Narasingha Rao,* (1904) 29 Bom. 213.

[49] *Krishnarav* v. *Vasudev,* (1884) 28 Bom. 371; *Kunhi* v. *Changarachan,* 2 M.H.C.R. 313.

[50] *Ramaswami* v. *Paraman,* (1901) 25 Mad. 448=11 M.L.J. 403; *Lachman* v. *Shambhu,* (1910) 33 All. 174; cf. *Ram Harakh* v. *Sheodihar,* (1893) 15 All. 384; also see *Kawa Manji* v. *Khowaz,* (1879) 5 C.L.R. 278 (284); *Mathooranath* v. *Tarini,* (1864) 8 W.R. 164.

(1) *Juridical possession* of the immoveable property in dispute, by plaintiff: within six months of the date of suit.

(2) His *dispossession* by the defendant, without plaintiff's consent, and *otherwise than in due course of law.*

**No question of title.**

The question of title is not to be determined in a suit under S. 9 of the Specific Relief Act.[1] It is immaterial, if the plaintiff was in possession, that such possession was without title. But the plaintiff will have to prove juridical possession and not mere isolated acts of trespass.[2] He must prove *exclusive* acts of dominion, exercised over the whole, or a part, of the property, the nature of which must vary with the nature of the property.[2]

"If each of two persons commits what may be deemed acts of trespass upon the disputed property, and it is ultimately proved that one of them has title and the other has not, the act of the rightful owner would not be an act of trespass, but would amount to an act of possession, whereas in the case of the wrong-doer such act would properly be deemed nothing more than an act of trespass."[3]

It is to be noted, that it is not a point requisite for the purposes of a suit under S. 9 of the Specific Relief Act, that the plaintiff was in possession of the land in suit within six months from the date of dispossession. All that has to be determined is, whether the **plaintiff** was **dispossessed,** and whether his **suit** was brought **within six months** from when the dispossession occurred.[4] Where a Court finds that there was no dispossession, because there was no possession by the plaintiff, the suit should be dismissed.[4]

Where the suit is one for the establishment of title, and recovery of possession, it cannot be regarded as merely a suit for possession under S. 9 of the Specific Relief Act.[5] A suit under S. 9 of the Specific Relief Act is **a possessory suit in which no question of title is involved.**[6]

"Possession within the prescribed period and dispossession without the consent of the plaintiff and otherwise than in due course of law are the only issues for determination, and it has consequently been held that where a person seeks to recover possession of property of which he has been illegally dispossessed, *on proof of his title to the property,* the suit is governed by the ordinary law of limitation."[7]

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[1] *Raj Krishna* v. *Muktaram Das,* (1910) 12 C.L.J. 605=7 I.C. 700; also see *Munna* v. *Ausan,* (1918) 41 All. 108 and *Satish Chandra De* v. *Madan Mohan,* (1930) 58 Cal. 29.

[2] *Ibid.,* 7 I.C. 700 (701).

[3] *Ibid.*

[4] *Jnan Chandra Nag Das* v. *Lochh Mohan Basak,* (1912) 13 I.C. 541 (Cal.).

[5] Per Maclean, C.J., in *Tamizuddin* v. *Ashrub Ali,* (1904) 31 Cal. 647 (651) (F.B.).

[6] Per Prinsep, J., in *Tamizuddin* v. *Ashruf Ali,* (1904) 31 Cal. 647 (651, 652) (F.B.).

[7] *Ibid.*

Distinction between a possessory suit and an action on title.

There is **a clear distinction between a possessory action,** such as S. 9 of the Specific Relief Act contemplates, **and an action upon title.**[8] The summary remedy under S. 9 is applicable alike to a person, whether he be a trespasser, a tenant or an owner of the land, when he is ejected without due course of law.[9] Accordingly, it was held by a **Full Bench of the Calcutta High Court** in *Tamizuddin* v. *Ashrub Ali,*[10] that the remedy indicated in S. 9 of the Specific Relief Act, I of 1877, is not the only remedy which the Legislature has provided for a non-occupancy *raiyat,* who has been dispossessed otherwise than in due course of law: and that the period of limitation applicable to the case of a non-occupancy raiyat, who has been dispossessed from his holding, otherwise than in execution of a decree, is either six or twelve years as provided for in Art. 120 or Art. 142 of the Limitation Act.[11] Similarly, it has been held by the **Madras High Court,** in *Ramaswami Chetti* v. *Paraman Chetti,*[12] that where the suit as laid by the plaintiff is a suit in ejectment, and is founded on plaintiff's title, it is not a suit brought under the special provisions of S. 9 of the Specific Relief Act.

> "In a suit under S. 9, no question as to title on either side can be raised and no appeal is allowed. In a suit based on plaintiff's title, the title of both sides may be gone into, and the decision of the original Court is open to appeal and second appeal."[12]

**941. POSSESSION—CLASSES OF.**—Possession of immoveable property may be (1) juridical or legal; (2) constructive; and (3) symbolical.

**942. JURIDICAL POSSESSION.**—It was observed by Lort-Williams, J., in *Rahim Bux* v. *Central Bank,*[13] that

> "the word 'juridical' does not appear in Strand's Judicial Dictionary, but the expression seems to be only our friend legal possession in a more impressive form".

Juridical possession, thus, does not depend on a legal title to possess like ownership, but would signify possession both in fact and law in its fullest and widest meaning both natural or ordinary, and technical or artificial.[14]

Sir F. Pollock points out that **"legal possession"** does not necessarily coincide either with actual physical control, or the pre-

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8. Per Ghose J., in *Tamizuddin* v. *Ashruf Ali,* (1904) 31 Cal. 647 (655) (F.B.); also see *Ramasami* v. *Paraman,* (1901) 25 Mad. 448 (450).

9. *Ibid.,* 31 Cal. 647 (656) (F.B.).

10. (1904) 31 Cal. 647 (F.B.).

11. (1904) 31 Cal. 647 (F.B.) **(O.R. 7 C.W.N. 218).**

12. 25 Mad. 448 (450).

13. (1929) 56 Cal. 367=1929 Cal. 497 (501).

14. *Ibid.*

sent power thereof, or with the right to possess and it need not have a rightful origin. Legal possession is the state of being a possessor in the eyes of law.[15]

**Corpus and animus.**

**943.** The word "possession" in S. 9 of the Specific Relief Act, must imply, *first,* some actual power over the object possessed; and *secondly,* some amount of will to avail himself of that power. These essential elements of possession were described in Roman law by the terms *"corpus"* and *"animus"* respectively.[16]

It has been explained by the Sind Judicial Commissioner's Court, in *Bawa Chhatagir* v. *Matanomal,*[16] that

"**The corporeal element** is the physical control. To be the possessor of an object, a man must have it so far under his control as to be able to exclude others from it."[16]

"**The mental element** varies greatly in degree. It is in *lowest degree* when the person having control of the object asserts no right over it on his own behalf, but merely intends to protect it. Such is the 'animus' of a servant, or manager, or any person who exercises control in a purely representative capacity." . . . . "It is conceded under all systems of law, that control accompanied by such degree of intention does not amount to juridical possession."[17]

"The possession is in the person on whose behalf the control is being exercised".[18]

"*The highest degree* of intention is manifested when the possessor denies the existence of any right over the object in any other person but himself, such is the *'animus'* of the actual owner."[19] "Between these two extremes, we have the case of a lessee, usufructuary, and trustee, etc., where the title of another is not denied, but where there is the power of control, and an intention to exclude not only all strangers, but even the owner himself."[19]

**A substantive right or interest.**

**944.** Accordingly, it was held, in *Bawa Chhatagir's case*[20] by the Sind Judicial Commissioners, that

"possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title";

and where a person has, in his own right, and not merely as representative of another, such control over immoveable property as to be able to exclude defendants from it, and he has the intention of exercising such power of exclusion, he has a right, if dispossessed by defendant without his consent, otherwise than in due course of law to seek relief under S. 9 of the Specific Relief Act.[21]

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[15] Pollock and Wright on "Possession".

[16] *Bawa Chhatagir* v. *Matanomal,* 3 S.L.R. 149=4 I.C. 359 (362).

[17] *Ibid.;* also see 3 Cal. 243; 2 Cal. 110; 15 W.R. 15 (P.C.) (Section 9 does not apply to possession of a servant); and *Nritto Lal* v. *Rajendro Narain,* (1895) 22 Cal. 562 (Possession of a son and nephew, representing his father and uncle who were alive not a juridical possession).

[18] 3 S.L.R. 149=4 I.C. 359 (362).

[19] *Ibid.,* 3 S.L.R. 149=4 I.C. 359 (362, 363).

[20] 3 S.L.R. 149=4 I.C. 359.

945. **The rule of law** is well established

**Possessory title.**

> "that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title."[22]

An owner of land returning upon his own property cannot be sued under S. 9 by an agent who had been put into possession on behalf of such owner.[23] The occupation of a casual trespasser is not a possession which is protected under S. 9, Specific Relief Act, against the rightful owner, if the trespass is not acquiesced in.[24]

Subramania Aiyar, J., observed in *Mustapha* v. *Santha*,[25] which notes the above rule of law, that

> "the rule in question is so firmly established as to render a lengthened discussion about it quite superfluous".

A dictum of their Lordships of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse*,[26] supports it:—

> "The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By S. 9 of the Specific Relief Act (I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession notwithstanding any other title that might be set up in such suit."[27]

In other words, where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of S. 9 of the Specific Relief Act, and not otherwise.[28]

**Value and import of possession.**

946. On this point there is no difference of opinion in any of the High Courts. Though there is some **conflict of view** on the value and import of possession in a suit against third parties other than the true owner. The legal position under English law has been stated by **Pollock** thus:—

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[21] *Bawa Chhatagir* v. *Matanomal,* 3 S.L.R. 149=4 I.C. 359 (362, 363); also see 23 Mad. 179 (183).

[22] *Mustapha Saheb* v. *Santha Pillai,* (1899) 23 Mad. 179 (182).

[23] *Madhub* v. *Sham,* (1877) 3 Cal. 243.

[24] *Dadabhai* v. *Sub-Collector of Broach,* (1870) 7 Bom. H. C. R. 82.

[25] (1899) 23 Mad. 179 (182).

[26] (1893) 20 I.A. 99 (106)=20 Cal. 834 (842, 843) (P.C.).

[27] *Ibid.*

[28] Per O'Farrel, J., in *Mustapha Saheb* v. *Santha Pillai,* (1899) 23 Mad. 179 (183).

**English law.**

"Sometimes mere detention may be sufficient; but on principle it seems more correct to say that physical control or occupation is *prima facie* evidence that the holder is in exercise (on his own behalf or on that of another) of an actual legal possession, and then, if the contrary does not appear the incidents of legal possession follow. The practical result is that an outstanding claim of a third party (*jus tertii*), cannot be set up to excuse either trespass or conversion. **'Against a wrong-doer possession is a title'**, or as the Roman maxim runs *'Adversus extraneus vitiosa possessio prodessi solet'*. As regards real property, a possession commencing by trespass can be defended against a stranger not only by the first wrongful occupier, but by those claiming through him; in fact, it is **a good root of title as against every one except the person really entitled"**.[29] "The authorities do not clearly decide, but would seem to imply that it would make no difference if the *de facto* possession violated by the defendant were not only without title, but obviously wrongful."[30]

**Bombay.**

In *Asher* v. *Whitlock*,[31] followed by the **Bombay High Court**, the principle is enunciated that the plaintiff's possession is a good title against everybody except the true owner. He can assert his title as possessor against a person who is seeking to disturb that possession, and who has not a colour of title to the land in dispute, and never had possession of it.[32] These principles were applied by Jardine and Ranade, JJ., in *Ganga Ram* v. *Secretary of State*.[33] It is clear that

"under S. 110, possession, when long and continued up to a recent date, leads to a presumption of title, where the conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suits under S. 9, Act I of 1877, brought within six months from dispossession. Where this period is exceeded before a suit is brought, and is less than the limitation law requires, he must make out a *prima facie* title".[34]

**Madras.**

The **Madras High Court** has discussed this question fully in *Narayana Row* v. *Dharmachar*,[35] where the learned Judges, Bhashyam Aiyangar and Moore, JJ., have stated the legal position thus:—

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[29] Pollock on Torts, p. 330, 4th Edn., cited in *Hanmantha Rao* v. *Secretary of State*, (1900) 25 Bom. 287 (290, 291).

[30] *Ibid.*

[31] 1865 L.R. 1 Q.B. 1.

[32] *Pemraj* v. *Narayan*, (1882) 6 Bom. 215 (F.B.); Relied on *Radha Pyari* v. *Nabin Chandra*, (1870) 5 Beng. L. R. 708 (F.B.).

[33] (1895) 20 Bom. 798; also see *Krishnarao* v. *Vasudev*, (1884) 8 Bom. 371 (Plaintiff, although suing more than six months after the date of dispossession, and without resorting to a possessory suit, was held entitled to rely on the possession previously to his possession as against a person who has no title).

[34] Per Ranade, J., in *Hanmantrav* v. *Secretary of State*, (1900) 25 Bom. 287 (303); also see *Bapuji Narayan* v. *Bhagwant Balwant*, (1918) 45 I.C. 550 (*Held*, that in a suit in *ejectment* the plaintiff must prove good title and there is no onus on defendant to prove title relatively good or bad at all).

[35] (1902) 26 Mad. 514 (Per Bhashyam Ayyangar and Moore, JJ.); also see *Krishna Rao* v. *Vasudev*, (1884) 8 Bom. 371, to the same effect.

"In the language of modern English authorities, possession is good title against all but the true owner, and a person in peaceable possession of land has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed (*Asher* v. *Whitlock*)."[36]

They were wholly unable to concur in the view taken by the **Calcutta High Court** in *Nisa Chand* v. *Kanchiram*,[37] that previous possession for any time short of the statutory period will not entitle a plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land. In their opinion

"Section 9, Specific Relief Act, is in no way inconsistent with the position that as against a wrong-doer, prior possession of the plaintiff in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of, and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person".[38] ......"The only **effect of S. 9 of the Specific Relief Act** is that if a summary suit be brought within the time prescribed by that section, the plaintiff therein who was dispossessed otherwise than in due course of law will be entitled to be reinstated even if the defendant who thus dispossessed him be the true owner or a person authorised by or claiming under him, but a **decree in such a suit will not have the force of *res judicata* on the question of title**".[39]

**Privy Council.**

Reliance was placed for this view on the pronouncements of the Judicial Committee in *Sundar* v. *Parbati*,[40] and *Ismail Ariff* v. *Mahomed Ghouse*.[41] It was held in the former authority that

"possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised".[42]

In the latter case, it was held that possession of land was sufficient evidence of right as owner as against a person who had no title whatsoever.[43] **The principle** underlying the rule of law was explained to be

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36. *Narayana Row* v. *Dharmachar,* (1902) 26 Mad. 514; citing L.R. 1 Q.B. 1 (6).

37. 26 Cal. 579; Relied on dictum of P. C. in *Wise* v. *Ameerunnessa Khatoon,* (1879) 7 I.A. 73 (P.C.) [*Held,* that plaintiffs relying on previous possession without title, ought to have brought their action within six months under S. 15 of Act XIV of 1859 (now S. 9, Specific Relief Act); also see *Debi Churn* v. *Issur Chunder,* (1882) 9 Cal. 39=11 C.L.R. 342; and *Ertaza Hossein* v. *Bany Mistry,* (1882) 9 Cal. 130=11 C.L.R. 393, to the same effect.

38. *Narayana Row* v. *Dharmachar,* (1902) 26 Mad. 514 (517); cf. 26 Cal. 579, which takes the opposite view: but see *Mohabeer Pershad* v. *Mohabeer Singh,* (1881) 7 Cal. 591=9 C.L.R. 164 (*Held,* by Garth, C.J., that "where plaintiff is dispossessed by a person who is found to have no title, and to be a trespasser, it is sufficient for the plaintiff to prove that he was in quiet possession at a time when he was so dispossessed).

39. *Ibid.,* (1902) 26 Mad. 514 (517).

40. 12 All. 51 (56) (P.C.).

41. 20 Cal. 834 (P.C.).

42. 12 All. 51 (56); cited in 26 Mad. 514 (517).

43. 20 Cal. 834 (P.C.); cited in 26 Mad. 514 (517).

**"that acquisition of title by operation of the law of limitation being a lawful mode of acquiring title, the person in peaceful possession is entitled to maintain such possession against all but the true owner and that therefore a third party who has no better title than the person in possession has no right to invade upon the possession of the latter and interrupt or arrest his lawful acquisition of title by his continuing to remain in possession for the statutory period".[44]**

This is the basic principle underlying the rule of law in S. 9, Specific Relief Act.

**Conclusion.**

**947.** The case-law on the point shows a divergence between the view of Calcutta High Court, and other High Courts. So far as Calcutta High Court is concerned, a recent ruling collects the case-law on the point, that mere fact of previous possession is not enough to support a title in a suit under S. 9 of the Specific Relief Act, even though peaceful possession for a long period of time may, under certain circumstances, give rise to an inference of title in the plaintiff as against a trespasser who has no right to possession whatsoever.[45] But, the decisions of **Bombay,**[46] **Allahabad,**[47] **Madras,**[48] and **Patna**[49] High Courts, on the other hand are to the effect that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title. A person have bare possession can eject a mere trespasser so long as his possession is clear and conclusive. A trespasser cannot set up a *jus tertii* as against a person in possession unless he claims under it.[50] A person holding peaceful possession of land even for a period short of statutory period of 12 years is entitled to recover possession of the same from a trespasser, and S. 9 of the Specific Relief Act is no bar to the suit even if it is brought beyond six months of the dispossession.[1]

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[44] 26 Mad. 514 (518).

[45] *Raikiram Chandra Roy* v. *Prosanna Kumar,* 1934 Cal. 561=61 Cal. 419=150 I.C. 723; citing (1890) 17 Cal. 256; (1890) 26 Cal. 579= 3 C.W.N. 568; also see *Shama Churn* v. *Abdul Kabeer,* (1911) 3 C.W.N. 158; *Manik Barai* v. *Bani Charan,* (1911) 10 I.C. 469; *Year Mamud* v. *Paomocha,* (1925) 89 I.C. 180 (Cal.); *Satyendra Nath* v. *Latif Khan,* (1913) 21 I.C. 118 (Cal.).

[46] *Ganga Ram China Patel* v. *Secretary of State for India in Council,* (1895) 20 Bom. 798; *Hanmantrav* v. *Secretary of State for India,* (1900) 25 Bom. 287 (291); *Pemraj Bhavaniram* v. *Narayan Ahivaram Khisti,* 6 Bom. 215 (F.B.); *Krishnarav Yashvant* v. *Vasudev Appaji Ghotikar,* 8 Bom. 371 (375); *Rudrappa* v. *Sankappa,* 29 Bom. 213.

[47] *Sundar* v. *Parbati,* 12 All. 51 (56) (P.C.); *Wali Ahmad Khan* v. *Ajudhia Kandu,* 13 All. 537; *Umrao Singh* v. *Ramji Das,* 36 All. 51.

[48] *Narayana Row* v. *Dharmachar,* 26 Mad. 514 (518); also *Ramalinga Pandaram* v. *Anthonimuthu Vathiar,* 1934 Mad. 274=148 I.C. 631=66 M.L.J. 358; *Mustapha Saheb* v. *Santha Pillai,* 23 Mad. 179; *Periaswami Muthiriyan* v. *Anandayi,* 80 I.C. 82=1924 Mad. 722; *Kondapa Rajam Naidu* v. *Devarakonda Satyanarayana,* 34 Mad. 173.

[49] *Chandi Misser* v. *Narsingh Rai,* (1917) 39 I.C. 26 (Pat.).

[50] *Ibid.*

948. **POSSESSION, ACTUAL OR CONSTRUCTIVE.**— Legal possession is not synonymous with physical possession.[2] In order to bring S. 9 of the Specific Relief Act into operation it is not necessary that the possession which is lost should be actual physical occupation of the property.[3] Constructive possession which goes with title would suffice for the purposes of the section.[4] When a Zemindar has let his lands or a portion of them in farm, he, his farmers, and the occupying *ryots* are all, in their degree, concerned in any dispute as to possession which may arise, and they may, and ought to be, respectively maintained in possession of the interests which they severally enjoy.[5] A landlord holding possession through a tenant can bring a suit under S. 9, Act I of 1877, to recover possession of property of which he has been dispossessed by the act of a third party.[6] An *adhier* who is a tenant, can therefore bring a possessory suit under this section.[7] Constructive possession is mediate or derivative possession, not direct, or immediate, *i.e.*, where legal possession is with one person and physical possession with another, who holds the property for him.[8] The Roman lawyers distinguished actual physical possession, as possession *naturalis*, and possession in law as possession *civilis*. Thus possession may exist in law, but not in fact. For example, the possession of a servant is the possession of his master,[9] and the possession of a mortgagee that of a mortgagor.[10] Likewise, the possession of the guardian of a minor or insane,[11] is in the eye of law the possession of the person under his guardianship, and the possession of a tenant is the possession of his landlord. Ouster of a tenant may in certain circumstances amount to an ouster of his landlord also; for which the landlord has his summary remedy under S. 9 of the Specific Relief Act open to him as a party in possession constructively through his tenant.[12]

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[1] *Sohadra Kuer* v. *Gobardhan Tiwari,* (1917) 39 I.C. 458 (Pat.).

[2] Lal Mohan Mukhopadhya on Ejectment, p. 561: Pollock and Wright, pp. 6, 16, 26.

[3] *Gulam* v. *Sheodin Ram,* (1918) 48 I.C. 415 (Nag.).

[4] *Ibid.*

[5] *Harak Narain Singh* v. *Luchmi Bux,* (1879) 5 C.L.R. 287 (289).

[6] *Jagannatha* v. *Rama Rayer,* (1904) 28 Mad. 238.

[7] *Debnath* v. *Ram,* 29 C.W.N. 1205.

[8] Pollock and Wright, p. 27.

[9] *Bawa Chhatagir* v. *Matanomal,* 3 S.L.R. 149=4 I.C. 359 (362).

[10] *Jageshar Singh* v. *Jawahir Singh,* 1 All. 311 (F.B.); and *Inayat Husen* v. *Ali Husen,* 20 All. 182=18 A.W.N. (1898) 19 (The possession of a usufructuary mortgagee is the possession of all the persons who have the right of redemption, *i.e.,* of all the persons entitled in the estate as mortgagor or his vendee).

[11] *Bawa Chhatagir* v. *Matanomal,* 3 S.L.R. 149=4 I.C. 359 (362).

[12] *Ghrish Chunder Roy* v. *Bhugwan Chunder Roy,* (1870) 13 W.R. 191; *Jagannatha* v. *Rama Rayer,* (1904) 28 Mad. 238; also see *Rathna-*

But, even a tenant has his remedy under this section against his landlord if ousted otherwise than in course of law.[13]

**949. SYMBOLICAL POSSESSION.**—A person is said to be in *formal or symbolical possession* when the physical change cannot be effected conveniently, and a symbol is adopted to indicate delivery in fact, *e.g.*, when the key of the warehouse is handed over to indicate transfer of goods lying in a locked warehouse,[14] or when the auction-purchaser in execution sale of some immoveable property is put in formal or symbolical possession by affixing a copy of warrant in some conspicuous place on the property, and proclaiming by beat of drums or other customary mode, at some convenient place, the substance of the decree. Symbolical possession given in cases contemplated by O. 21, R. 35 (2), by R. 36 and by R. 96 of the same order, operates as *actual* possession against the judgment-debtor, but not against third persons who were not parties to the decree.[15] Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given. But as regards persons not so parties, only actual dispossession can interrupt their adverse possession.[16] According to **Calcutta High Court,** as noticed in **S. 947,** above, mere previous possession for less than the statutory period would not enable a party to succeed in a suit for ejectment when the relief by possessory suit under the Specific Relief Act is gone. Where the plaintiff's predecessor *K*, was, in 1897, put in symbolical possession, not in actual possession, under S. 9 of the Specific Relief Act and defendant was not a party to the suit under S. 9 and *K* died one month after he was put in possession, it was held that a suit for recovery of possession in 1910, should be dismissed, and the Court should not investigate the defendant's title.[17]

**950. DISPOSSESSION.**—"Dispossession is that which occurs when property, which is capable of being taken possession of, is taken actual possession of, by *another person*".[18] To constitute

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*sabapathi* v. *Ramasami,* (1910) 5 I.C. 630=33 Mad. 452 (The interest of a landlord which may consist in mere receipt of rents is capable of delivery and possession).

[13] *Tamizuddin* v. *Ashrub Ali,* (1904) 31 Cal. 647 (F.B.) (Non-occupancy ryot's suit for possession under S. 9, Specific Relief Act, against landlord or a trespasser); *Rudrappa* v. *Narsingrao,* (1904) 29 Mad. 243 (Tenant holding over dispossessed by landlord: suit by tenant to recover possession maintained).

[14] Lord Hardwicke in *Ward* v. *Turner,* (1752) 2 Ves. Sen. 431.

[15] *Runjit Singh* v. *Bunwari Lall,* (1884) 10 Cal. 993; *Herjiwan* v. *Shivram,* (1895) 19 Bom. 620; compare *Joggubandhu* v. *Ramchunder,* (1880) 5 Cal. 584=5 C.L.R. 548 (F.B.); *Chanderji* v. *Ram Bahadur,* (1918) 43 I.C. 268 (P.C.).

[16] *Renganatha Iyer* v. *Srinivasa Iyengar,* (1925) 90 I.C. 1037=1926 Mad. 42=49 M.L.J. 656.

[17] *Satyendra Nath* v. *Latif Khan,* (1913) 21 I.C. 118 (Cal.).

[18] Nelson, S. P. R. Act, S. 9.

dispossession there must, in every case, be positive acts which can be referred only to the intention of acquiring exclusive control,[19] *e.g.*, mere plastering of a wall, or repairing the wall, which acts are referrable to the easement right, and are not adverse to the existing title will not amount to dispossession of the person having title in the wall.[20] The dispossession or discontinuance of possession is that which occurs where the property is taken *actual* possession of by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation and actual possession.[21] Many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.[22] The mere discontinuance of a payment of rent by tenant does not constitute a dispossession within the meaning of S. 9 of the Specific Relief Act.[23] The object of this section is to provide a speedy remedy for the class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent.[24] The section was held inapplicable to a case, in which the plaintiff had himself let the defendant into possession, but the latter had interfered with the plaintiff's proprietary rights later.[25]

**Dispossession, whole or partial.**

The possession of a party rightfully entitled may be disturbed either wholly or partially, to attract the operation of S. 9 of the Specific Relief Act.[26] But isolated acts of trespass do not constitute legal possession.[27] However, evidence of possession of certain specific property was treated as evidence of possession as regards an appendage to such property, though no definite acts of possession were proved as regards the appendage.[28] Where a tract of land with a defined boundary had been throughout claimed by a person as owner, and acts of ownership had been done on various portions of it, such acts may be accepted as evidence of the possession of the whole tract.[29]

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[19] *Sundrasastrial* v. *Govinda Mandarayan,* (1908) 31 Mad. 528= 5 M.L.T. 136=19 M.L.J. 309=4 I.C. 619.

[20] *Ibid.,* 4 I.C. 619=31 Mad. 528 (529).

[21] Per White, J., in *Kally Churn Sahoo* v. *The Secretary of State,* (1881) 6 Cal. 725=8 C.L.R. 90; cf. *Secretary of State* v. *Krishnamoni Gupta,* (1902) 29 Cal. 518 (Government held dispossessed by the *vis major* of submersion, which had the same effect as a voluntary abandonment of the land).

[22] *Mahomed Ali Khan* v. *Khaja,* 9 Cal. 744=12 C.L.R. 257 (F.B.).

[23] *Tarini Mohun Mozumdar* v. *Gunga Prosad Chuckerbutty,* (1887) 14 Cal. 649; and *Sarbananda* v. *Pran Sanker,* (1888) 15 Cal. 527.

[24] *Ibid.,* 14 Cal. 649.

[25] *Baldeo Das* v. *Mangni Ram,* (1900) A.W.N. 7.

[26] *Sabapathy* v. *Subbraya,* 3 Mad. 250.

[27] Mitra's Limitation Act, p. 137.

[28] *Iqbal Husen* v. *Nand Kishore,* (1902) 24 All. 294.

[29] *Sivasubramanya* v. *The Secretary of State,* (1886) 9 Mad. 285.

**951. "OTHERWISE THAN IN DUE COURSE OF LAW".**—A dispossession by a legal process, which ought not to have been applied, is not a dispossession in due course of law within the meaning of S. 9 of the Limitation Act.[30] Batchelor, J., has observed in *Rudrappa* v. *Narsingrao,*[31] that

> "to read the words 'due course of law' in S. 9 of the Specific Relief Act, as merely equivalent to the word 'legally' is, we think, to deprive them of a force and a significance which they carry on their very face. For a thing, which is perfectly legal, may still be by no means a thing done 'in due course of law'; to enable this phrase to be predicated of it, it is essential, speaking generally, that the thing should have been submitted to the consideration and pronouncement of the law, and the 'due course of law' means, we take it, **the regular normal process** and effect of the law operating on a matter which has been laid before it for adjudication. That, in our opinion, is the primary and natural meaning of the phrase, though it may be applied in a derived or secondary sense to other **proceedings held under the direct authority of the law**; in this sense it may be said, for instance, that revenue or taxes are collected in due course of law."

In this case, a tenant holding over after the expiry of the period of tenancy was dispossessed without his consent by his landlord. The tenant then brought a suit for possession against his landlord under S. 9 of the Specific Relief Act. It was held, by the **Bombay High Court,** that the plaintiff (tenant) was not liable to be evicted by the defendant (landlord) *proprio motu,* and that he was entitled to a decree for possession.[32]

In *Muluk* v. *Bharat,*[33] where an auction-purchaser, on obtaining delivery of possession of immoveable property under S. 318, Civil Procedure Code, 1882 (O. 21, R. 95) dispossessed a tenant of the judgment-debtor, without proceeding under S. 319, Civil Procedure Code (O. 21, R. 96) it was held that the dispossession was *not* in due course of law. Similarly, in *Suresh* v. *Nesabibi,*[34] possession taken by landlord after service of notice under S. 87, Bengal Tenancy Act, was held not in due course. The carrying off of the produce of land in the occupancy of a tenant does not necessarily amount to dispossession.[35] However, it is a dispossession in due course of law, if a parcel of land not described in the decree is seized in pursuance of a warrant.[36] And, the dispossession of *burgadars* of a tenant, in execution of a decree against the tenant, was held to be in due course of law, even if *burgadars* were no parties to the suit, and even if the decree was obtained on a false admission of the tenant.[37] Similarly, where in execution of a decree for physical possession against the landlord the tenants were ousted under a legal process issued by the Court.[38]

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[30] *Roshanullah* v. *Hazir Mahmud,* 18 I.C. 727 (Cal.) (This proposition is open to doubt in view of O. 21, R. 100, Civil Procedure Code).

[31] (1904) 29 Bom. 213=7 Bom. L. R. 12; Relied in *Secretary of State* v. *Dinshaw Navroji,* 1925 Sind 275=87 I.C. 1002.

[32] *Ibid.,* 29 Bom. 213; also see *Sofaal Khan* v. *Woopean Khan,* 9 W.R. 123 (*Held,* that a tenant in possession, holding over under an unexpired lease, if dispossessed without his consent, of the land, otherwise than by due course of law, is entitled to sue and recover possession notwithstanding a *pottah* set up by the defendant).

[33] 12 C.W.N. 694.

[34] 11 C.L.J. 433.

[35] *Seethul* v. *Judoonath,* (1876) 5 W.R. 180.

952. **SUITS AGAINST GOVERNMENT.**—No suit is competent *against* the Government under S. 9, Specific Relief Act. But, there is nothing to prevent such a suit being brought *by* the Government, the period of limitation however, being sixty years under Art. 149.[39]

953. **SUITS RESPECTING EASEMENTS AND PROFITS.**—Their Lordships of the **Privy Council** held in *Maharana Futteh Singhji* v. *Dessai Kullianraj*,[40] that the term "immoveable property" in Act XIV of 1859, included incorporeal hereditaments. The definition of *"immoveable property"* in Act of 1868, which was taken to apply to Art. 3, Act XV of 1877, includes "benefits to arise out of land". Accordingly it was held by the **Madras High Court** that a right of Ferry, Fishery, Light and Way, are immoveable property,[41] but the **Calcutta High Court** held that a right to fish in a khal, the soil of which belongs to another, though a benefit arising out of another's land, is not immoveable property, and a suit arising out of dispossession of such property is not one falling under S. 9 of the Specific Relief Act.[42] The corresponding S. 15, Act XIV of 1859, was held not applicable to a suit to enforce a mere right of way.[43] But, this view was not accepted by the **Bombay High Court** in *Bhundal* v. *Pandol*,[44] on the ground that the legislature, if it had intended to exclude incorporeal rights, might be expected to have done so by express terms or by confining the operation of the section to "tangible immoveable property" as is done in S. 145, Criminal Procedure Code, 1882. A right of way

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[36] *Jadub* v. *Heera,* 1 I.J. (N.S.) 21; Harnam Singh's S. R. Act, p. 113.

[37] *Haran* v. *Madan,* 15 C.W.N. 956.

[38] *Kamini* v. *Sabed,* 14 C.W.N. 403=5 I.C. 379; cf. 12 C.W.N. 694 and 18 I.C. 727, *supra*.

[39] *Secretary of State* v. *Dinshaw Naoroji,* (1925) 87 I.C. 1002=1925 Sind 275.

[40] (1873) 21 W.R. 178 (181) (P.C.).

[41] *Krishna* v. *Akilanda,* (1889) 13 Mad. 54; also see *Bhundal* v. *Pandol,* (1887) 12 Bom. 221; *Parbutty* v. *Mudho,* (1878) 3 Cal. 276.

[42] *Natabar* v. *Kubir,* (1890) 18 Cal. 80; *Fadu Jhala* v. *Gour Mohun,* (1892) 19 Cal. 544 (F.B.); Expld. in *Bejoy Chandra* v. *Banku Behary,* 4 I.C. 116.

[43] *Haro Dyal* v. *Kristo,* (1872) 17 W.R. 70.

[44] (1887) 12 Bom. 221 (224).

has been held, however, not "immoveable property" within the meaning of S. 9 of the Specific Relief Act.[45] In *Bejoy Chandra* v. *Banku Behary*,[46] it was explained that a fishery right is a very different thing from a right of way. The ruling in 19 Cal. 544 only holds it not such immoveable property as is contemplated by S. 9 of the Specific Relief Act. Similarly the Bombay decision goes no further than holding that a right of way, though immoveable property, does not fall under S. 9 of the Specific Relief Act. The **Calcutta High Court** stands committed to the view that S. 9 of the Specific Relief Act, and Art. 3 of the Limitation Act apply to properties of which actual physical possession can be given and taken.[47] This view is doubted by Mitra in his work on Limitation on the ground that Art. 10 speaks of "*physical possession*", while Art. 3 speaks of possession only, and in the preamble, and Part IV of Act IX of 1908, the term "*possession*" is used by the legislature as applicable to easements and profits in the lands of others.[48]

| **Article.** | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 4. | Under the Employers and Workmen (Disputes) Act, 1860, Sec. 1. | Six months. | When the wages, hire or price of work claimed accrue or accrues due. |

### SYNOPSIS.

954. Act IX of 1860.
955. Corresponding provisions.
956. Application of Article.

### NOTES.

954. **ACT IX OF 1860.**—The special provisions of this Act empowering Magistrates to decide such disputes up to a certain valuation (Rs. 200) have been extended to the Punjab, to Nadia, and 24-Pergunnas; to the district of Nimar; and in the Bombay Presidency to the districts of Ahmednagar, Broach, Ahmedabad, Khandesh, Khaira, Poona, Sholapur, Surat, Tanna and to the Province of Sind.[49]

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[45] *Mangaldas* v. *Jewanram,* (1899) 23 Bom. 673=1 Bom. L. R. 167; Expld. in *Bejoy Chandra* v. *Banku Behary,* 4 I.C. 116.

[46] (1909) 9 C.L.J. 336=13 C.W.N. 451=4 I.C. 116.

[47] *Tarini* v. *Gunga Pershad,* (1887) 14 Cal. 649; and *Fadu* v. *Gour Mohun,* (1892) 19 Cal. 544 (547, 571) (F.B.) (*Fisheries* though "immoveable property," under General Clauses Act, are not such for purposes of S. 9, Specific Relief Act); also see *Fuzhur* v. *Krishna,* (1902) 29 Cal. 614 (A *hat,* the possession of which is held by collecting tolls or rents is not immoveable property under S. 9, Specific Relief Act).

[48] Mitra's Limitation Act, Vol. II, p. 1044.

[49] Mitra's Limitation Act, Vol. II, p. 1046.

Section 1 of the Act IX of 1860, ran as follows:—

> "It shall be lawful for the Executive Government of any presidency or place within the British territories in India to invest any Magistrate or other officer exercising the powers of a Magistrate, with power to enquire into and decide disputes on account of wages, hire of carriage, or the price of work, between any workmen employed in the construction of any railway, canal or other public work, the construction of which is or shall be sanctioned by Parliament by any Executive Government, and the person or persons by whom such workmen are employed."

Section 2 limited the jurisdiction of Magistrates in such cases to Rs. 200 and provided that the "claim was to be preferred within six months from the date on which cause of action arose". Section 2 of the Act thus contained the corresponding provision for limitation of such suits.

**955. CORRESPONDING PROVISIONS.**—The corresponding provision to Art. 4 was Art. 4 in Act IX of 1871, and also Art. 4 in Act XV of 1877.

**956. APPLICATION OF ARTICLE.**—A *complaint* brought under Act XIII of 1859 (Workmen's Breach of Contract Act), to recover a sum advanced in respect of work, which work was not done, is not governed by any provision of the Limitation Act, which applies to *civil suits* only.[50]

### *Part IV.—One year.*

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 5. | Under the summary procedure referred to in section 128 (2) (*f*) of the Code of Civil Procedure, 1908, *where the provision of such summary procedure does not exclude the ordinary procedure in such suits, and under O. 37 of the said Code.* | One year. | When the debt or liquidated demand becomes payable, or when the property becomes recoverable. |

### SYNOPSIS.

957. Corresponding provisions.
958. Legislative changes.
959. Application of Article.

### NOTES.

**957. CORRESPONDING PROVISIONS.**—Art. 5 of **Act IX of 1871** and Art. 5 of **Act XV of 1877** ran as follows:—

> "Under the Code of Civil Procedure, Chapter XXXIX of Summary Procedure on Negotiable Instruments"—"*Six months*"—"When the instrument sued upon becomes due and payable".

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[50] In the matter of *Kittu,* (1887) 11 Mad. 332.

**Act IX of 1908** made a change in the time from which period begins to run. The Civil Procedure Code of 1882, in its Chapter XXXIX, Ss. 532 to 538 provided for summary procedure for suit on *Negotiable Instruments*. The corresponding provisions in Civil Procedure Code, 1908, are contained in O. 37 thereof. Section 128 (*f*), Civil Procedure Code, to which reference is made in first column empowers the High Courts to make rules providing for summary procedure

> "(*i*) in suits in which plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a contract express or implied; or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or on a trust;" or
>
> "(*ii*) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant."

**Legislative changes.**

**958.** We have seen that "Art. 5 of the Limitation Act XV of 1877 prescribed a period of *six months* for *suits on Negotiable Instruments* instituted under Ch. XXXIX of the old Code (corresponding to O. 37, Civil Provedure Code, 1908). There was no specific provision for other summary suits such as those specified in S. 128 of the Code. When S. 128 was newly introduced in Civil Procedure Code of 1908, Art. 5 was also amended by providing for suits under the summary procedure referred to S. 128 (2) of the Civil Procedure Code, 1908. The intention of the Legislature obviously being to provide for all summary suits under the Code."[1]

The **Calcutta High Court,** however, held in *Robindra Nath Dutt* v. *Abdul Ahad*,[2] (C. C. Ghose, J.), that Art. 5 of Sch. I to the Limitation Act of 1908 was not applicable to suits under O. 37 of the Civil Procedure Code. It was pointed out

> "that rules made under S. 128, Civil Procedure Code, could only refer to amendments of the First Schedule to the Code and in particular to rules in respect of certain matter therein set forth".

It further seemed to follow

> "that rules made under S. 128 (2) (*f*) of the Civil Procedure Code could not have any reference to suits referred to in R. 2 of O. 37, in respect of which rules for summary procedure have been made by the Legislature itself and in respect of which no rules had been made by the High Courts under the rule-making power vested in them".[2]

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[1] Chitale's Civil Procedure Code, 1st Edn., p. 2717.

[2] (1925) 52 Cal. 954=88 I.C. 400=1925 Cal. 781 (782)=29 C.W.N. 589=41 C.L.J. 368.

The intention of the Legislature had not been expressed in clear and apt words in Art. 5 of the present Limitation Act.[3] And, it became necessary again to amend Art. 5, which was done by the Amending Act XXX of 1925, so as to include suits under O. 37, Civil Procedure Code. The period of six months was also increased to one year.[4]

**The reasons for the change** have been thus stated:—

"Article 5 of the First Schedule to the Indian Limitation Act, 1908 (IX of 1908) provides a period of limitation of six months for a suit under the summary procedure referred to in S. 128 (2) (*f*) from the date on which the debt or liquidated demand becomes payable or when the property becomes recoverable. As the article stood in the Act of 1877, it referred to suits on negotiable instruments under Ch. 39 of the Code of Civil Procedure of 1882. In the Code of 1908 powers were given in S. 128 (2) (*f*) to High Courts to extend the summary procedure, and a reference to that section was substituted for Chapter XXXIX of the Civil Procedure Code, when the Limitation Act was consolidated in 1908. The fact that the provisions of Chapter XXXIX of the Code were also retained in O. 37 of the New Code of Civil Procedure seems to have been overlooked. Accordingly if Art. 5 is strictly construed, it applies now only to suits under the summary procedure made by rules under S. 128 (2) (*f*) of the Code since the Code was enacted. The Bill proposes to make the intention clear, and to make a similar consequential change in Art. 159 of the same Schedule. The Bill further propose to extend the period of limitation now fixed in Art. 5 for suits to which summary procedure applies from six months to one year, as the existing period has been represented to be too short."[5]

This amendment had been made as a result of the recommendation of the Civil Justice Committee. (Vide *Report*, pp. 489-490.)

**959. APPLICATION OF ARTICLE.**—The Calcutta ruling stands overruled, and the result is that as held by the Sind Judicial Commissioner's Court, a summary suit whether under O. 37, Civil Procedure Code, or under S. 128 of the Code, should be filed within one year of the date given in column 3 of Art. 5.[6]

"A suit instituted as a summary suit, but not coming under the summary procedure may be allowed to proceed under the ordinary procedure."[7]

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[3] *Rabindra Nath Dutt* v. *Abdul Ahad,* (1925) 52 Cal. 954=88 I.C. 400=1925 Cal. 781 (782)=29 C.W.N. 589=41 C.L.J. 368.

[4] But see contra *Jetha Deoji & Co.* v. *Sriram Moolchand,* (1926) 98 I.C. 78=1927 Sind 90 (92)=21 S.L.R. 257 [*Held,* that a suit on a negotiable instrument under O. 37, Civil Procedure Code, falls under the category of the suits of the nature referred to in S. 128 (2) (*f*), Civil Procedure Code and Art. 5 of the Limitation Act was applicable to such suits even before the amendment].

[5] *Statement of Objects and Reasons* (G. of I., Part V, p. 181).

[6] *Jetha Devji & Co.* v. *Sriram Moolchand,* 1927 Sind 90 (92)= 98 I.C. 78=21 S.L.R. 257.

[7] Mitra's Limitation Act, Vol. II, p. 1047; citing (1876) 1 Cal. 130 and (1903) 30 Cal. 446.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 6. | Upon a Statute, Act, Regulation or Bye-law for a penalty or forfeiture. | One year. | When the penalty or forfeiture is incurred. |

### SYNOPSIS.

960. Corresponding provisions.
961. Application of article. Suit based on Statute.
962. Penalty or forfeiture.
963. Suit for tax, etc.

### NOTES.

**960. CORRESPONDING PROVISIONS.**—Act XIV of 1859 made an analogous provision in S. 1, cl. 2.

Act IX of 1871, S. 6 and Act XV of 1877, S. 7, were the same as the present provision.

**Suit founded upon a statute.**

**961. APPLICATION OF ARTICLE.—(1) Suit to recover penalty under a contract is not within Art. 6.** Where an agreement between a contractor, and a Local Board, contained terms against the defendant collecting fees, on articles brought for sale in market, at higher rates than those specified, and this contract did not appear to have been made under the provisions of any law, but by his contract the defendant made himself civilly liable for any offence which it might be proved his agent had committed under S. 165 of the Local Board's Act, it was held that the article applicable to the suit was not Art. 6, but Art. 68, or Art. 115 of the Limitation Act, 1877.[8] Where a bond executed by defendant provided for a penalty for non-fulfilment of the contract, *held,* that Art. 68 applied to recovery of the amount of the bond; and **Art. 115 applied in respect of the penalty under the contract.**[9] In *Meri Lal* v. *Mukhta,*[10] where the plaintiff was lessee from the Government for collection of grazing tax, and the clause in the lease authorising the impounding and levy of an extra fee in the case of cattle grazed without permission was a bye-law within the meaning of Art. 6, but the claim was based on defendant's *agreement to pay* to the plaintiff the grazing fee as if the cattle had been regularly brought to be grazed, it was held that the abovenoted article did not apply.

**Penalty or forfeiture.**

**962.** "The terms '*penalty*' and '*forfeiture*' have reference to penalties and forfeitures created by statute alone, and inflicted for derelictions of duty, or failure to perform specific acts, or for the commission of acts prohibited by statute".[11] "Article 6 is inapplicable to cases where a statute enables an action to be brought, which nevertheless is not an *action on the statute.*"[12] Penalties and forfeitures are incurred chiefly for offences against the Revenue Laws, which "generally speaking, are not recoverable in the Civil Courts, but are adjudicable by the Revenue Authorities or in the Criminal Department".[13] Where a statute provides a special mode of enforcing the penalty, the particular remedy must in general be followed, and no action can be maintained where the statutory provision for the enforcement of the penalty is inconsistent with there being a jurisdiction in the ordinary Courts to entertain such action.[14]

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[8] *The President of the Taluk Board, Kandapur* v. *Burde Lakshminarayana,* (1906) 31 Mad. 54=17 M.L.J. 537.

[9] *Dharm Singh* v. *Ali Mardkhan,* (1911) 12 I.C. 616=6 P.L.R. 1912.

[10] 3 P.R. 1875.

**Suit for tax, etc.**

**963.** A suit for the recovery of instalments of *profession tax* under the provisions of the Towns Improvement Act, 1871, is not a suit for recovery of a penalty or forfeiture, and is not governed by Art. 6, but falls under Art. 120.[15] Similarly, a suit to recover *surplus sale proceeds* of a sale for arrears of Government revenue, is governed by Art. 120.[16] The Limitation Act does not prescribe any period of limitation for money due under a statutory liability to pay it.[17]

A suit (upon a statute) for a penalty or forfeiture by, or on behalf of the Secretary of State for India in Council, if not provided for by any special law, is governed by Art. 149, Sch. I, Limitation Act.[18] A suit for *possession* of immoveable property to which the plaintiff is entitled *by reason of any forfeiture* or breach of conditions is governed by Art. 143.[19]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 7. | For the wages of a household servant, artisan, or labourer, not provided for by this Schedule, Art. 4. | One year. | When the wages accrue due. |

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[11] **Rustomji's Limitation Act, p. 310; citing 25 Cr. C. p. 1055.**

[12] Darby, p. 7: Rustomji, p. 310.

[13] *See* the Special Report of the Indian Law Commissioners, dated 26th February, 1842.

[14] Maxwell, 7th Edn., p. 334: Mitra's Limitation Act, Vol. II, p. 1048.

[15] *President, Municipal Council, Guntur* v. *Srikakulapu,* (1881) 3 Mad. 124.

[16] *Secretary of State* v. *Abdul Bari,* (1892) 20 Cal. 51 (F.B.).

[17] *Secretary of State* v. *Abdul Bari,* supra.

[18] Mitra's Limitation Act, Vol. II, p. 1048.

[19] *Ibid.*

## SYNOPSIS.

964. Corresponding provisions —Act IV of 1859.
965. Act IX of 1871.
966. Act XV of 1877.
967. "Household servant."
968. Suit against master for wages.
969. "Artisan."
970. "Labourer."
971. Starting point of limitation.

## NOTES.

**Act XIV of 1859, S. 1, cl. 2.**

**964. CORRESPONDING PROVISIONS.**—In Act XIV of 1859, the corresponding provision was contained in S. 1, Cl. (2), which applied, *inter alia,* "to suits to recover the wages of servants, artizans, labourers."

**Case-law.**

A *chowkidar* was held to be a "servant" within the meaning of Cl. (2), S. 1 of Act XIV of 1859.[20] He could only sue the landholder on the ground that he was employed by him or by some person who was his agent.[21] But, the **Tehsildar** was **not** a **"servant"**, within the meaning of the clause which contained the term "servant" coupled with the words "artisans or labourers". Accordingly, the limitation of 3 years under Cl. (9) or (10) of S. 1 of the Act XIV of 1859 was applied to a suit for recovery of arrears of salary due to plaintiff on an engagement by which defendant had employed him as a Tehsildar or Collector of rents with special powers.[22] A suit by a *Mooktear* for salary was not barred by the limitation of one year prescribed in Cl. (2), S. 1, Act XIV of 1859.[23]

The suit contemplated by this article was a suit for **wages** brought by a servant, artizan or labourer, **against** his **master or employer.** Accordingly a suit to recover the **cultivator's share of produce** was held **not** covered by this clause, as it was not a suit for **wages** of the labourer.[24] A suit for the price of work done by **a painter or goldsmith,** under an agreement was **not** a suit for **"wages"**[25]; nor could an *artist* be held to be an **"artizan"** within the meaning of this clause.[26] Where a suit was brought by one Government servant *against another* for the recovery of a sum of public money received by the defendant on account of the wages of the plaintiff, the clause was held inapplicable, the suit not being against the master.[27] Similarly a suit brought against a Batwara Ameen or a superior servant who had drawn the wages of the whole establishment, and did not pay plaintiff the wages due to him, was not a suit covered by this article.[28] In *Kalichurn* v. *Mahamed Soleem,*[29] where the plaintiff was appointed on a fixed monthly salary, payable at the expiration of each month, and not in advance, the limitation as to each month's salary was held to commence from the time at which the salary became due, namely, the end of each month. And the limitation did not begin to run at the time at which the plaintiff's services were ended.[30]

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[20] *Golamee* v. *Shaikh Paelan,* 18 W.R. 298.

[21] *Ibid.*; cf. *Ghasi Ram* v. *Uma Dutt,* 1924 Oudh 189=79 I.C. 576.

[22] *Oroon Chunder Mundul* v. *Ramanath Rukheet,* 10 W.R. 260.

[23] *Nitto Gopal Ghose* v. *Mackintosh,* 6 W.R. 11 (Civ. Ref.).

[24] *Andy* v. *Venkata,* (1865) 2 M.H.C. 387.

[25] *Viraswamy* v. *Sayambabay,* (1864) 2 M.H.C.R. 6.

[26] *Ibid.*

[27] *Shiva* v. *Turnbull,* (1868) 4 M.H.C. 43.

**Act IX of 1871.**

**965.** In Act IX of 1871, the corresponding Art. 7 used the word *"domestic* servant" and, in the 3rd column, the starting point of limitation was given as follows: "When the wages sued for accrued due."

Suits for arrears of a monthly payment agreed to be made for instructions in fencing and wrestling were held to be outside the scope of this article.[31]

**Act XV of 1877.**

**966.** The article was the same in Act XV of 1877 as at present. All the rulings under the Act of 1877 are, therefore, relevant now.

**"Household servant".**

**967.** This article "does not apply to all servants", but only to "household servants". The words *"household servants"* are *ejusdem generis* with the words "artizan" or "labourer" which follow it.[32] A **temple servant,** whose duty it is to provide flowers for daily worship[33]; or a person employed for the purpose of collecting rents, and as a **male companion**[34] are not "household servants". Similarly a **wet nurse** was not a household servant and a suit by her for recovery of her wages was governed by Art. 102 of the Limitation Act.[35] **A cook** is a domestic or household servant although he may be an expert in cooking. There is no necessity for resort to the residuary Art. 102 of the Limitation Act.[36] A **village watchman** is not a household servant, and a suit by him would fall within Art. 102.[37] A *Shahana,* who is merely employed to watch crops, cannot be described as a labourer.[38] **A weighman** employed to work at a shop is not a "household servant", nor is he an "artizan", nor a mere "labourer". He may be regarded in fact as a shop-keeper's assistant. A suit by a weighman for his wages is, therefore, governed by Art. 102, and not by Art. 7 of Sch. I to the Limitation Act.[39] A person who was employed as a salesman by a dealer to assist him in the sale of goods, is not a "household servant or labourer" and the suit for his wages would be governed by Art. 102, and not by Art. 7.[40] Persons in the public service are not apparently *household* servants.[41]

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[28] *Abhaya* v. *Haro,* (1870) 4 Beng. L. R. App. 68=13 W.R. 150.

[29] (1866) 6 W.R. 33 (Civil References).

[30] *Ibid.*

[31] *Pylwan Jarkan* v. *Jenaka,* (1875) 8 M.H.C.R. 87.

[32] *Mt. Subhani Begam* v. *Imtiaz Ahmad Khan,* 1933 Oudh 393=8 Luck. 119=147 I.C. 227=10 O.W.N. 1311.

[33] *Muttirangot Manakal* v. *Erangot,* (1883) 7 Mad. 99 (*Kayagam Service*).

[34] *Mt. Subhani Begam* v. *Imtiaz Ahmad,* supra.

[35] *Mohanlal* v. *Jumerat,* 10 A.L.J. 395.

[36] *Kuppu Rao* v. *Narasier,* (1915) 28 I.C. 956 (Mad.).

[37] *Ghasi Ram* v. *Uma Datt,* (1923) 10 Oudh L. J. 348=1924 Oudh 189=79 I.C. 576 (Dist. 18 W.R. 298—Under Act XIV of 1859).

**Suit against master for wages.**

**968.** Where the suit is not only against the master, but against master and another who stood as his surety, the claim against master alone is covered by Art. 7.[42] This article is applicable only to suits for *wages* against the master. But, where the master has given credit for the salary in his account-book treating the servant as creditor, Art. 7 has no application; and the ordinary rule of limitation as to *debts* would govern the case.[43] The term "wages" in Art. 102 of the Limitation Act is a very general term; although it is usually used in connection with daily wages, it also includes the wages paid as monthly salary.[44] The term "wages" is generally understood to refer only to the remuneration for mechanical or muscular labour. And the term "salary" is spoken of in connection with services of a higher class.[45] A claim for the salary and perquisites of office by the *archaka* of a temple, whose position is essentially that of a servant under the temple trustee is governed by Art. 102 of the Limitation Act.[46]

**"Artizan".**

**969.** The word *"artizan"* in Art. 7 denotes a mechanic or workman who has acquired some manual skill. It does not apply to the higher class of work which involves responsibility and intellectual training.[47]

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[38] *Babu Lal* v. *Hukam Singh,* (1935) 152 I.C. 932 (All.).

[39] *Mutsaddilal* v. *Bhagwandas,* (1925) 90 I.C. 120=48 All. 164=1926 All. 172=23 A.L.J. 1059.

[40] *Musameah Sawdagar* v. *Shirazulla,* 1935 Rang. 235.

[41] Starling, p. 188; Rustomji, p. 311.

[42] *Shwe Hla Gyi* v. *San Dwe,* (1921) 64 I.C. 361=10 L.B.R. 332.

[43] *Chinnan Chetty* v. *Vilathan,* (1927) 106 I.C. 229=1928 Mad. 27=39 M.L.T. 415=27 M.L.W. 30.

[44] *Bhardwaja Mudaliar* v. *Arunachalla,* (1918) 45 I.C. 414=23 M.L.T. 288=7 L.W. 524=41 Mad. 528.

[45] Dr. Pal's Limitation Act, p. 472. Ogilvies' Imperial Dictionary and Stroud's Judicial Dictionary; also see *Gordon* v. *Jennings,* (1882) 9 Q.B.D. 45.

[46] (1918) 45 I.C. 414 (Mad.), *supra.*

[47] *Navalmal* v. *Mangal Das,* (1919) 50 I.C. 37=12 S.L.R. 140.

Accordingly, a suit by **a mechanical engineer,** who was in charge of an engine which worked the defendant's mill to recover the amount of his wages would be governed by Art. 102, and not by Art. 7.[48] **A person engaged to drive an engine** on board the steamer is an *"artizan"* within the meaning of the term as used in S. 107 of the Indian Emigration Act, 1883.[49] This term *"artizan"* appears also in Artizan and Labourers' Dwellings Act (31 and 32 Vict., c. 170); and Artizans and Labourers' Improvement Act (38 and 39 Vict., c. 36). This word is found always associated with *"labourers"*, and their earnings are spoken of as *"wages"*.[50] But, the dictionary meaning of the term is "one who practises an art or an applied science". There is no definition of the term "artizan" in the Act itself, nor is there any definition of it in any other contemporary Act of the legislature; and it must be interpreted in the conventional sense in which it is used.[1] An "artizan" is defined by Webster in his dictionary to be "one who is engaged in a mechanical employment".[2]

> "That is the popular meaning and there is no reason to suppose that the legislature meant to use it in any other sense."[3]

**A motor-car driver** has been held to be an *"artizan"* within the meaning of this article.[4] But a contractor or a sub-contractor may not be an *artisan* or labourer under this article if he does not ordinarily work himself, but contracts to get work done through other labourers.[5]

**"Labourer".**

**970.** A *"labourer"* is defined in Murray's English Dictionary as follows:—

> "One who performs physical labour as a service or for a livelihood, *e.g.*, one who does work requiring chiefly bodily strength or aptitude and little skill or training, as distinguished, *e.g.*, from an artisan."[6]

A labourer is also defined in *Mutsaddilal* v. *Bhagwandas,*[7] by the **Allahabad High Court**

> "as a man who digs and does other work of a kind with hands".

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[48] *Navalmal* v. *Mangal Das,* (1919) 50 I.C. 37 (Sind).

[49] *Emperor* v. *Haji Shaik Mohamed Shustari,* (1907) 32 Bom. 10=9 Bom.L.R. 1059=7 Cr.L.J. 238.

[50] *Ibid.,* 32 Bom. 10 (Arguments).

[1] *Ibid.,* (1907) 32 Bom. 10 (12).

[2] *Ibid.*

[3] *Ibid.*

[4] *Sewa Ram* v. *Lachhminarayan,* (1927) 5 Rang. 477=1927 Rang. 279.

[5] *Gilby* v. *Subbu,* (1883) 7 Mad. 100; also see In re *Balkrishna,* 10 Bom. 196; cf. *Namdev* v. *Ramkrishna,* (1935) 152 I.C. 885=1934 Nag. 260.

[6] *Musa Meah Sawdagar* v. *Shirazulla,* 1935 Rang. 235.

[7] 1926 All. 172 (1)=90 I.C. 120=48 All. 164.

A labourer is a servant in husbandry or manufacture not living *intra moenia,* who labours in a toilsome occupation and does work that requires little skill as distinguished from an artisan. Accordingly, it has been held that a person who was appointed as a salesman by a dealer to assist him in the sale of goods, and who had to work not only with his hands, but also had to use his brain, was not merely a "labourer" within the meaning of Art. 7, and a suit by him for wages was governed by Art. 102.[8] It has been noticed in S. 964, *ante,* that under Act XIV of 1859, a suit by a cultivator of another's land was held not covered by this clause. A **Bargadar** may not be a labourer on wages.[9]

**971. STARTING POINT OF LIMITATION.**—"Under a contract for services for a stated period, no time for payment being agreed upon, limitation runs upon completion of the term of service."[10] "If a person is employed by the day, week or month, and is to be paid thereof at the end of each day, week or month, the statute begins to run at the end of each day, week or month, as the case may be, and will bar that part of the wages which occurred more than, *e.g.,* one year under Art. 7 before the suit was brought, although the service continued for several years."[11] The bar of limitation may be saved by proving that the time for payment of wages was agreed to be at a later date, or that there is some acknowledgment.[12] The date of the dismissal of the servant is not the starting point where the wages were payable at the expiration of each month.[13]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 8. | For the price of food or drink sold by the keeper of a hotel, tavern or lodging house. | One year. | When the food or drink is delivered. |
| 9. | For the price of lodging. | One year. | When the price becomes payable. |

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[8] *Musa Meah Sawdagar* v. *Shirazulla,* 1935 Rang. 235; also see *Morgan* v. *London General Omnibus Co.,* (1884) 13 Q.B.D. 832 (A *carpenter* held not a "labourer", because his work requires skill and training although it is mostly done by hands).

[9] *Andy* v. *Venkata,* (1865) 2 M.H.C.R. 387.

[10] Wood, 4th Edn., p. 673; Rustomji, p. 310.

[11] *Ibid.,* p. 674; Rustomji, p. 310.

[12] *Kuppu Rao* v. *Narasier,* (1915) 28 I.C. 956 (Mad.); cf. *Shwe Hla Gyi* v. *San Dwe,* (1921) 64 I.C. 361 (L.B.) (Where the promise to pay being without consideration did not constitute a fresh contract so as to operate to give a fresh period of limitation).

[13] *Kali Churn* v. *Mohamed Soleem,* (1866) 6 W.R. 33 (Civ. Ref.).

## NOTES.

972. **CORRESPONDING PROVISIONS.**—In Act XIV of 1859, S. 1, Cl. (2) provided, *inter alia,* for "suits to recover the amount of tavern bills or bills for boarding and lodging only": the period was one year: commencing "from the time the cause of action arose".

The Art. 8 remains in its present form since the Act IX of 1871. Article 9 had the words *"when the lodging ends"* in Act IX of 1871, but the article was in its present form in Act XV of 1877, which is considered more expressive.

**Boarding charges.**

973. Article 8 applies to hotel, etc., bills for boarding charges, at a public place, like a tavern, "licensed to sell liquors in small quantities", or at lodging houses where travellers and other transient guests are accommodated with arrangement for supply of food and drinks.[14] Article 9 applies to house rent, or the price charged for residence in and occupation of the premises. This residence, and occupation is generally **not exclusive,** as the owner of the lodging, and his servants have to look after the rooms and the furniture.[15]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 10. | To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract. | One year. | When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession when the instrument of sale is registered. |

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[14] *Bhag Singh* v. *Dhirta Singh,* 142 P.L.R. 1908 (A village liquor shop held to be covered by the article).

[15] Mitra's Limitation Act, Vol. II, p. 1051: citing *Wright* v. *Stovert,* 29 L.J.Q.B. 161 and *Allan* v. *Liverpool,* (1874) L.R. 9 Q.B. 180 (191).

## SYNOPSIS.

### Title I: Historical.

974. Corresponding provisions—Act XIV of 1859.
975. Act IX of 1871.
976. Act XV of 1877 and Act IX of 1908.
977. "Physical possession".

### Title II: Scope and application.

978. Right of pre-emption.
979. Section 30, Punjab Pre-emption Act I of 1913.
980. Application of Art. 10.

### Title III: Starting point of limitation.

981. Starting point of limitation.
982. Physical possession.
983. Of waste lands.
984. Possession "under the sale".
985. Whole of property must admit of possession.
986-992. Property not admitting of physical possession.
986. Nature of property considered.
987. Foreclosure of share of an undivided mahal.
988. Sale of a share in an undivided mahal.
989. Sale of share in Shamilat.
990. Property in possession of tenants.
991. Possession of a trespasser.
992. Sale of an equity of redemption.
993. Date of registration.
994. Article 120.

## NOTES.

**974. CORRESPONDING PROVISIONS.**—In Act XIV of 1859, the corresponding provision was contained in S. 1, cl. 1, where the period prescribed was

**Act XIV of 1859.**

> "one year, to be computed from the time at which the purchaser shall have taken *possession* under the sale impeached".

In *Goordhan* v. *Heera Singh.*[16] a **Full Bench** of the Sadr Diwani held that "possession" of Act XIV of 1859 must be actual and not a constructive possession. In 1868, the question came again before **a Full Bench of the Allahabad High Court,** and in *Ganeshee Lal* v. *Toola Ram,*[17] the Full Bench decided that the "possession" of Act XIV of 1859 included constructive as well as actual possession. It is probable that this decision led to the altering of the wording of the article relating to limitation in pre-emption suits in the next succeeding Limitation Act.

**975.** In Art. 10 of the Second Schedule to Act IX of 1871, it was prescribed that limitation should run from the date "when the purchaser takes *actual possession* under the sale sought to be impeached." A

**Act IX of 1871.**

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[16] S.D.A. N.-W.P. (1866), p. 181.

[17] N.-W.P. H. C. Rep. 1868, p. 376.

**Full Bench of the Allahabad High Court** held in *Jageshar Singh* v. *Jawahir Singh,*[18] that full effect is given to the expression

> " 'actual possession' by holding that, when the nature of the subject of the sale admits of visible and tangible possession, limitation will run from the period when tangible possession is taken, but that when the nature of the subject of the sale does not admit of tangible possession, limitation runs from the time when the subject of sale is completely conveyed to, and vested in, the purchaser, and he has acquired such possession as before the sale, was enjoyed by the seller".[19]

Thus, the majority of the Full Bench held that "actual possession" of Act IX of 1871 was the same thing as "possession" of Act XIV of 1859, and included constructive possession. Stuart, C.J., however, differing from four of his colleagues, held that in case of a property which had been mortgaged with possession, **actual possession meant personal and immediate enjoyment** of the profits, by the purchaser after the expiry of the term of mortgage, on its redemption.

**Act XV of 1877 and Act IX of 1908.**

976. This view seems to have been adopted by the Legislature that actual possession meant physical and tangible possession. And, it is to be noticed that the wording of column 3 was changed in Act XV of 1877, and the article has been left unchanged since 1877.

The expression "physical possession" in Act XV of 1877 was noticed in the Full Bench case of *Unkar Das* v. *Narain,*[20] where it was explained that

> "where a distinct parcel of land is sold by one person and bought by another, the vendee does obtain physical possession". . "But the position is altogether different as regards a **share in an undivided mahal.**"[21] "In that case the right to receive profits vests in the purchaser from the time of sale, but such right can be materially enjoyed only at such time as the next division of profits may take place, and even such material enjoyment cannot be said to be '*physical possession of the whole of the property sold*', for the beneficial enjoyment receives at each subsequent division of profits."[22]

It was added that

> "While on the one hand, the object of the Legislature has been to shorten the periods of limitation, its purpose on the other, has been to encourage registration, and it was probably under the influence of both these con-

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[18] (1876) 1 All. 311 (F.B.).

[19] (1876) 1 All. 311 (F.B.) (Per Majority of F.B.; also see 29 P.R. 1878, which interpreted "actual possession" of Act IX of 1871, as including constructive possession); and *Ram Saran* v. *Hirde,* 65 P.R. 1883 (Sale of land in possession of lessee held to be "actual possession"). Both these are no longer good law under the present Act, which uses the words "*physical possession*".

[20] (1881) 4 All. 24=1 A.W.N. (1881) 116 (F.B.).

[21] *Ibid.*

[22] *Ibid.*

siderations that the word '*physical*' and the alternative provision in Art. 10 above referred to were introduced."[23]

**977. PHYSICAL POSSESSION.**—The expression "*physical possession*" employed in the Limitation Acts of 1877 and 1908, has been explained by Edge, C.J., in *Batul Begam* v. *Mansur Ali Khan.*[24]

> "The Legislature meant some limitation of the term 'possession' by the use of the term 'physical'. . . . In our opinion, for instance, the owner of a house who has let the house to a tenant cannot be said to be in physical possession of that house so long as the tenancy subsists, and his tenant remains in exclusive possession of the demised premises. In such a case, the owner has parted with the physical possession to his tenant for the period of his tenancy, and the tenant alone is the person who has physical possession."

Accordingly, it was held (1) that a **share in an undivided zemindari mahal** is not susceptible of "physical possession" in the sense of Art. 10 of the Second Schedule to Act XV of 1877; (2) that **constructive possession,** *e.g.,* by receipt of rent from tenants, is not "physical possession" within the meaning of said article.[25]

The above case *Batul Begum* v. *Mansur Ali,*[26] went on appeal to the Privy Council, when the decision of the High Court was affirmed: **24 All. 17 (P.C.).** Their Lordships observed that the language of Art. 10 was extremely absolute.

> "The word '*physical*' is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has, in successive enactments about the limitation of such suits, gone on strengthening the language used, first in 1859 prescribing '*possession,*' then in 1871 requiring 'actual possession' and finally in 1877 substituting the word 'physical' for 'actual', it is seen that the word has been very deliberately chosen and for a restrictive purpose."[26]

Their Lordships were of opinion that the High Court were right in the conclusion they had stated; and considered that the expression used by Stuart, C.J., in regard to the words "actual possession" was applicable with still more certainty to the words "**physical possession**", and that what was **meant** was **a personal and immediate possession.**[27] Physical possession does not mean merely proprietary possession[28]; or a constructive possession through agent or tenant.[29]

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[23] *Unkar Das* v. *Narain,* (1881) 4 All. 24=1 A.W.N. (1881) 116 (F.B.).

[24] (1898) 20 All. 315 (F.B.); Relied on *Ali Abbas* v. *Kalka Prasad,* 14 All. 405 (F.B.).

[25] *Ibid.*

[26] 20 All. 315 (F.B.); affirmed in 24 All. 17 (P.C.).

[27] 24 All. 17 (P.C.) (*Held,* that 'formal possession' constituted by the *dakhalnama,* which was ceremonial, and on paper, when physical possession could not be obtained by enforcing a partition, did not fall within Art. 10 of the Limitation Act).

## TITLE II: SCOPE AND APPLICATION.

978. **RIGHT OF PRE-EMPTION.**—The law of Pre-emption imposes a qualified disability upon the owners of properties, by restricting the vendors in the choice of their vendees. The right of pre-emption is a statutory creation, but can be created by contract, and is recognised by custom.

According to **Allahabad High Court,** the law of pre-emption is essentially a part of Muhammadan jurisprudence[30]: but in course of time pre-emption became adopted by Hindus as a custom[31]: and it has grown up or been adopted in village communities, as the result of agreement amongst the shareholders of particular villages.[32] In Upper India, the analogy of rules of Muhammadan Law of Pre-emption has been followed even in cases where the right is not claimed under that law, but under local usage or custom,[33] on the ground that these rules are consistent with the principles of equity, justice and good conscience.[34] But this analogy is not consistently followed where the right is claimed under customary law.[35]

**The law of pre-emption in the Punjab** is traceable to three sources, *viz.*, (1) to village customs, (2) to the influence of Muhammadan Law, and (3) enacted law.[36] Pre-emption under Muhammadan Law was a town institution; while customary pre-emption in Punjab owes its origin to the principle of limited right of landholders amongst village communities.[37] In its nature and origin the right of pre-emption is nothing more or less than a right conferred upon, and exercisable by, each member of the proprietary body, primarily with the object of preserving the integrity of the village community by preventing any interference with customary rules of inheritance.[38] In the Punjab, legislative enactments have existed from the time of Punjab Civil Code, 1854, and later the Punjab Laws Act of 1872, and its amendment of 1878. Act II of 1905, which codified custom in villages, and prescribed partial codification in towns, has been developed under Act I of 1913, which contains provision as to limitation of suits in S. 30.

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[28] *Haider Ali Shah* v. *Bhikhe Shah,* (1922) 68 I.C. 811 (Lah.).

[29] *Bishan Singh* v. *Feroze Chand,* 97 P.R. 1917.

[30] *Gobind Dayal* v. *Inayat-ullah,* (1884) 7 All. 775.

[31] *Ibid.*

[32] *Kumar Digambar* v. *Ahmad Sayeed,* 1914 P.C. 11=37 All. 129 (P.C.).

[33] *Zamir Husain* v. *Daulat Ram,* (1882) 5 All. 110.

[34] *Bhawani Prasad* v. *Damru,* 5 All. 197; also see *Rajjo* v. *Lalman,* 5 All. 180.

[35] *Wajid Ali* v. *Sobhan,* 31 All. 623 (630).

[36] *Gani* v. *Sabib,* (1875) 91 P.R. 1875.

[37] *M. Ilahi Baksh* v. *Kaki,* 87 P.R. 1895.

[38] *Sanwal Das* v. *Gur Pershad,* 90 P.R. 1909 (F.B.).

**979. Section 30, PUNJAB ACT I OF 1913.**—Section 30, Punjab Pre-emption Act I of 1913, enacts as follows:—

> "*In any case not provided for by Art.* 10 of the Second Schedule of the Indian Limitation Act, 1908, the period of limitation in a suit to enforce a right of pre-emption under the provisions of this Act shall, notwithstanding anything in Art. 120 of the said Schedule, be one year—
>
> "(1) in the case of a sale of agricultural land or of village immoveable property, from the date of the attestation (if any) of the sale by a Revenue Officer having jurisdiction in the register of mutations under the Punjab Land Revenue Act, 1887, or from the date on which the vendee takes under the sale physical possession of any part of such land or property,
>
> whichever date shall be the earlier;
>
> "(2) in the case of a foreclosure of the right to redeem village immoveable property, from the date on which the title of the mortgagee to the property becomes absolute;
>
> "(3) in the case of a sale of urban immoveable property from the date on which the vendee takes under the sale physical possession of any part of the property."

It will be noticed that in the Punjab suits for pre-emption are governed by Art. 10 and S. 30 of Punjab Pre-emption Act lays down one year as the period of limitation in cases to which Art. 10 of the Limitation Act does not apply.

**980. APPLICATION OF ARTICLE 10.**—Article 10 of the Limitation Act applies to suits "to enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract". It would apply both in towns, and in villages. It applies to cases of **sales** where they have actually taken place.[39] A suit for mere specific performance of a contract of sale will be governed by Art. 113 of the Sch. I to the Limitation Act.[40] Column 3 notes two cases:—

**Sales.**

(1) Where the purchaser takes, *under the sale* sought to be impeached, physical possession of the whole of the property sold, in which case limitation starts from date of such physical possession[41]; and

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[39] *Rai* v. *Saida Kali,* (1922) 65 I.C. 959 (Nag.) (Art. 120 applied to suits by a landlord claiming pre-emption under S. 41, C. P. Tenancy Act, where the sale has not taken place).

[40] *Khemchand Ramdas* v. *Mohson Shah,* (1924) 80 I.C. 962=17 S.L.R. 1=1921 Sind 118.

[41] *See* S. 977.

(2) where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.[42]

First part of Art. 10 applies, where the whole of the property admits of physical possession at the date of sale[43] and time runs from the date of the physical possession.[44] If the whole of the property does not admit of physical possession, then and then only, the second part of Art. 10 comes into operation. In cases falling under cl. 2 of column 3, we have to see *firstly,* if the instrument of sale is registered. If registered, the date of its registration is the commencing date for purposes of limitation under Art. 10; otherwise, either Art. 120 of Limitation Act (or S. 30, Punjab Pre-emption Act), applies as the case may be.

Art. 10 simply has regard to the question whether the property sold is capable of immediate and personal possession as soon as the sale is effected,[45] (*see* S. 986, *post*); and, if it is not, the property does not admit of physical possession, and Cl. (2) comes into operation. Whether the subject of sale does or does not admit of physical possession must be determined with reference to the date of sale.[46]

In every case of pre-emption the law contemplates that there should be a purchaser who has either takes possession under the sale sought to be impeached or in some cases has obtained title under a registered instrument of sale.[47] As to the object of the legislature in enacting Art. 10, *see*[47-a]

The word sale includes an auction-sale held in execution of a decree.[48] A document executed as a gift, but really a sale, or as a coloured mortgage, but meant as a permanent transfer would attract the operation of Art. 10.[49] A suit by a pre-emptor is not a suit for possession of property in respect of which he has a right of pre-emption, and this right is not, therefore, extinguished under S. 28, Limitation Act, and may be pleaded in defence, though a suit to enforce it as plaintiff may then be barred.[50]

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[42] *See* **S. 993.**

[43] *See* **S. 985.**

[44] *Achutanand* v. *Biki Bibi,* 69 I.C. 666=1 Pat. 578=1922 Pat. 601.

[45] *Ghulam Mustafa* v. *Shahabuddin,* 49 P.R. 1908 (F.B.); Folld. 24 All. 17 (P.C.).

[46] *Ganwa* v. *Joti Pershad,* (1923) 73 I.C. 903=1924 Lah. 302; also see *Bhawani Pershad* v. *Attar Singh,* 68 P.R. 1884 (The term "physical possession" must be construed with reference to the time of the sale); also see *Khunda* v. *Chuni Lal,* 87 P.R. 1893 (A partition after sale will not make property *separate,* which was joint at time of sale).

[47] *Jagannath* v. *Sheoratan Singh,* (1910) 7 I.C. 295 (Sind); also see *Nagina Singh* v. *Duni Chand,* (1921) 62 I.C. 797.

[47-a] 62 I.C. 797.

[48] *Ramji* v. *Dawaji,* (1892) 6 C.P.L.R. 67.

[49] *Abdul Rahman* v. *Parshotam Das,* 57 I.A. 251=5 Luck. 492= 1931 P.C. 12=128 I.C. 257 (P.C.); also see *Bhagwana* v. *Shadi,* 1934 Lah. 878=36 P.L.R. 114 (S. 18 applied).

**Foreclosure of mortgages by conditional sales.**

**981.** In certain earlier cases, it was held that Art. 10 did not apply to a sale completed by foreclosure of a mortgage by conditional sale. However, in principle there is no difference between sales absolute *ab initio,* and sales which are perfected on foreclosure of mortgages, and it has now been definitely stated that Art. 10 does apply to conditional sales in the same way as it applies to sales out and out.[1] It would apply to a sale which in its inception was a mortgage by conditional sale, but which by the operation of Regulation XVII of 1806, or by the operation of Act IV of 1882, or O. 34, R. 3, Civil Procedure Code, 1908, has become in effect an absolute sale, the right of redemption being extinguished.[2] This view is now generally accepted in Calcutta,[3] Central Provinces,[4] Punjab[5] and Oudh.[6]

It is of course clear that Art. 10 has no application to conditional sales in cases in which it would not apply to absolute sales,[7] *e.g.,* where the subject of sale is an undivided share in a joint holding, and there is no registered sale-deed[8]; or, where the land being part of a joint *khata,* also contains shamilat.[9] Thus, it was held in *Nath Prasad* v. *Ram Paltan Ram,*[10] that the limitation applicable to a suit by a pre-emptor to enforce his right against the vendor and vendee, under a registered deed of conditional sale relating to a fractional share of an undivided *mahal,* which does not admit of physical possession, is six years under Art. 120. The

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[50] *Kanharan Kutti* v. *Uthothi,* 13 Mad. 490; *Krishna Menon* v. *Kesavan,* 20 Mad. 305; contra *Visvanathan* v. *Ethirajulu,* 1924 Mad. 57 =45 M.L.J. 389; and *Ramasami* v. *Chinon Asari,* 24 Mad. 449.

[1] Sir Shadilal's Pre-emption Act, p. 601; citing 3 All. 175; 3 All. 610; **20 All. 315 (F.B.)**; *Batul* v. *Mansur Ali,* 24 All. 17 (P.C.); also see 2 W.R. 5; 14 Cal. 761; and 87 P.R. 1896; 76 P.R. 1895 and 103 P.R. 1901 (F.B.).

[2] *Batul Begam* v. *Mansur Ali,* (1898) 20 All. 315 (F.B.); affd. in (1901) 24 All. 17 (P.C.).

[3] *Digamber* v. *Ramlal,* (1887) 14 Cal. 761 (767).

[4] *Fateh Chand* v. *Dina Nath,* (1890) 4 C.P.L.R. 73; *Ramji* v. *Dewaji,* (1892) 6 C.P.L.R. 67; *Sitaram* v. *Ram Dayal,* (1904) 1 N.L.R. 6.

[5] 87 P.R. 1893; 76 P.R. 1895; 103 P.R. 1901 (F.B.).

[6] *Arjan Singh* v. *Ikbal,* (1907) 10 Oudh Cas. 374.

[7] *Ali Gauhar* v. *Jawahir,* 30 P.R. 1892.

[8] *See* S. 987, *post.*

[9] *See* S. 989, *post.*

[10] (1882) 4 All. 218=2 A.W.N. (1882) 28 (F.B.); Folld. in 4 All. 414=2 A.W.N. (1882) 83.

**Allahabad High Court** pointed out in *Ali Abbas* v. *Kalka*,[11] that Art. 120 is the appropriate article in suits for pre-emption arising out of conditional sales: and that in such cases the plaintiff's right of pre-emption accrues, and limitation begins to run against him from the expiration of the year of grace: and not the date of the decree for foreclosure.

**Period of grace.**

**982.** The first point to determine is when the foreclosure becomes absolute. According to Privy Council view in *Forbes* v. *Amirunissa*,[12] the right of redemption is gone at the expiration of the year of grace. But, the mortgagee in order to complete his title has to bring a regular suit for possession, if out of possession, or to obtain a declaration of his title if in possession. It was explained in *Hazari Ram* v. *Shankar Dayal*,[13] that this decree in favour of the mortgagee does not create his title as owner, which was created by the failure of the mortgagor to redeem within the year of grace and dates from the end of that year. The foreclosure, therefore, becomes absolute on the expiry of the year of grace. This view was also taken in *Alu Pershad* v. *Sukhan*,[14] that the title as owner of the mortgagee begins when the right of redemption has gone, from the end of the year of grace; and in *Ali Abbas* v. *Kalka Pershad*,[15] it was held, likewise that the title of the conditional vendee became absolute on the expiration of year of grace. This view is confirmed by the Privy Council authority in *Batul* v. *Mansur Ali*,[16] that the period when the right of the mortgagee becomes mature is the expiration of the year of grace, and the mere fact that he has not enforced that right by a suit for possession is immaterial.[17] In cases governed by the Transfer of Property Act, which is now superseded by O. 34, R. 3, Civil Procedure Code, it is after a final decree for foreclosure is passed, that the right of the mortgagor to redeem the property is extinguished. Hence limitation would run from the date of possession under the decree.[18]

**Waste lands.**

**983.** However, it has been held that the vendee's possession of uncultivated area was their own personal possession as it was not necessary that the chaser of waste land should step on to the land or get into corporeal contract with it. All that was necessary was the physical possibility of the buyer dealing with the land exclusively as his own.[19] The possession of waste lands is obtained by the vendor simply showing it to the vendee on the spot.[20]

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[11] (1892) 14 All. 405=12 A.W.N. (1892) 108 (F.B.) (O.R. 4 All. 414 and 8 All. 54).

[12] 10 M.I.A. 340.

[13] (1881) 3 All. 770=1 A.W.N. (1881) 66.

[14] 3 All. 610=1 A.W.N. (1881) 31 (The cause of action for a suit for pre-emption in the case of conditional sale would arise when such mortgage is foreclosed).

[15] 14 All. 405 (F.B.).

[16] 24 All. 17 (P.C.).

[17] Also see *Bacha Rai* v. *Ram Sarup Khan*, 51 I.C. 73=17 A.L.J. 691; and *Rupa Bai* v. *Rodba*, 72 I.C. 121=6 N.L.R. 130 and *Attar Singh* v. *Ralla Ram*, 103 P.R. 1901 (F.B.).

[18] *Arjun Singh* v. *Ikbal Narain*, (1907) 10 Oudh Cas. 374; also see 20 All. 358; 20 All. 375; and 16 Cal. 346.

**Possession under the sale.**

**984.** The possession referred to in Art. 10 must be possession *"under the sale sought to be impeached"*, and such possession could not be prior to the date of the deed of sale, although the vendee had taken actual possession of the land in dispute some months prior to the deed of sale being formally executed and registered.[21] Where the vendor in 1906 sold three fields by three sale-deeds, each transferring 1|3rd share in each field to the vendees, father and son, and two of the fields were at the time of the sale in possession of the father vendee under mortgage-deed, and the third was cultivated by him as tenant before 1906, in 1907-08, and subsequently, and in 1906 the mutation was refused as possession had not been transferred; and on mutation being sanctioned in 1912, plaintiff sued to pre-empt; it was held that as vendee had not taken possession under the sale, limitation commenced from the date of mutation.[22] The taking of possession under a sale is an overt act fixed as the *terminus a quo* for limitation because it constitutes a publication of the transfer.[23] Where a tenant who is in possession of property subsequently becomes the owner thereof under the terms of a foreclosure decree, he does not take physical possession of the property under the foreclosure decree and a suit for pre-emption against him is consequently governed not by Art. 10 of Sch. I of the Limitation Act, but by Art. 120.[24] This view is supported by the principle of a decision of a Bench of the **High Court at Allahabad** in the case of *Shiam Sundar* v. *Amanat Begam,*[25] and also of a decision of **Oudh Judicial Commissioner's Court** in *Raj Raghuraj Singh* v. *Raj Raghunath*

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[19] *Bishan Singh* v. *Feroze Chand,* 40 I.C. 618=97 P.R. 1917; Reld. on *Bahadur Chand* v. *Nainamal,* 14 P.R. 1915.

[20] *Ibid.*

[21] *Piyara* v. *Ruplal,* 80 P.R. 1918=48 I.C. 102=181 P.W.R. 1918; also see contra *Lachmi Narain* v. *Sheo Ambar,* (1879) 2 All. 409; compare *Ramsookh* v. *Nannoo,* 34 P.R. 1871 (Where the purchaser was put in possession by the vendor, but being afterwards ejected by the latter, sued and obtained possession again in execution of a decree, held that limitation ran from the date when he was originally put in possession).

[22] *Imamuddin* v. *Khuda Bux,* 63 P.W.R. 1915=88 P.L.R. 1915 =29 I.C. 146 (1).

[23] *Ibid.*

[24] *Mata Din* v. *Mt. Mithana,* (1927) 102 I.C. 22=1 Luck. 38= 1927 Oudh 212.

[25] 9 All. 234=7 A.W.N. (1887) 24.

*Singh.*[26] Where prior to a sale the vendee is in physical possession of the property sold as a tenant, physical possession of the property under the sale cannot be given to him "*under the sale*", and the property must be treated as not admitting of physical possession being given.[27] Similarly, where land is sold to a person who is already in possession of it as a lessee, it is impossible for him to take possession of the land under the sale.[28] The matter is concluded by *Tola Ram* v. *Lorinda Ram.*[29] In that case there had been an agreement to sell land to a certain person on the fulfilment of certain conditions. He got possession and subsequently he fulfilled the conditions and became the owner of land. It was held that the vendee having been in physical possession from the date of the execution of the original contract, physical possession "*under the sale*" was impossible, and time began to run (under S. 30, Punjab Pre-emption Act) from the date of the mutation. Where the vendee was in possession as tenant prior to sale, the nature of his title no doubt changed on the execution of the sale-deed, but his physical possession remained precisely the same for all the world to see.[30] The **question is really one of notice** and as the potential pre-emptor received no notice whatever until the date of mutation, it was held that the limitation must be held to run from that date.[31] In *Thakur Singh* v. *Karam Singh,*[32] the same view was taken that

> "the law of pre-emption insists on 'physical possession', because physical possession is visible to all concerned. It is a notice to all would-be pre-emptors that a change has occurred in the enjoyment and possession of the land in question and puts them on inquiry".

Accordingly, it was held that the mere reporting to the *Patwari* that the vendor has relinquished possession and that the vendee has assumed possession is no proof that there was a giving and taking of physical possession within the meaning of S. 30 of the Pre-emption Act.[33] The **Allahabad High Court** has also held that the transfer of physical possession may take place at the time of the sale or at some time later; but if the property admits of physical possession, the limitation does not start till the physical possession is actually taken.[34] This was a case where the vendee of a shop attempted to take physical possession, but found that the house was occupied by a trespasser whom he had to eject by suit: it was held that limitation for a pre-emption suit against vendee began to run from the date of actual possession obtained by vendee under the decree.[35] The pre-emptor cannot, for the purpose of bringing his suit within limitation, claim that limitation should be completed from the date of the decision of a previous suit, in which the validity of the sale was in question.[36]

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[26] 3 Oudh Cas. 184.

[27] *Misri Khan* v. *Shahji,* (1923) 71 I.C. 823 (Lah.) (A case under S. 30, Punjab Pre-emption Act, 1913).

[28] *Dhanna* v. *Lekh Ram,* 76 I.C. 206 (Martineau, J.).

[29] 3 Lah. 261=69 I.C. 715=1922 Lah. 210; Folld. in 76 I.C. 206, *supra;* and in *Gyan Singh* v. *Gyan Singh,* 76 I.C. 202; also in *Sheo Ram* v. *Indraj,* (1924) 78 I.C. 57 (Lah.).

[30] *Gyan Singh* v. *Gyan Singh,* (1923) 76 I.C. 202 (Lah.).

[31] *Ibid.*

[32] (1924) 82 **I.C. 203 (Lah.).**

[33] *Ibid.*

**Whole of property must admit of possession.**

**985.** The first part of Art. 10 does not apply where only *part* of the property sold admits of physical possession, and the remaining part includes intangible rights,[37] *e.g.*, an equity of redemption,[38] or a share in an undivided estate,[39] or a property in possession of a tenant,[40] or a share in shamilat,[41] etc., which do not admit of physical possession.[42] The right of pre-emption to the whole of the land being one and indivisible, Art. 10, Sch. II, Act IX of 1871 (now Sch. I, Act IX of 1908) must be construed as fixing in every case a single point of time at which action to enforce the right becomes altogether barred.[43] It is essential for the application of the first part of Col. 3 of Art. 10, that the whole of the property sold must be susceptible of physical possession *at the time of sale.*[44]

**Nature of property considered.**

**986. PROPERTY NOT ADMITTING OF PHYSICAL POSSESSION.**—The words used in Art. 10, are "where the *subject of sale* does not admit of physical possession". Therefore, in deciding whether the property in suit admits of physical possession or not, it is only necessary to look to the nature of the property sold and not to the capacity of the vendor to deliver immediate possession.[45] In *Chanda Singh* v. *Chandi Prasad,*[46] the **Allahabad High Court** has observed as follows:—

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[34] *Jagamaya Dasi* v. *Tulsa,* (1926) 48 All. 12=1926 All. 70=89 I.C. 444=23 A.L.J. 885.

[35] *Ibid.*

[36] *Sundar Singh* v. *Dhian Singh,* 15 P.R. 1919.

[37] *Jairam* v. *Sitaram,* 52 I.C. 940 (F.B.) (Nag.) (Effect of delivery of physical possession not being possible where property is with holder of a particular or intermediate estate); also see *Umar Baksh* v. *Chogatta,* 156 P.R. 1882; *Kalu* v. *Bhupa,* 30 P.R. 1893; *Bholi* v. *Imam Ali,* 4 All. 179; and *Ram Jas* v. *Aman,* 5 I.C. 667 (All.).

[38] *See* "Property not capable of physical possession", **S. 992,** *post.*

[39] *Ibid.,* **S. 988,** *post.*

[40] *Ibid.,* **S. 990,** *post.*

[41] *Ibid.,* **S. 989,** *post.*

[42] *Kalan Khan* v. *Ram Saran,* 97 P.R. 1880; *Karm* v. *Fazal and Haji,* 10 P.R. 1881; *Jowala Singh* v. *Tek Chand,* 23 P.R. 1882; *Umar Baksh* v. *Chogatta,* 156 P.R. 1882; *Sohan* v. *Himmat,* 61 P.R. 1885; *Maluk Singh* v. *Muhammad,* 65 P.R. 1889.

[43] *Dewa* v. *Dia Ram,* 98 P.R. 1876.

[44] *Panna Lal* v. *Bhagwandas,* 16 P.R. 1902; *Batul* v. *Mansur,* 24 All. 17 (P.C.).

> "The phrase 'the subject of the sale does not admit of physical possession' does not refer to anything other than the nature of the property conveyed by the sale, and has no reference to the ability or inability of the vendor to place the vendee in actual physical possession of the property sold; whatever that inability may arise from".

**Foreclosure of share of an undivided mahal.**

987. A fractional share of an undivided mahal is not capable of physical possession.[47] The **Full Bench** of Allahabad High Court, in *Nath Prasad* v. *Ram Palatan,*[48] were of opinion that Art. 10 has no application to a suit by a pre-emptor in respect of a conditional sale of a fractional share of an undivided mahal. Such an interest is incapable of physical possession under an ordinary contract of sale.[49] The subject-matter of a sale of fractional shares of a Zemindari estate situate in several *khatas* is not capable of being taken physical possession of within the meaning of that expression in this article.[50] A suit, therefore, to enforce a right of pre-emption in respect of such a sale would be time-barred if brought after the expiration of one year from the **date of the registration** of the sale-deed.[1] A suit for pre-emption in respect of an undivided share in a field transferred under a foreclosure decree is not governed by Art. 10, where there is no registered instrument of sale.[2] The limitation applicable to a suit for pre-emption in respect of a *bai-bil wafa* mortgage or a mortgage by conditional sale of a fractional share of an undivided mahal is that provided for by Art. 120 of the Limitation Act.[3] The Privy Council have held in *Batul* v.

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[45] Sir Shadilal's Pre-emption, p. 596.

[46] 8 A.W.N. 227. *See* **S. 991,** *post;* cf. 43 P.R. 1900 (*Held,* that the limitation ran from the date of the deed, because the property at the time of the sale was not in the possession of the vendor, though the latter subsequently obtained possession, and delivered it to the vendee); also see *Jagamoya* v. *Tulsa,* 89 I.C. 444=1926 All. 470=48 All. 12=23 A.L.J. 885.

[47] *Nath Prasad* v. *Ram Palatan,* 4 All. 218=2 A.W.N. (1882) 28 (F.B.).

[48] *Ibid.*

[49] *Unkar Das* v. *Narain,* 4 All. 24 (F.B.).

[50] *Umrao Beg* v. *Mukhtar Beg,* (1919) 50 I.C. 80=17 A.L.J. 269; Folld. in 1930 All. 255 (1).

[1] 50 I.C. 80 (All.).

[2] *Balwant* v. *Sheodas,* (1927) 99 I.C. 659=1927 Nag. 64=9 N.L.J. 205 (Art. 120 applied).

[3] *Ashik Ali* v. *Mathura Kandu,* 5 All. 187=2 A.W.N. (1882) 212.

*Mansur*,[4] that where the property foreclosed is an undivided share in certain villages, the subject of sale does not admit of physical possession within the meaning of Art. 10 of the Limitation Act. The **Punjab Chief Court** has also applied Art. 120 to a suit for pre-emption of an undivided share, which did not admit of physical possession being taken, and in which the purchaser acquired his title by foreclosure proceedings under Regulation XVII of 1806, and a subsequent suit for possession, there being no registered deed.[5]

**Sale of a share in an undivided mahal.**

988. Similarly, the **sale of a share in an undivided mahal** does not admit of physical possession.[6] In a suit for pre-emption where part of the property sold is a share of an undivided *mahal* which does not admit of physical possession, limitation will run from date of registration of sale-deed.[7] A suit for pre-emption in respect of an oral sale of a share in joint and undivided property, which does not admit of physical possession is governed by Art. 120 of the Act.[8] If the sale is of a share of joint *khata*, the property sold would not be capable of actual possession. But where the sale is of a specified plot whether in actual possession of the vendor or in joint possession of himself and others and actual possession of the property sold can be given Art. 10 would be applicable.[9] Where the subject of a sale does not admit of physical possession, (being an undivided share of an estate), and where moreover there is no registered deed of sale, Art. 120 would apply whether the sale is in the first instance an absolute one, or a conditional one.[10] An undivided share which is incapable of physical possession cannot become capable of physical possession merely because a lease of it for a fixed period has been granted.[11]

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[4] 24 All. 17 (P.C.).

[5] *Ali Gauhar* v. *Jawahir*, 30 P.R. 1892; Folld. 13 P.L.R. 1900, p. 45.

[6] *Unkar Das* v. *Narain*, 4 All. 24 (F.B.); also see *Ram Sukh Das* v. *Fazl-ud-din*, 19 P.R. 1898; and *Muhammad Ataulla Khan* v. *Gopala Mal*, (1922) 68 I.C. 906 (Lah.); cf. *Himma Mul* v. *Rikh Lal*, 160 P.R. 1879 (*Held*, under Act IX of 1871, that a registered sale of vendor's share was *"actual possession"*, being all the possession vendor could transfer). This is no longer good law.

[7] *Bholi* v. *Imam Ali*, (1881) 4 All. 179=1 A.W.N. (1881) 176; also see *Jowala Singh* v. *Tek Chand*, 23 P.R. 1882.

[8] *Kishen Chand* v. *Kehr Singh*, 14 P.R. 1904; Folld. 24 All. 17 (P.C.); Reld. on 30 P.R. 1892; 4 All. 24 (F.B.); 4 All. 179; 20 All. 315 (F.B.).

[9] *Jhanda* v. *Ditt*, (1928) 109 I.C. 382=1928 Lah. 705.

[10] *Khunda* v. *Chunilal*, 87 P.R. 1893.

[11] *Ram Charan* v. *Mathura Prasad*, 1930 All. 255 (1)=1930 A.L.J. 375; Reld. on *Batul Begum* v. *Mansur Ali*, (1898) 20 All. 315=61 A.W.N. (1898) (F.B.); affd. in (1902) 24 All. 17=28 I.A. 248 (P.C.).

It may, however, happen that by virtue of partition amongst the co-sharers, the nature of the property may change and what was once a share incapable of physical possession may become susceptible of such possession.[12] An undivided share in respect of which the vendor has only an actionable claim cannot be considered to be property admitting of "physical possession", within the meaning of Art. 10, and in such a case a claim for pre-emption if not brought within one year of the registration of the sale-deed will be time-barred.[13] But, where the sale though nominally a share in a joint *khata,* the vendor's share is in fact separated, property sold is capable of physical possession being taken under the sale.[14]

**Sale of a share in shamilat.**

989. A share in an undivided *Zemindari mahal* is not susceptible of physical possession.[15] Likewise, an undivided share of the common land does not admit of physical possession[16]; and limitation must be computed from the date when the deed of sale was registered.[17] Similarly, where the property sold consisted of an ascertained and definite share in a certain *khata* together with a **share in the shamilat** and other manorial rights, it was held that these rights not being capable of physical possession being taken of them, limitation should be computed only from the date of the registration.[18] Where the land sold did not admit of physical possession, being a half-share in a holding partly under cultivation by occupancy and non-occupancy tenants, and some forming *shamilat* or common grazing land, it was held that such sale being effected otherwise than by a registered deed, a suit for a claim of pre-emption was governed by Art. 120, and not by Art. 10.[19] No vendor can give better possession than he himself enjoys, and unless the entire land of a village or *mahal* sold is in his actual cultivation, no delivery of physical possession at the time of the

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[12] *Bakar Hussain* v. *Bhaggu Rai,* (1884) 4 A.W.N. 317.

[13] *Hirdey Behari* v. *Ganesh Dutt,* (1928) 111 I.C. 715=1928 Oudh 375=5 Oudh W. N. 674.

[14] *Bhawani Pershad* v. *Attar Singh,* 68 P.R. 1884.

[15] *Unkar Das* v. *Narain,* (1881) 4 All. 24 (F.B.); *Batul Begum* v. *Mansur Ali,* (1898) 20 All. 315 (F.B.); affd. in 24 All. 17 (P.C.).

[16] *Karm* v. *Fazl and Haji,* 10 P.R. 1881.

[17] *Maluk Singh* v. *Muhammad,* 65 P.R. 1889; Folld. in *Lehna Singh* v. *Bhagat Singh,* 47 I.C. 359=68 P.R. 1918 (*Held,* that until a joint holding is partitioned, no co-sharer can say that he is absolutely the owner of any particular field or fields).

[18] *Sohan* v. *Himmat,* 61 P.R. 1885.

[19] *Jowala Singh* v. *Tek Chand,* 23 P.R. 1882 (Sale of a share in joint *khata*); also see *Sheoji Singh* v. *Sheoji Singh,* 129 P.R. 1906 (Preemption on foreclosure of mortgage by conditional sale of land including *shamilat,* not governed by Art. 10).

sale is possible.[20] Where the property sold was a 10 *biswas* share of a village, which had been formed into a separate *mahal* by partition, but it was not shown that the land appertaining thereto was entirely in the cultivatory occupation of the vendor, it was held that the property did not, therefore, admit of physical possession on the date of the sale.[21] The rights in the *shamilat* are not a mere accessory to the rest of the property, as these rights are not mere easements necessarily appertaining to the separate property. Where, therefore, a sale of property which is subject to a right of pre-emption includes a share in the *shamilat,* even though the greater part of the property sold may consist of a separate holding, the subject-matter of the sale is not capable of physical possession within the meaning of Art. 10, and the period of limitation in such a case is one year from date of registration, if the sale deed has been registered.[22]

**Property in possession of tenants.**

990. The term "physical possession" means corporeal or tangible possession, and excludes any notion of constructive possession by the landlord through his tenant.[23] Where a house forming the subject of a sale is a shop in the possession of a tenant, it is not capable of being taken into physical possession in the sense contemplated by the Act; and the acceptance by him of the purchaser as his landlord does not constitute such physical possession.[24] "Physical possession" as defined by their Lordships of the Privy Council means *"immediate and personal possession"*; consequently, in the case of a house let to tenants, the purchaser cannot be said to obtain possession so long as the tenants remain in the house, even if they attorn to him and pay him rent.[25] Such property appears to become a subject not capable of physical possession for the time being, and if an instrument of sale has been registered, limitation will commence to run from date of registration.[26] Possession by a tenant is not physical possession by the landlord, and it is at best constructive possession.[27] Accordingly, it was held

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[20] *Narendra Bahadur Singh* v. *Wali Muhammad,* (1915) 28 I.C. 208 (Oudh).

[21] *Ibid.*

[22] *Maluk Singh* v. *Muhammad,* 65 P.R. 1889; cf. 13 P.L.R. 1900 (Where a sale of land is otherwise than by a registered deed, and the land sold does not admit of physical possession, Art. 120 and not Art. 10 applies).

[23] *Kalan Khan* v. *Ram Sarn Das,* 97 P.R. 1880.

[24] *Gauhri Mal* v. *Jainti Mal,* 73 P.R. 1885.

[25] *Pannalal* v. *Bhagwandas,* 16 P.R. 1902=15 P.L.R. 1902.

[26] *Ibid.;* Folld. 20 All. 315 (F.B.); Reld. 48 P.R. 1884 and 73 P.R. 1885.

[27] *Sharif Hussain* v. *Muhammad Yusaf,* 88 P.R. 1905=170 P.L.R. 1905.

> "that where property capable of physical possession in the occupation of a tenant is sold and possession is transferred to the purchaser merely by the tenants executing a lease in his favour, and the tenant holds on for any number of years, limitation will not commence to run against the pre-emptor until such time".[28]

Where property sold admits of "physical possession" being taken, S. 10, Cl. (1) applies, and no other and limitation starts from the date of vendee's taking *physical possession* of whole of the property.[29] A Full Bench of **Punjab Chief Court** held in the case of *Ghulam Mustafa* v. *Shahabuddin,*[30] that Art. 10 has merely regard to the question whether the property sold is capable of immediate and personal possession as soon as the sale is effected; and if it is not, the property does not admit of physical possession. Property in possession of tenants *at the time of sale* does not admit of "physical possession", until the tenant is *removed,* and mere attornment to purchaser is not enough to satisfy the words of the article.[31] Where land is in possession of tenants on date of sale, time runs from date when vendee took possession ousting the tenants[32] the **Nagpur Court** takes the same view in *Ramji* v. *Sheikh Mansur,*[33] where it was held following the Punjab view, that when property sold is in the possession of another person as lessee, it is not capable of being taken into physical possession by the vendee, and the limitation for a pre-emption claim runs from the date of the registration of the deed of sale. The underlying principle governing the limitation in column 3, Cls. (1) and (2), is that limitation in pre-emption cases runs from the date of notice. If physical possession is given under the sale the whole world is given notice of the alienation. If a registered deed is executed, constructive notice is given, and in the same way constructive notice is given by mutation.[34]

**Possession of a trespasser.** 991. It has been pointed out already in S. 986, *ante,* that the words

> "where the subject of sale does not admit of physical possession do not refer to any thing other than the nature of the property conveyed by the sale, and has no reference to the ability or inability of the vendor to place the

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[28] *Sharif Hussain* v. *Muhammad Yusaf,* 88 P.R. 1905=170 P.L.R. 1905.

[29] *Ibid.*

[30] 49 P.R. 1908 (F.B.); Folld. 24 All. 17 (P.C.) and *Panna Lal* v. *Bhagwan Das,* 16 P.R. 1902; also *Haider Ali Shah* v. *Bhike Shah,* (1922) 68 I.C. 811 (Lah.); *Pertab Singh* v. *Gulab,* 105 I.C. 501=1927 Lah. 784=26 P.L.R. 780 (The question whether the subject of sale does or does not admit of physical possession must be determined with reference to the date of sale).

[31] (1907) 49 P.R. 1908=63 P.L.R. 1908 (F.B.).

[32] *Tulsi Ram* v. *Gunwa,* (1922) 69 I.C. 418=1924 Lah. 196=5 Lah. L. J. 539.

[33] (1912) 15 I.C. 890 (Nag.); Reld. on 73 P.R. 1885; and *Mansabdar* v. *Nabi Baksh,* 43 P.R. 1900; Folld. 24 All. 17 (P.C.); also see *Jairam* v. *Sitaram,* (1919) 16 N.L.R. 37 (58) (F.B.).

[34] *Tola Ram* v. *Lorinda Ram,* (1922) 69 I.C. 715 (Lah.).

vendee in actual physical possession of the property sold, whatever that inability may arise from".[35]

In *Velayudham Pillai* v. *Thina Velayudham*,[36] where *T*, by registered sale-deed, sold certain property to *V*, and under an oral arrangement *T* retained possession till a betel garden on the property ceased to exist; after this happened *X*, with notice of the covenant, purchased the property from *V*, and more than one year after registration of the deed evidencing this sale, *T* brought a suit for pre-emption under the covenant in case of re-sale by vendee, it was held by Napier, J., that however wide a meaning can be claimed for the words "subject of the sale does not admit of physical possession", it cannot be read as including the case where possession has not been taken for such a reason only. Therefore, the second alternative position in Art. 10 did not apply, and that being so, Art. 120 applied because it was a case where no "period of limitation" was provided elsewhere. Krishnan, J., held that the plaintiff was within time even if Art. 10 applied to the case on the ground that the purchaser could, but did not take possession.[37] A **Full Bench of Nagpur Judicial Commissioner's Court** has held, however, that

> "the first part of the third column of Art. 10 of Sch. I does not apply to a case where the subject-matter of the sale consists of land or other tangible immoveable property, physical possession whereof at the date of the sale is with the holder of a particular or intermediate estate, *e.g.*, an usufructuary mortgagee or a lessee, or a tenant for a time, owing to which circumstance the vendor is unable to give immediate physical possession to the purchaser".[38]

In *Mohanlal* v. *Satyabhama*,[39] the **Nagpur Judicial Commissioner's Court** has followed the authority of **Allahabad**[40] and **Madras** High Courts,[41] as also the **Full Bench of Nagpur** in *Jairam* v. *Sitaram*,[42] for holding that land in possession of a trespasser at the date of the registration of a sale-deed is not land which is incapable of physical possession within Art. 10. It was observed that the words "does not admit of physical possession" in Art. 10, Sch. I do not merely refer to the inability of the vendor in fact to give possession to the purchaser but refer to his inability both in fact and in law. The **Allahabad High Court** has held very clearly that

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[35] *Chandan Singh* v. *Chandi Prasad*, (1888) 8 A.W.N. 227 (228); cf. *Mansabdar* v. *Nabi Baksh*, 43 P.R. 1900.

[36] (1921) 62 I.C. 27=1921 Mad. 554=40 M.L.J. 443.

[37] *Ibid*.

[38] *Jairam* v. *Sitaram*, (1919) 52 I.C. 940 (Nag.); Refd. *Ramji* v. *Sheikh Mansur*, 15 I.C. 890=8 N.L.R. 68 and *Panna Lal* v. *Bhagwan Das*, 16 P.R. 1902=15 P.L.R. 1902.

[39] 107 I.C. 194=1928 Nag. 89=23 N.L.R. 178.

[40] *Chandan Singh* v. *Chandi Prasad*, 8 A.W.N. (1888) 227; *Jagamoya* v. *Tulsa*, 89 I.C. 444=1926 All. 70=48 All. 12=23 A.L.J. 885.

[41] *Velayudham Pillai* v. *Thina Velayudham*, 62 I.C. 27=1921 M.W.N. 207=40 M.L.J. 443.

[42] 52 I.C. 940=16 N.L.R. 37 (F.B.).

> "If the subject of sale by its nature admits of physical possession, the ability or inability of the vendor to place the vendee in actual possession of the property is not material;"[43]

and it draws a pointed distinction between property such as an undivided share in a mahal which is not by its nature capable of physical possession, and property like "houses and shops over which physical possession is always possible and practicable".[44]

**Sale of an equity of redemption.**

992. An equity of redemption is an incorporeal or intangible right which does not admit of physical possession. Where the land sold was, at the time of sale, in the possession of a mortgagee, the limitation ran from the time when the instrument of sale was registered.[45] If the sale-deed is not registered, and the purchaser of the equity of redemption could not come in under first clause of Art. 10, the suit will be governed by Art. 120, as no period of limitation is elsewhere provided in the Act for pre-emption on sale of an equity of redemption.[46] A suit for pre-emption against a mortgagee-purchaser in respect of property already in his possession, and now sold to him by an unregistered sale is governed not by Art. 10, but by Art. 120 of Sch. I, to the Limitation Act.[47] In the case of a usufructuary mortgage, the right of redemption is an incorporeal right which does not admit of physical possession within Art. 10.[48] In *Tikaya Ram* v. *Dharm Chand*,[49] the question was raised whether the transaction ostensibly a mortgage was in reality a sale. It was held that the transaction was both nominally and actually a deed of mortgage which was not pre-emptible. In any case, if the deed was one of sale, the suit would have to be dismissed as barred by limitation under Art. 10 of the Limitation Act, as the property when sold was not capable of physical possession being in possession of a mortgagee whose term was yet unexpired. The **Allahabad High Court** has held in *Shiam Sundar* v. *Amanat Begam*,[50] that in the case of the sale of an equity of redemption by the mortgagor to the mortgagee in possession, which

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[43] *Jagamoya* v. *Tulsa*, 89 I.C. 444, *supra*.

[44] *Ibid*.

[45] *Bhawani Pershad* v. *Attar Singh*, 68 P.R. 1884.

[46] *Jawala Sahai* v. *Allah Ditta*, 90 P.R. 1886.

[47] *Gaffar Khan* v. *Sattar*, 160 P.R. 1889.

[48] *Nga Shwe Dok* v. *Nga Nu*, (1909) U.B.R. (1909) 7=4 I.C. 754.

[49] 45 P.R. (1895) 198.

[50] 9 All. 234=7 A.W.N. (1887) 24; Folld. in *Viswanathan Chetty* v. *Ethirajulu*, (1923) 76 I.C. 467=1924 Mad. 57=45 M.L.J. 389; cf. 2 All. 409 (Which lays down a different rule, and must be considered as overruled).

has the effect of extinguishing the right to redeem by a merger of the two estates in the mortgagee, it cannot properly be said that any property is sold which is capable of "physical possession" within the meaning of Art. 10 of the Limitation Act. When a part of the property sold is already mortgaged with possession to the vendee, the whole of the property is not capable of physical possession at the time of the sale, and consequently the period of limitation for a suit for pre-emption must be reckoned from the date of the registration of the sale-deed.[1]

**993. DATE OF REGISTRATION.—The second part of Art. 10** provides that if the whole of the property sold does not admit of physical possession, the period of limitation will commence to run from the date of registration, if there is a registered sale-deed. If there is no deed at all, or there is a deed but same is not registered, then, under the old law, Art. 120 was applicable, and now, under the Punjab Pre-emption Act, I of 1913, S. 30 would apply.[2] The *"date of registration"* is the date when the instrument of sale is registered within the meaning of S. 60 of the Registration Act, and not the date of its presentation for registration.[3] The **date of the certificate** of registration after the document has been copied into the book is the date from which the limitation for the suit must be computed.[4] Where on the registration of a sale-deed in one district, information was given to another district where the rest of the property sold was situate, *held,* that the limitation for the suit commenced to run from the date of the registration of the sale-deed and not from the date on which the entry in the register was made by the Sub-Registrar of the district in which the bulk of the property was situate.[5] It is immaterial whether the registration is effected with or without the consent of the vendor.[6] **The object of the Legislature** in enacting Art. 10 was to provide a period of one year from the date on which the person entitled to pre-empt was expected to know of the transaction sought to be pre-empted, either from delivery of possession, or from the factum of its registration.[7]

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[1] *Ramjas Ahir* v. *Aman Sahai,* (1910) 5 I.C. 667 (All.); Reld. on *Dul Chand* v. *Naubat Singh,* A.W.N. (1892) 77; also see *Darabali* v. *Hussain,* 32 P.L.R. 743 (Property in possession of mortgagee: Limitation commences from date of registration).

[2] *Darabali* v. *Hussain,* 32 P.L.R. 743; *Jawala Sahai* v. *Allah Ditta,* 90 P.R. 1886 and *Gaffar Khan* v. *Sattar,* 160 P.R. 1889 (Sale of equity of redemption by an unregistered deed: Art. 120 applied); also see *Sohan* v. *Himmat,* 61 P.R. 1885 (Sale of a share in *shamilat*).

[3] *Bhanjan Ram* v. *Gopala Ram,* 92 P.R. 1906.

[4] *Karm* v. *Fazl and Haji,* 10 P.R. 1881.

[5] *Sheopujan Misra* v. *Mahngu Rai,* (1925) 86 I.C. 130=1925 All. 324=23 A.L.J. 104.

[6] **Nagina Singh v. Duni Chand, (1921) 62 I.C. 797 (Punjab).**

[7] *Ibid.*

The Legislature expressly states that limitation begins from *registration,* without any reference to whether the transaction was with or without notice.[8]

**Oral sale.**

Where there is an oral sale followed by mutation, limitation begins to run for purposes of pre-emption (under S. 30, Punjab Pre-emption Act) from the date of mutation or physical possession whichever is earlier, and the drawing up of a sale-deed subsequently evidencing the same transaction does not give a fresh start from the date of the sale-deed under S. 10 of the Limitation Act.[9] If there is an oral agreement to sell, followed by mutation which completes the sale, the period of limitation would begin to run only from the date of mutation.[10]

**Sale plus agreement to reconvey.**

Where the transaction of sale is accompanied with an agreement to re-sell the property to the vendor, limitation runs on the sale transaction from the date of delivery of possession or from date of sale as the case may be, without reference to the agreement for re-sale, as against persons entitled to pre-empt the sale.[11] But, if the vendee transfers the property to a stranger in violation of the agreement to reconvey to the original vendor, limitation runs against the original vendor from the date of the subsequent sale or delivery of possession thereunder as the case may be.[12] In *Velayudham* v. *Thina Velayudham,*[13] where property was transferred by a deed of sale containing a covenant for pre-emption in case of re-sale by the vendee, and the property was afterwards purchased by a stranger from the vendee, with notice of the covenant of pre-emption in favour of the original vendor, *held,* that Art. 120 applied to the case, as the possession had not been taken by the vendee: but that suit would be in time even if Art. 10 applied to the case.

994. **ARTICLE 120.**—It has already been noticed that in some cases neither the first, nor the second clause of Art. 10 applies and the case is governed by the residuary Art. 120. These cases are of the type, **where property does not admit of physical**

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[8] *Viswanathan* v. *Ethirajulu,* 76 I.C. 467 (471).

[9] *Gurdas Mal* v. *Qadir Baksh,* (1927) 102 I.C. 423=1927 Lah. 388 =28 P.L.R. 192=9 L.L.J. 285; Folld. 1900 P.L.R. 203.

[10] *Madho* v. *Mehra,* (1930) 124 I.C. 338=1930 Lah. 33.

[11] *Shiam Sabal* v. *Sharai Beg,* (1905) 8 Oudh Cas. 275.

[12] *Ibid.*

[13] (1920) 62 I.C. 27 (Mad.).

**possession** being taken, **and the instrument of sale is unregistered.**[14]

**A claim by one pre-emptor against another** for the determination of the question as to who has the better title is not a suit for pre-emption within the meaning of Art. 10. Such a suit will be governed by Art. 120, Sch. I, Limitation Act.[15]

It has been noticed already that the **right of pre-emption extends to completed sales,** and not to mere agreements to sell, or contemplated purchases. The third column does not provide a starting point of limitation except for transactions in which the sale has actually taken place. Where a right of pre-emption exists irrespective of the fact whether the intended sale has taken place or not, as in case of a landlord's claim under S. 41 of the C. P. Tenancy Act, recourse must be had to the omnibus Art. 120 of the Schedule. That allows a period of six years from the time "when the right to sue accrues".[16]

**A perpetual lease is not a sale**; and a suit to enforce a right of pre-lease (or pre-emption) in respect of such lease, does not fall under Art. 10, but under Art. 120.[17] A suit against a transferee from vendee, who is added as a defendant by reason of an assignment of a date previous to the date of institution, is not a suit governed by Art. 10, but by Art. 120, and the time from which limitation should be counted is the date on which the land in dispute was re-sold by the original purchasers to the second vendee.[18] Art. 10 contemplates only the first sale, and the first set of purchasers and takes no cognizance of the second vendee to whom the subject of the first sale has been transferred subsequently to the date of that sale.[19] That as between the second vendee and the pre-emptor, the contest only arises when he is made a party to the suit, and the nature of the contest is whether he has an independent right of pre-emption superior to that of the plaintiff-pre-emptor.[20]

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[14] *See* Ss. 986 to 992, *ante;* also see *Ali Gauhar* v. *Jawahir,* 30 P.R. 1892; *Batul* v. *Mansur,* 20 All. 315 (321) (F.B.); 24 All. 17 (P.C.) (Part of property not admitting of physical possession); *Kishen Chand* v. *Kehr Singh,* 14 P.R. 1904 (Oral sale of a share in undivided holding); *Achutananda* v. *Biki Bibi,* (1922) 1 Pat. 578=69 I.C. 666 (Unregistered sale in execution of decree followed by symbolical possession, etc.).

[15] *Durga* v. *Haider Ali,* (1884) 7 All. 167; *Ilahi Bux* v. *Muhammad Rab Nawaz Khan,* 80 P.R. 1912=14 I.C. 328; *Mutsadda* v. *Hamira,* 11 P.R. 1893; *Ram Pershad* v. *Ganga Datt,* 20 P.R. 1908.

[16] *Rai* v. *Sidda Kalli,* (1922) 65 I.C. 959=1922 Nag. 14.

[17] *Mukhal* v. *Hira Nand,* 62 I.C. 884=19 A.L.J. 442; *Gopal* v. *Lachhmi,* 1926 All. 549=95 I.C. 138.

[18] *Karm Dad* v. *Ali Muhammad,* 31 P.R. 1913 (F.B.) (O.R. 25 P.R. 1903 and 106 P.R. 1907).

[19] *Ibid.* (Per Shah Din, J.).

[20] *Ibid.*

This view has been followed in *Fazal Husain* v. *Malik,*[21] *Hari Ram* v. *Allahditta*[22] and *Razawand* v. *Dukchhor,*[23] where it has been held that limitation as regards second vendee is six years from the time of transfer to second vendee.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 11. | By a person against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order.<br>(1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree.<br>(2) Order under section 28 of the Presidency Small Cause Courts Act, 1882. | One year. | The date of the order. |

## SYNOPSIS.

995. Corresponding provisions: Act XIV of 1859.
996. ,, ,, Act IX of 1871.
997. ,, ,, Act XV of 1877.
998. ,, ,, Act IX of 1908.
999. *Scope of Art.* 11.
1000. ,, ,, Change of law.
1001-1006. *Mortgagee claims*: Madras.
1002. ,, ,, Bombay.
1003. ,, ,, Lahore.
1004. ,, ,, Allahabad.
1005. ,, ,, Calcutta.
1006. ,, ,, Nagpur.
1007-1014. *Investigation of claims*: Madras.
1008. ,, ,, Calcutta.
1009. ,, ,, Allahabad.
1010. ,, ,, Rangoon.
1011. ,, ,, Lahore.
1012. ,, ,, Patna.
1013. ,, ,, Oudh.

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[21] 49 P.R. 1914=25 I.C. 443.

[22] 17 P.R. 1915=186 P.L.R. 1915=28 I.C. 695.

[23] 1 Oudh L. J. 196=24 I.C. 116 (117).

1014. *Investigation of claims*: Bombay.
1015. Proceedings are permissive.
1016. Proceedings on attachments.
1017. Effect of order on particular attachment.
1018. Attachment before judgment.
1019. By a person against whom.
1020. Finality of uncontested order.
1021. Orders without jurisdiction.
1022. Mortgage decree—Procedure in.
1023. Order disallowing claim.
1024. Garnishee orders.
1025-1028. *Suit to establish right claimed*:
1025. By judgment-debtor.
1026. By claimants and decree-holders.
1027. By auction-purchaser.
1028. By assignee.
1029. By Official Receiver.
1030. *Starting point*.

## NOTES.

**Act XIV of 1859.**

995. **CORRESPONDING PROVISIONS.**—The Act XIV of 1859 contained no corresponding provision. But, the Civil Procedure Code, Act VIII of 1859 itself in S. 246 provided that

> "the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year of the date of the order".

A similar provision was made prescribing the rule of one year's limitation in S. 269 after enacting how to deal with any case of resistance or obstruction by claimants other than defendants.

In the Code of 1859, there was a refusal to investigate in certain circumstances, and this was not an order which gave rise to the shortened period of limitation mentioned in the section of the Code.

**Act IX of 1871.**

996. There was no similar provision in Act IX of 1871 also. This Act repealed the last twelve words of S. 246, Civil Procedure Code, 1859, *i.e.*, "at any time within one year of the date of the order"; but did not re-enact it. The relevant words in S. 269 of the Civil Procedure Code were not repealed.

There was a **conflict of views** between the **Calcutta High Court,** on one side, and the **Bombay** and **Madras High Courts** on the other. In *Matonginy Dassee* v. *Chowdhry Junmunjoy,*[24] Markby, J., held that S. 246 being repealed, the matter was governed by cl. 15 of Sch. II of Act IX of 1871, which, however, only applied to suits brought to *set aside* the order, and not to suits to establish the right. According to this view twelve years' limitation applied to suit to establish title to property ordered to be sold in execution. According to the **Bombay High Court,** a claimant against whom an order had been made under S. 246 of Civil Procedure Code, 1859, must sue to establish his right within one year from the date of such order. But when the Civil Court disallowed an investigation under S. 247, Civil Procedure Code, 1859, the claimant might bring his suit within the ordinary period of limitation applicable to his suit.[25] This was also the view of the **Madras High Court**[26]: and one year's rule was not applied to a suit for possession after an adverse order under S. 246 of Act VIII of 1859.[27] A **Full Bench** of the **Allahabad High Court,** in the case of *Badri Prasad* v. *Muhammad Yusaf,*[28] held that,

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[24] (1876) 25 W.R. 513 (Per Markby, J.); also see *Bessesur* v. *Murli,* (1882) 9 Cal. 163; *Luchmi Narain* v. *Assarup,* (1882) 9 Cal. 43; *Gopal* v. *Mohesh,* (1882) 9 Cal. 230; *Raj Chunder* v. *Shama Charan,* 8 Cal. 395=10 C.L.R. 435 and *Rashbehary* v. *Buddun,* 12 C.L.R. 550.

> "when an enquiry had been duly held under S. 246, and an order passed thereon, so long as the order remained unquestioned by the procedure directed in the Code, it was as final and conclusive on all persons who were parties to it, as any other final order or decree of a Court of Justice" . . . . "and that it was immaterial whether or not the Court which had investigated the claim had formed an erroneous judgment on the question of possession".

**Act XV of 1877.**

997. Art. 11 was introduced in Act XV of 1877 setting the above controversy at rest. This article provided a period of one year from the date of the order for a suit,

> "by a person against whom an order is passed under Ss. 280, 281, 282 or 335 of the Code of Civil Procedure to establish his right to the present possession of the property comprised in the order".

Article 11 contemplated two kinds of suits:

(1) Suits respecting orders either releasing or refusing to release the property from attachment or continuing attachment subject to claims of incumbrancer,

*Vide* Ss. 280, 281 and 282, Civil Procedure Code, 1877, corresponding to S. 246 of the Code of 1859;

(2) suits respecting obstruction to the delivery of possession to the auction-purchaser,

*Vide* S. 335 of Act X of 1877, corresponding to S. 269 of Civil Procedure Code, 1859.

Section 283, Civil Procedure Code, 1882, did not apply where a Court had, under the proviso to S. 278 (Civil Procedure Code, 1882) not made an investigation.[29]

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[25] *Venkappa* v. *Chenbasappa,* (1879) 4 Bom. 21; also see *Krishnaji Vithal* v. *Bhaskar,* (1880) 4 Bom. 611 (Art. 15, Sch. II substituted for the limitation provided by twelve repealed words in S. 246, Act VIII of 1859).

[26] *Settiappan* v. *Sarat Singh,* 3 M.H.C. 220; *Netietom* v. *Damodren,* 4 M.H.C. 472.

[27] *Narasimma* v. *Appalacharlu,* (1888) 12 Mad. 294.

[28] (1877) 1 All. 381 (F.B.).

[29] *Sarala Subba Row* v. *Kamsalla Timmayya,* 31 Mad. 5=17 M.L.J. 554=3 M.L.T. 106.

**Act IX of 1908.**

**998.** The present Limitation Act, 1908, has split up the article into two articles, *viz.*, Art. 11 and Art. 11-A, so as to enlarge the scope of Art. 11, by providing for certain other suits not covered by Art. 11 of Act XV of 1877.

**999. SCOPE OF Art. 11.**—Article 11 is limited to "claim orders", on a claim preferred to, or an objection made to the attachment of property attached in execution of a decree,. *See* O. 21, Rr. 58 to 63, and 99 and 103 of the present Code of Civil Procedure, Act V of 1908. But the article makes no specific mention of any sections of the Civil Procedure Code, which bear on the "investigation of claims or objections", as noted in the heading of O. 21, Rr. 58 to 63. Article 11 refers to orders under the new Code only.[30]

**The general policy of the Code.**

The general policy of these provisions of the Code, as explained in *Sardhari Lal* v. *Ambika Pershad,*[31] is to secure the speedy settlement of questions of title raised at execution sales. Section 283, Civil Procedure Code, 1882, failed to provide for the speedy settlement of the questions of title raised by the claim where the Court under S. 278 refused to investigate the claim on the ground that it had been designedly or unnecessarily delayed. Order 21, R. 63 of the present Code would appear to supply this omission, by conferring the right of suit in general terms, "*where a claim or objection is preferred*", upon "*the party against whom an order is made*".[32]

**Change of law.**

**1000.** The **Madras High Court** held in *Narasimha Chetti* v. *Vijiapala*[33] that

> "Order 21, Rule 63 of the new Code is much wider in its scope than the corresponding S. 283 of the Code of 1882, and unlike the latter section covers cases in which there has been no investigation".

This case was followed in *Ponnusami Pillai* v. *Samu Ammal.*[34] There the order was passed by the Court in the following terms:

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[30] *Subba Aiyar* v. *Subba Aiyar,* (1915) 31 I.C. 250 (Mad.); also see *Sundarbai* v. *Ganpat,* 1935 Nag. 171 (Art. 11 did not apply where the objection made to the sale of certain property was not an objection under O. 21, R. 58, C. P. Code).

[31] 15 I.A. 123 (127)=15 Cal. 521 (P.C.); also see *Jetti* v. *Syed Hussain,* 4 Bom. 23-n and *Alexander* v. *Mathura,* 8 All. 6 (P.C.) (As to the policy of the Legislature in requiring the termination of litigation once commenced to come to an end within a reasonable time).

[32] *Machi Raju* v. *Vadrevu,* 48 I.C. 270 (275) (F.B.)—Per Wallis, C.J.; followed 27 I.C. 944=2 L.W. 206 and 38 I.C. 937=31 M.L.J. 247.

[33] 27 I.C. 944=2 L.W. 206.

[34] 38 I.C. 937=31 M.L.J. 247.

"Application comes late, and is rejected". The High Court held that "the language of Art. 11 in the new Act is more comprehensive than that of the previous Act, and that has been construed in this Court as covering orders after full investigation as well as orders passed on default".[35]

A **Full Bench of the Madras High Court** in *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma*[36] upheld these views, and observed that the change in the language is not due merely to the altered scheme of the Code, but to

> "the clear intention of the legislature to widen the scope of the rule in accordance with the general policy of this legislation as explained by the highest tribunal".[37]

Seshagiri Aiyar, J., agreeing with the Chief Justice, held that

> "the language of O. 21, R. 63 leaves little room for doubt that all orders which negative the right set up by the claimant or the decree-holder are within the rule".[38]

This leading case has been followed by the **Lahore High Court** in *Niwal Kishore* v. *Khyali Ram*,[39] by the **Allahabad High Court** in *Goberdhan Das* v. *Makundi Lal*,[40] by the **Rangoon High Court** in *Maung Pya* v. *Ma Hla Kyu*[41] and by the **Oudh Chief Court** in the recent Full Bench case of *Ran Bahadur Singh* v. *Salig Ram*.[42] But, it has been explained in subsequent cases by the Madras High Court, where the trend of opinion now is to treat it as being confined to the particular facts of that case, and to cases where a claim was dismissed as too late.[43]

**Mortgagee without possession objecting under O. 21, R. 58.**

**1001.** The Full Bench ruling of the **Madras High Court** in *Venkataratnam* v. *Ranganayakamma*[44] has been applied in *Lakshmanan* v. *Parasivan*[45] where it was held that a petition to a Court, asking that sale be held subject to a mortgage falls within the provisions of O. 21, R. 58, Civil Procedure Code, and where such petition is rejected, Art. 11 applies. Similarly, in *Velu Padayachi* v. *Arumugam*,[46] the effect of an order dismissing an application to have it recognised that property about to be sold is subject to an encumbrance in favour of the applicant, is held to amount to property being free of encumbrance, and such order becomes final against both the applicant, and the judgment-debtor, unless a suit is brought within one year to contest it. The same view as to the finality of the order unless displaced by a regular suit was taken in a later case of *Muthiah Chetti* v. *Palaniappa.*[47] This would apply equally to the case of a mortgagee claimant who had obtained a decree on his mortgage, preliminary or final on the date of the petition, whose claim petition is dismissed.[48]

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[35] *Ponnusami Pillai* v. *Samu Ammal*, 38 I.C. 937=31 M.L.J. 247.

[36] 48 I.C. 270 (275) (F.B.)—Per Wallis, C.J.

[37] *Ibid.*

[38] 48 I.C. 270 (275) (F.B.)—Per Seshagiri, J.

[39] 1929 Lah. 865=11 Lah. 369=120 I.C. 679.

[40] 74 I.C. 1024=1923 All. 435=45 All. 438=21 A.L.J. 342.

[41] (1923) 76 I.C. 841=1924 Rang. 42=1 Rang. 481=2 Bur.L.J. 173.

[42] 1931 Oudh 1 (F.B.).

[43] *Kandasami* v. *Sivagurunatha*, 1935 Mad. 328=1935 M.W.N. 331=41 M.L.W. 500; Relied upon *Abdul Kadir* v. *Somasundaram*, 1923 Mad. 76 (2)=70 I.C. 648=45 Mad. 827; *Lakshmi Narasamma* v. *Pydanna*, 1925 Mad. 265=80 I.C. 233; *Lingamma* v. *Official Receiver*, 110 I.C. 511 (Mad.).

[44] 48 I.C. 270=41 Mad. 985=35 M.L.J. 335 (F.B.).

[45] (1919) 52 I.C. 720 (721)=37 M.L.J. 159.

[46] (1920) 56 I.C. 481=38 M.L.J. 397=11 L.W. 343.

**Bombay.**

**1002.** The **Bombay High Court** held in *Ganesh* v. *Damoo,*[49] that where an order was passed under S. 287 of old Code (now O. 21, R. 66) on a petition filed by the mortgagee in response to a notice from Court, this article would not apply, and it was observed that an order refusing to recognise the mortgagee's claim, and directing the attached property to be sold free from the alleged mortgage must be referred to S. 287, and not to S. 282 (O. 21, R. 62). This ruling was decided under S. 283 of the old Code, the terms of which were very much narrower than those of O. 21, R. 63 of the present Code, and it is distinguished on this ground in the **Lahore** case of *Nawal Kishore* v. *Khiali Ram.*[50]

**Lahore.**

**1003.** The **Lahore High Court** takes the view that if a mortgagee without possession chooses to prefer an objection under R. 58, on the strength of his alleged mortgage, an adverse order passed against him in the objection proceedings becomes conclusive under R. 63, unless he brings a declaratory suit within the period prescribed by Art. 11.[1]

"If a person chooses to take advantage of a summary procedure, he must 'suffer its disadvantages as well as enjoy its benefits'."[2]

**Allahabad.**

**1004.** This rule agrees with the decisions of the **Madras High Court,** S. 1001, *ante,* and of the **Allahabad High Court,** in *Devi Das* v. *Rupchand,*[3] where it was held that a petition by a simple mortgagee of the properties belonging to the judgment-debtor, praying that properties attached in execution be sold subject to his mortgage falls under O. 21, R. 58, and if it is dismissed, after investigation or otherwise, the mortgagee is barred from suing after one year from the date of the order, specially where the absence of investigation is due to the default of the mortgagee himself.

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[47] (1922) 70 I.C. 432=41 M.L.J. 594=45 Mad. 90=1922 Mad. 447 [Reversed on another point in (1928) 51 Mad. 349=55 I.A. 256=55 M.L.J. 122 (P.C.)].

[48] *Ramalingayya* v. *Velluri Narayanappa,* (1926) 93 I.C. 335=1926 Mad. 593.

[49] (1916) 41 Bom. 64=36 I.C. 627=18 Bom.L.R. 782.

[50] (1929) 11 Lah. 369=1929 Lah. 865=120 I.C. 679=11 L.L.J. 452.

[1] *Ibid.*

[2] *Ibid.,* 1929 Lah. 865 (866); Relied on *Kaura* v. *Ramchand,* 1925 Lah. 385=6 Lah. 206—Per Sir Shadi Lal and Le Rossignol, J.

[3] (1927) 102 I.C. 792=1927 All. 593=49 All. 903=25 A.L.J. 609; also see *Ram Gopal* v. *Mahanand Lal,* 1927 All. 420=100 I.C. 763 (*Ex parte*

**Calcutta.**

**1005.** In *Bhiku* v. *Shujat Ali,*[4] the **Calcutta High Court** held that if an objection under S. 335, Civil Procedure Code, 1882 (now O. 21, R. 103) is rejected, the objector is not precluded by Art. 11, Limitation Act, from instituting a suit to enforce his mortgage lien over the property comprised in the order rejecting the application more than a year after the date of the order.

**Nagpur.**

**1006.** A single bench decision of the Nagpur Judicial Commissioner's Court took a different view, but in a recent Full Bench case, the Allahabad view is followed, that if a mortgagee has put forward a claim under R. 58, and the Court has rejected that claim, an order has been made against the mortgagee within the meaning of R. 63.[5]

**1007. DISMISSAL OF OBJECTIONS WITHOUT INVESTIGATION.**—It has been noticed in S. 1000, *ante,* that the **Full Bench** decision of the **Madras High Court,** in *Machi Raju Venkataratnam* v. *Ranganayakamma,*[6] had taken the view that Art. 11 is general in its terms, and applies to all orders in claim proceedings whether they are passed after full investigation under the claim sections of the Code, or are passed summarily without investigation at all. This is now understood as applying to cases where the decision in claim proceeding is given on the ground that that matter has been designedly or unnecessarily delayed.[7] But where the claimant withdrew his petition, and it was dismissed, because not pressed, the order was held not falling under O. 21, R. 63.[8] Where a Court refuses to investigate the claim on the ground that the proper Court for its adjudication is a Court of a higher grade, and dismisses the claim petition, such an order is not one under O. 21,

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order proclaiming a mortgage as an incumbrance: note of objection added to proclamation, order held to fall under O. 21, R. 58, or R. 62 to which Art. 11 applied).

[4] (1901) 29 Cal. 25 (*Held,* that a suit to enforce a mortgage lien over a property is not one to establish a right to the property).

[5] *Maroti* v. *Sonabai,* (1930) 123 I.C. 474 (Nag.) (F.B.); cf. *Wamandhar* v. *Kampta Prasad,* 1926 Nag. 423.

[6] 48 I.C. 270=41 Mad. 985=1919 Mad. 738=35 M.L.J. 335 (F.B.); Followed in *Gangadhar Rao* v. *Abdul Majid,* 69 I.C. 522 (Nag.).

[7] *Abdul Kadir* v. *Somasundaram,* (1923) 1923 Mad. 76 (2)=70 I.C. 648=45 Mad. 827.

[8] *Lakshminarasamma* v. *Pydanna,* 1925 Mad. 265=80 I.C. 233.

R. 63, and need not be set aside by a suit brought within one year.[9] Similarly, the petitioner was not bound to bring a suit within a year where the claim had not been disposed of on the merits, or rejected as being late. All other modes of disposal are treated as modes of disposal which do not entail on the party on whom an adverse order is made the duty of filing a suit to set it aside.[10] Where an order passed on a claim petition said that "there is no time to investigate into this claim. Petition is dismissed without investigation on the ground of delay," it was held that the order was subject to provisions of O. 21, R. 63, Civil Procedure Code.[11]

**Calcutta.**

**1008.** The decisions under Art. 11 of Limitation Act, 1877, are no longer authoritative, because the language of the article has been changed in the Act of 1908, making the provision general in its scope following the change in O. 21, R. 63, Civil Procedure Code. All that is now necessary is a claim preferred under R. 58, and an order either allowing or rejecting it, which requires a suit to establish the right claimed to property comprised in the order.[12] Where in proceedings under O. 21, R. 97, the auction-purcraser is present but does not adduce evidence, an order passed by Court is not without investigation and falls under Art. 11-A, Limitation Act.[13] There was a divergence of opinion in cases under Act XV of 1877,[14] but there was weighty authority in support of the view that where an application had been dismissed, with or without investigation, a regular suit, if instituted, must be commenced within one year from the date of such order.[15] The order of refusal was plainly final, on the face of R. 63, till a regular suit had been instituted, and successfully prosecuted.[16] In *Panchu* v. *Bhuto*,[17] Greaves, J., did not apply Art. 11, where order in a claim proceeding was based on consent, without any investigation. Where there was no inquiry at all, the order was not held to be one under S. 335, Civil Procedure Code, 1882.[18]

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[9] *Lakshmi Ammal* v. *Kadersan*, 41 M.L.J. 198=63 I.C. 431=1921 Mad. 488.

[10] *Lingama Naidu* v. *Official Receiver, Madura*, (1928) 110 I.C. 511 (Mad.); Followed in *Kandasami* v. *Sivaguru Natha*, 1935 Mad. 328=1935 M.W.N. 331=41 M.L.W. 500.

[11] *Aisamma* v. *Moidir Kunhi*, (1923) 77 I.C. 264=47 Mad. 160=1924 Mad. 111=45 M.L.J. 690.

[12] *Nogendra Lal* v. *Fani Bhushan*, (1918) 44 I.C. 265=45 Cal. 785 =23 C.W.N. 375; Follows 27 I.C. 944 and 38 I.C. 937; Followed in *Narsayya* v. *Lakshminarayan*, 71 I.C. 404=1923 Nag. 187 and in *Gangadhar Rao Abdul Majid*, (1922) 69 I.C. 522=1923 Nag. 69 (N.F. 45 I.C. 102).

[13] *Harisaday* v. *Mahendra Narain*, 1935 Cal. 267=39 C.W.N. 164.

[14] *Satindra Nath* v. *Siva Prasad*, (1912) 64 I.C. 713=1922 Cal. 166 =26 C.W.N. 126; also see *Kallar Singh* v. *Toril Mahton*, 1 C.W.N. 24 and *Rahim Bux* v. *Kader*, (1904) 32 Cal. 537; cf. *Sarat Chandra* v. *Tarini*, 34 Cal. 491=11 C.W.N. 487 (A ruling under old Code).

[15] *Jugal Kishore* v. *Bejoy Krishna*, 15 I.C. 683=16 C.W.N. 882.

[16] (1921) 64 I.C. 713 (715)=1922 Cal. 166=26 C.W.N. 126; Followed 45 Cal. 785.

[17] (1919) 50 I.C. 649 (Cal.).

**Allahabad.**

**1009.** According to the Allahabad High Court, Art. 11 applies to suits arising out of orders passed after investigation of the claim as well as to those arising out of orders in which the claim has not been investigated at all but rejected as preferred too late.[19] An order summarily rejecting an objection under the proviso to R. 58 of O. 21, Civil Procedure Code, on the ground that it was filed intentionally or unnecessarily late, comes under O. 21, R. 63 of the Code, and a suit to contest such an order must be brought within one year under Art. 11 of Limitation Act.[20] Where an objector fails to adduce evidence in support of his petition, and the same is dismissed, a suit by him or his vendee to establish his right must be brought within one year.[20-a] Every order no matter made on what grounds, whether on merits or not, must be treated as one contemplated by O. 21, R. 63, and a suit to set aside that order must be brought under Art. 11, within one year of its date.[21] Where an application by auction-purchaser for possession was dismissed for default, and the plaintiff had no opportunity to establish his right, limitation began to run against plaintiff from the date of defendant's objection being allowed.[22]

**Rangoon.**

**1010.** The **Rangoon High Court**[23] follows the opinion of **Calcutta**[24] and **Allahabad**[25] High Courts, supporting the view that an order dismissing an objection to an attachment without any investigation is an order against the objector within the meaning of O. 21, R. 63, Civil Procedure Code, which becomes final unless a suit is brought within one year of the order to set it aside. The learned Judges declined to follow the opinion of Mr. Rustomji that there was no substantial change in the law by the Code of 1908, in face of so many authorities.[26]

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[18] *Raghunath Jha* v. *Birjnandon,* (1915) 31 I.C. 444 (Cal.); Followed 34 Cal. 491, *supra.*

[19] *Goberdhan Das* v. *Makundi Lal,* (1923) 74 I.C. 1024=1923 All. 435=45 All. 438=21 A.L.J. 342.

[20] *Durgadas* v. *Gorimal,* 116 I.C. 81=1928 All. 327=26 A.L.J. 794.

[20-a] *Gulab* v. *Mutsaddi,* (1919) 50 I.C. 748=41 All. 623=17 A.L.J. 674; Followed in *Ram Niranjan* v. *Khanu Rai,* 57 I.C. 5 (All.).

[21] *Damodar Das* v. *Peary Lal,* (1930) A.L.J. 1322; Followed in 1931 Oudh 1 (F.B.).

[22] *Ali Mohammad* v. *Ram Narain,* (1917) 39 I.C. 797 (All.).

[23] *Maung Pya* v. *Ma Hla Kyu,* (1923) 76 I.C. 841=1 Rang. 481=1924 Rang. 42; Followed 41 Mad. 985 and 27 I.C. 944=2 L.W. 206.

[24] *Nagendra Lal* v. *Fani Bhushan,* 44 I.C. 265=45 Cal. 785=23 C. W.N. 375.

[25] *Gulab* v. *Mutsaddilal,* 50 I.C. 748=41 All. 623=17 A.L.J. 674.

**Lahore.**

1011. The **Lahore High Court**[27] relies on Calcutta,[28] Allahabad,[29] and Rangoon[30] decisions for the view.

> "that if an application is to be treated as having been made under O. 21, R. 58, Civil Procedure Code, the fact that it was dismissed for default and without investigation, does not make any difference, as it is now settled law that R. 63 of the Code of 1908 applies to every order passed against a party in a claim preferred or an objection made under R. 58, whether the order was passed after contest and enquiry or for default and without investigation".

In *Dial Chand* v. *Lachman Singh,*[31] Bhide, J., took the same view.

**Patna.**

1012. The Patna High Court, in *Gokal* v. *Mohri Bibi,*[32] was dealing with a case where the objections of the plaintiff were dismissed not in default, nor without any investigation, and the learned Judges (Piggott and Rafique) relied upon the Calcutta case of *Kunj Behari* v. *Kandh Prashad,*[33] for the conclusion

> "that the only order upon which the character of finality is impressed is an order made upon enquiry".

But,

> "it does not follow, that merely because the claimant does not advance evidence or is absent, there are no materials before the Court to enable it to enquire into the matter".[34]

They referred to *Lachmi Narain* v. *Martindell,*[35] for the principle according to which the limitation of one year should be enforced, and also to cases where the circumstances did not warrant the conclusion that the objections were decided without investigation.[36] An order dismissing an objection under O. 21, R. 58, Civil Procedure Code, on the ground that the objection is not entertainable, is an order falling within the purview of O. 21, R. 63, to which Art. 11, of the Limitation Act will apply.[37] An order stating that the property in dispute does not admittedly belong to the claimants, in a suit by the claimants amounts to dealing with the merits of the application and Art. 11 applies to the case.[38]

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[26] 1 Rang. 481=76 I.C. 841=1924 Rang. 42.

[27] *Nawal Kishore* v. *Khiali Ram,* 11 Lah. 369=1929 Lah. 865 (866); Followed 66 P.R. 1916=35 I.C. 321=130 P.L.R. 1916.

[28] (1918) 45 Cal. 785=44 I.C. 265=23 C.W.N. 375.

[29] (1918) 41 All. 623=50 I.C. 748=17 A.L.J. 674.

[30] 1924 Rang. 42=1 Rang. 48.

[31] 104 I.C. 289=1927 Lah. 680; Followed 45 Cal. 785=44 I.C. 265=23 C.W.N. 375.

[32] (1918) 44 I.C. 1005=58 I.C. 37=1 P.L.T. 559=5 P.L.J. 652.

[33] 6 C.L.J. 362.

[34] *Ibid.*

[35] 19 All. 253=17 A.W.N. (1897) 60 (F.B.).

[36] *Rahim Bux* v. *Abdul Kader,* 32 Cal. 537; *Shagun Chand* v. *Shibbi,* 10 I.C. 401=8 A.L.J. 626 and *Chandi Prasad* v. *Nand Kishore,* 20 I.C. 369.

[37] *Subedar Singh* v. *Ramprit,* (1929) 115 I.C. 703.

**Oudh.**

1013. A **Full Bench of the Oudh Chief Court**[39] has recently discussed the case-law, following the Calcutta,[40] Madras,[41] Rangoon,[42] and Lahore[43] High Court on the change in law under Act IX of 1908, following upon the wider scope of O. 21, R. 63, Civil Procedure Code. Reliance was also placed upon the **Allahabad** decision in *Gulab* v. *Mutsaddi Lal.*[44] **The conclusion** is thus stated:—

> "When the property is attached in execution of a decree it is not absolutely necessary for the claimant to file an objection under O. 21, R. 58, Civil Procedure Code. . . . . The object of that rule is not to deprive the claimant of the remedy by suit, but to give him a more speedy and summary remedy. If he avails himself of that remedy, and an order is made against him by the executing Court, he may institute a suit to establish the right which he claims to the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive. If he chooses to take advantage of a summary procedure he must suffer its disadvantages as well."......"Article 11 relates to any order passed in claim proceedings and is not restricted to an order passed under O. 21, Rr. 60-62. The order applies to all orders in claim proceedings whether they are passed after full investigation under the claim section of the Code or are passed without any investigation at all.

**Bombay.**

1014. The **Bombay High Court**[45] has, in a recent ruling expressed its agreement with the view taken by other High Courts, and has made a particular reference to the decision of **Madras Full Bench,**[46] **Calcutta**[47] and **Allahabad High Courts.**[48]

This ruling makes it clear that S. 283, Civil Procedure Code, 1882, was confined to orders made under the three preceding sections which corresponded to O. 21, Rr. 60, 61 and 62, whereas under

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[38] *Sri Krishna Sahu* v. *Dhirja,* 1935 Pat. 31.

[39] *Ran Bahadur Singh* v. *Salig Ram,* 1931 Oudh 1=130 I.C. 98 (F.B.); Relied on *Kedarnath* v. *Sukhnath,* 1921 Oudh 54=64 I.C. 209.

[40] *Nagendra Lal* v. *Fani Bhushan,* (1918) 45 Cal. 785=44 I.C. 265; *Satindra Nath* v. *Shiva Prasad,* (1922) 64 I.C. 713=1922 Cal. 166.

[41] *Venkataratnam* v. *Vadrevu,* (1918) 41 Mad. 985=48 I.C. 270 (F.B.).

[42] *Maung Pya* v. *Ma Hla Kyu,* 1 Rang. 481=76 I.C. 841=1924 Rang. 42.

[43] *Nawal Kishore* v. *Khiali Ram,* 1929 Lah. 865=120 I.C. 679=11 Lah. 369.

[44] (1919) 41 All. 623=50 I.C. 748.

[45] *Trimbak Tumdushet* v. *Ziparu,* 1933 Bom. 190=57 Bom. 213=144 I.C. 993=35 Bom.L.R. 147.

[46] (1918) 41 Mad. 985=48 I.C. 270 (F.B.).

[47] (1918) 45 Cal. 785=44 I.C. 265.

[48] (1923) 45 All. 438=74 I.C. 1024=1923 All. 435.

R. 63, the language is perfectly general; it is not confined to orders made under the three preceding rules, but covers any order made against the party making the claim.[49]

**Proceedings are permissive.**

**1015.** The claim proceedings are only permissive, and not obligatory. Art. 11 applies only when the summary procedure under O. 21, Rr. 58 to 62 had been adopted.[50] A person whose property is attached is not compelled to resort, in the first instance, to an application under Civil Procedure Code. There is nothing to prevent him from commencing litigation by a regular suit, if such were his pleasure.[1] The object of the rule is only to give a speedy summary remedy.[2]

**Proceeding may be taken on attachments.**

**1016.** "An essential condition precedent to a suit under O. 21, R. 63, Civil Procedure Code (S. 283, old Code), is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection (as to this see change in law under present Act); and lastly of its being allowed or disallowed."[3] An omission to bring in objection under O. 21, R. 58 does not bar his right to bring a suit to establish the right which he claims provided it is brought within the period of limitation prescribed for suits of this nature.[4] Proceedings under O. 21, R. 63, Civil Procedure Code, *may* be taken in connection with a *de facto* attachment. A mere order for attachment which has not been carried into effect is insufficient. As the whole subsequent proceedings will be without jurisdiction in the absence of a valid attachment, Art. 11 will not apply to suits in connection with adverse orders in claim proceedings, if there has been no attachment, or the attachment effected was invalid.[5]

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[49] 1933 Bom. 190=57 Bom. 213=144 I.C. 993; *cf.* Wazir Hasan, C.J., in 1931 Oudh 1 (F.B.).

[50] *Venkatanarsu* v. *Akkamma,* (1866) 3 M.H.C.R. 139; also see *Dayachand Nenchand* v. *Hemchand Dharamchand,* 4 Bom. 515 (F.B.).

[1] 4 Bom. 515 (F.B.), *supra*; also see *Deen Dayal* v. *Poran,* (1868) 9 W.R. 474; *Krishna Bhupati* v. *Vikrama,* (1894) 18 Mad. 13 (O. 21, R. 58, Civil Procedure Code, is permissive not imperative).

[2] *Ran Bahadur* v. *Salig Ram,* 1931 Oudh 1 (F.B.); also see *Nawal Kishore* v. *Khiali Ram,* 1929 Lah. 865=120 I.C. 679=11 Lah. 369.

[3] *Anganlal* v. *Gudarmal,* (1888) 10 All. 479=8 A.W.N. (1889) 189.

[4] *Deen Dayal* v. *Poran Das,* (1868) 9 W.R. 474.

[5] *Muthiah* v. *Palaniappa,* (1928) 51 Mad. 349=55 I.A. 256=55 M.L.J. 122=109 I.C. 626 (P.C.); also see *Mathra Das* v. *Amin Chand,* (1933) 141 I.C. 252=1933 Lah. 75 (76)=33 P.L.R. 1033 (*Held,* that this article does not apply unless there has been attachment in the manner prescribed by the C. P. Code) and *Qasim Ali* v. *Kalyan Das,* 144 I.C. 378=1933 Lah. 449=34 P.L.R. 443 (Art. 120 and not Art. 11 applied where attachment raised as irregular).

**Effect of order on particular attachment.**

**1017.** The provisions in O. 21, Rr. 58 to 61, Civil Procedure Code, would show that the conclusiveness of an order in claim proceedings on an objection or claim preferred in respect of an attachment has reference to release of a property from a particular attachment when made. It cannot relate to any other or future attachment.[6] In *Umesh* v. *Raj,*[7] the Calcutta High Court observed that a finding as to a sale being invalid only meant that the sale was invalid as against the judgment-creditor, and also against any auction-purchaser at an execution sale following that attachment. The **Madras High Court** has taken an opposite view, the correctness of which is open to serious doubt.[8] The rule appears to be that when the particular attachment ceases, by withdrawal of the attachment, or by reason of a payment of the amount decreed, the claim order ceases to have any operative force.[9] A suit to recover property that has been released from attachment under O. 38, R. 8, Civil Procedure Code, is not governed by Art. 11 or 13 of the Limitation Act.[10]

**Release of attachment, by withdrawal, etc.**

*Illustrations.*

(1) Where *A* obtained a decree against *B,* and in execution attached certain property, and *P's* objection to have the attachment removed was rejected, but later the judgment-debtor paid the amount of the decree into Court, whereupon the attachment was removed. Subsequently *A* again attached the same property in execution of another decree against *B;* and the plaintiff again objected, but his application was rejected. *Held,* that a suit by *P,* within one year of the second order was not barred by limitation.[11]

(2) Where the plaintiff withdrew his attachment, there was no longer an attachment or any proceeding in execution on which the order could operate to the prejudice of the claimant, and, therefore, there was no necessity for the objector to bring a suit to set aside the order.[12]

(3) Similarly, where the dismissal of execution proceedings in default has resulted in the removal of attachment, the parties are restored to *status quo ante,* and the unsuccessful objector is not bound to sue within one year of the order passed disallowing objections when the Court was *functus officio* on the dismissal of proceedings for default. A second attachment in execution of same decree, gives plaintiff a fresh cause of action.[13]

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[6] Mitra's Limitation Act, Vol. II, p. 1078.

[7] (1882) 8 Cal. 279.

[8] Cf. *Ramaswami* v. *Allagiri,* (1914) 20 I.C. 800 (Mad.); Folld. in *Singariah* v. *Chinnabbi,* (1920) 44 Mad. 268=40 M.L.J. 7 (*Held,* that an order in claim proceedings conclusively settles the question in respect of all proceedings between the same parties).

[9] *Sakhamoori* v. *Sakhamoori,* 104 I.C. 424=1927 Mad. 893.

[10] *Ramanamma* v. *Bathula,* 39 I.C. 863=41 Mad. 23=5 L.W. 704.

[11] *Ibrahim Bhai* v. *Kabuli Bhai,* (1882) 13 Bom. 72.

[12] *Gopala Purshotam* v. *Baidivali,* (1893) 18 Bom. 241; Folld. in 1921 Bom. 35.

[13] *Fateh Din* v. *Qutab Din,* (1922) 67 I.C. 543=3 Lah. 7.

(4) Where an attachment against which a claim has been preferred is raised, the cause of action for any suit founded upon an order on the claim petition thereby falls to the ground, and it is not necessary for the claimant to proceed with any suit to set aside the order.[14] For instance, where the claim is disallowed, but the decree is satisfied and attachment is withdrawn,[15] or where the defendant has settled with the creditor,[16] there is no necessity for bringing a suit to set aside the order as soon as the attachment ceases to subsist.

**1018. ATTACHMENT BEFORE JUDGMENT.**—The order contemplated by the article is one made on a claim preferred to the property attached *in execution* or on an objection made to the *attachment.* The scope of the claim proceedings has been considered by three Full Benches of the Madras High Court. In all these cases *Yarlagadda* v. *Mattapalli,*[17] *Venkataratnam* v. *Ranganayakamma,*[18] and *Ramaswami Chettiar* v. *Mallappa Reddiar,*[19] it has been pointed out that the object of the claim sections is to secure the speedy settlement of questions of title raised by attachments, as explained by the Judicial Committee in *Sardharilal* v. *Ambika Pershad,*[20] and in the last of these cases attention was drawn to the fact that in claim proceedings the release under R. 60 of the property attached, or the disallowance under R. 61 of the claim is made to depend not on title but on possession at the date of the attachment. The question of title is left to be determined in the suit which the unsuccessful party is bound to bring within the prescribed period on pain of losing all his rights.[21]

**43 M. 760 (F.B.).**

Section 246 of the Code of 1859 expressly provided as regards attachments before and after decree that the suit was to be brought within the shorter period of one year. This period of one year continued to be prescribed by the Limitation Acts of 1871 and 1877, and Wallis, C.J., considered that

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[14] *Sakhamoori* v. *Sakhamoori,* (1927) 104 I.C. 424=1927 Mad. 893; Reld. on *Najimunnessa* v. *Nacharaddin,* 83 I.C. 233=51 Cal. 548=1924 Cal. 744 and *Manilal Girdhar* v. *Nathalal Mahasukhram,* 59 I.C. 774=45 Bom. 561=22 Bom. L. R. 1446.

[15] *Krishna Prosad* v. *Bipin Behari,* (1903) 31 Cal. 228; Folld. 13 Bom. 72 and 18 Bom. 241.

[16] *Manilal Girdhar* v. *Nathalal Mahasukhram,* 1921 Bom. 35=45 Bom. 561=59 I.C. 774=22 Bom. L. R. 1446; Folld. in *Aminullah* v. *Makhdoom,* 1930 All. 179=1930 A.L.J. 594.

[17] 47 I.C. 1000=41 Mad. 849=35 M.L.J. 231=1918 M.W.N. 699 (F.B.); Diss. in *Vellayan* v. *Sivagnanam,* 79 I.C. 917=1925 Mad. 49.

[18] 48 I.C. 270=41 Mad. 985=35 M.L.J. 335=1918 M.W.N. 599 (F.B.).

[19] 59 I.C. 947=43 Mad. 760=39 M.L.J. 350 (F.B.).

[20] (1889) 15 Cal. 521 (P.C.).

[21] Per Wallis, C.J., in *Arunachallam Chetty* v. *Periasami Servai,* (1912) 70 I.C. 439 (441, 442)=44 Mad. 902.

> "the suggestion that in the Limitation Act of 1908 the Legislature consciously intended to make an alteration as regards orders on claims as to attachments before decree and to allow the unsuccessful party six years to sue under Art. 120 instead of one year under Art. 11, is *prima facie* most unlikely seeing that the effect of the alteration is to defeat what has always been the essential feature of this procedure, the speedy settlement of titles".[22]

An attachment made before judgment assumes the character of an attachment in execution when an order is passed for the sale of the attached property.[23] Wallis, C.J., held that the provision in O. 38, R. 11 does not mean that the property attached before judgment becomes property attached *in execution,* unless there is an order in execution for the sale of the attached property. He was accordingly of opinion that

> "a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of Art. 11,"

adding that

> "cases not governed by Art. 11 must be governed by Art. 120".[24]

Three other Judges on the Full Bench held as per Spencer, J., to the effect that

> "there is no occasion for third parties to object to attachment made before judgment, as they create no rights and disturb no third party's possession".[25] "O. 38, R. 10 expressly saves the rights, existing prior to attachment, of persons who are not parties to suit."[26] "If as the result of the trial, the suit is dismissed, the attachment has by the provision in O. 38, R. 9 to be forthwith withdrawn. If, on the other hand, a decree is passed, and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment *in execution* of a decree because O. 38, R. 11, Civil Procedure Code, declares that no re-attachment is necessary . . . . the effect of this provision is that execution is made to date back to the first attachment which was before judgment".[27]

To remove the doubts that have arisen, Spencer, J., suggested "that it is desirable that Art. 11 should be made clearer by adding the words '*before judgment or*' between the words 'property,' and 'in execution of a decree'."[28]

**47 M. 483 (F.B.).** This Full Bench ruling is thus an authority for the proposition

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[22] *Arunachallam Chetty* v. *Periasami Servai,* 70 I.C. 439 (442); Folld. in *Gopal Balkrishna* v. *Amrit Waman,* 116 I.C. 79=1929 Nag. 128 (*Held,* that Art. 11 applies to claims in execution in respect of property attached before judgment); Folld. in *Vellayan* v. *Sivagnanam,* (1924) 79 I.C. 917 (Mad.).

[23] *Vellayan* v. *Sivagnanam,* 79 I.C. 917=1925 Mad. 49=34 M.L.T. 193.

[24] *Arunachallam Chetty* v. *Periasami Servai,* 70 I.C. 439 (443)=44 Mad. 902 (F.B.).

[25] *Ibid.*

[26] *Ibid.*

[27] *Ibid.,* 70 I.C. 439 (443, 444)=44 Mad. 902 (F.B.).

[28] *Ibid.,* 70 I.C. 439 (444)=44 Mad. 902 (F.B.).

"that an attachment before judgment followed by a decree, and an order for sale is to be deemed by virtue of O. 38, R. 8, Civil Procedure Code, to amount to an 'attachment in execution' within the meaning of Art. 11".

Claim orders on petitions presented after that stage will have to be set aside within one year.[29]

"The principle of the Full Bench decision is, however, equally applicable even when an application for execution after decree to take some steps on the basis of the pre-existing attachment before judgment has been filed and admitted under O. 21, R. 17, Civil Procedure Code."[30]

Attachments before judgment and after judgment are identical in their essential features. Each is affected by a prohibitory order, the purpose of both is the same. The consequences of both are the same.[31]

"There is no difference in *rerum natura* between an attachment before judgment and an attachment in execution of decree except that one is prospective and, after the condition is fulfilled which brings it into active operation, namely, the obtaining of a decree, confers a priority of time. But an attachment before judgment is not a remedy of a kind higher than, or different from an attachment applied for and obtained for the first time in execution of a decree already passed."[32]

**Property attached in execution.**

Accordingly, the majority of Full Bench in the case of *Meyappa* v. *Chidambaram* held that the words "**property attached in execution**" in O. 21, R. 57 of the Civil Procedure Code, include "property attached before judgment", when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale, so that if the execution petition is dismissed for the decree-holder's default, the attachment before judgment comes to an end. The **Calcutta High Court** has held in *Sailesh Chandra* v. *Joy Chandra*[33] that it is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of a suit, and the reversal of the judgment on appeal does not operate to revive the cancelled attachment. The **Patna High Court** has held recently that although the provisions of O. 21, Rr. 58 to 63 may be applied to claims or objections made in attachments before judgment, no period of limitation is prescribed by R. 63, O. 21, Civil Procedure Code and in the absence of a special provision made for suits of this nature arising out of objections to attachment before judgment, Art. 120 will apply to such suits.[34]

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[29] Mitra's Limitation Act, Vol. II, p. 1062.

[30] *Ibid.*, p. 1062; see also the later Full Bench decision in *Meyappa* v. *Chidambaram,* (1923) 47 Mad. 483=46 M.L.J. 415 (F.B.).

[31] Per Ramesam, J., in 47 Mad. 483=46 M.L.J. 415=79 I.C. 144 (156) (F.B.).

[32] Per Coutts-Trotter, J., in *Meyappa* v. *Chidambaram,* (1923) 47 Mad. 483 (498) (F.B.). (See 83 I.C. 91, where the judgment of Coutts-Trotter, J., delivered in his absence on special duty, was held as a part of judgment of Full Bench.)

[33] (1925) 87 I.C. 756=1925 All. 704.

**1019. BY A PERSON AGAINST WHOM, ETC.**—The article applies to suits *by a person against whom* an order contemplated by the article has been made. Clause 1 of Art. 11 contemplates any order passed under O. 21, R. 63 against a party in a claim or objection proceeding.

**O. 21, R. 63, C. P. Code.**

The suit provided for in S. 283, old Code, that is, under O. 21, R. 63 of the present Code, is of the nature of a suit which may be described as a "**suit to alter or set aside a summary decision or order** of any of the Civil Courts not established by Letters Patent," within Art. 17, Sch. II of the Court-Fees Act[35]; and it is a method of obtaining review of a summary decision.[36] Suits under O. 21, R. 63 are not original suits but a mere continuation of proceedings in the claim petition.[37] The Privy Council decision noticed above is almost conclusive to show that suits of this class, though called original suits, are not *in their essence* original actions, but merely **forms of appeal** allowed by the Civil Procedure Code to be brought in the guise of original suits.[38] The **Madras High Court** observed in *Kovouri Basivireddi* v. *Nidoomoori Ramayya,*[39] that the suit authorised by O. 21, R. 63 is not merely in the nature of an appeal. The words *"to establish the right"* are not restricted to obtaining of a mere declaration of a plaintiff's title to the property to the exclusion of all consequential reliefs. Such reliefs include the recovery of the value of the property where it has been sold prior to the order on the claim petition.

**1020. FINALITY OF UNCONTESTED ORDER.**—An order passed disallowing an objector's claim, amounts to a summary declaration of a want of title in the objector, and such declaration becomes equivalent to a final adjudication against his right, unless he brings a regular suit to supersede the order by establishing his right.

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[34] *Mt. Babbal Kumari* v. *Mulchand,* (1934) 152 I.C. 297=1934 Pat. 580.

[35] *Phul Kumari* v. *Ghanshyam Misra,* (1907) 35 I.A. 22=35 Cal. 202=17 M.L.J. 618 (P.C.).

[36] *Jawahar Kumari* v. *Askaran,* (1915) 30 I.C. 855 (860)=22 C.L.J. 27 and *Abdul Kader* v. *Ali Meah,* (1912) 14 I.C. 715=16 C.W.N. 717; also see *Dayachand Nenchand* v. *Hemchand Dharamchand,* 4 Bom. 515 (F.B.).

[37] *Krishnappa Chetty* v. *Abdul Khader,* (1914) 25 I.C. 11 (15)=38 Mad. 535 (544)=26 M.L.J. 449.

[38] *Phul Kumari* v. *Ghanshyam,* (1907) 35 I.A. 22=35 Cal. 202=17 M.L.J. 618 (P.C.).

[39] (1916) 36 I.C. 445=40 Mad. 733=31 M.L.J. 394.

The finality of an uncontested order is dependent upon the following factors:—

**(i) Order against the claimant.**

(1) It must be an order clearly against the claimant, and intended to be such an order.[40]

Where a claim is preferred to property attached in execution of a decree it is the duty of the executing Court to investigate the claim, and if it is satisfied that the claimant has made out his case to release the property from attachment, or if it arrives at a decision against the claimant to disallow the claim. An order merely directing the notification of the claim to intending purchasers without investigating it is an improper order.[41] Every order which is not in favour of a claimant is not necessarily an order against him.[42] Therefore, unless an order is clearly against a claimant as contemplated by these provisions, the Court will not be justified in placing a forced construction upon it for the purpose of deciding that it is such an order.[43] "However, when a claim is disallowed, the defeated claimant must sue within a year (Art. 11) of the adverse order. He cannot wait till the property is sold in execution and then sue (Art. 12) within a year of the sale to set aside the execution sale. In other words, the bar imposed by Art. 11 cannot be evaded by framing the suit as one for setting aside the execution sale."[44]

*Illustrations.*

(1) Where a claim was preferred against the attachment of certain properties in execution of a decree on the ground that the judgment-debtor had only a share in them, and that the claimant was entitled to a moiety thereof, and the order of the Court was "whatever right the defendant has will pass by the sale. The claim put forward in the petition will be noted in the sale proclamation"; it was held that the order did not negative the claimant's right to a share and did not amount to an *order against him* under O. 21, R. 63 of the Civil Procedure Code.[45]

(2) Where the attachment of a property was objected to by three different objectors on different grounds, and the Court directed the raising

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[40] *Saharabi* v. *Ali*, (1922) 44 M.L.J. 141=1923 Mad. 295=72 I.C. 857=17 L.W. 182.

[41] *Ibid.*, 72 I.C. 857 (859).

[42] *Ibid.*, 72 I.C. 857 (859).

[43] *Ibid.*, 72 I.C. 857 (858).

[44] Rustomji, p. 322, citing *Krishnaji Vithal* v. *Bhaskar Rangnath*, 4 Bom. 611 (Art. 15 and not Art. 14 of the Limitation Act, IX of 1871, applied to a suit to set aside sale in execution); also see *Venkappa* v. *Chenbasappa*, 4 Bom. 21 (A person who has been unsuccessful in a proceeding under S. 246 of Act VIII of 1859, and who sues to recover the attached property from the purchaser at Court-sale, may be said to sue not to set aside the sale, but to set aside the order of Court under S. 246); also see *Ganpat Mal* v. *Bhagat Ram*, 74 P.L.R. 1901 (Suit to establish right to possession under S. 281, C. P. Code, 1882, not regarded as such unless suit brought under S. 283, C. P. Code, against the auction-purchaser).

[45] *Saharabi* v. *Ali*, (1922) 1923 Mad. 295=72 I.C. 857=44 M.L.J. 141.

of attachment by one joint order dealing with all objection petitions, it was held that the order was not against the objectors, although they may not have been well-founded.[46] A person who claims the property the attachment of which is removed, though at the instance of another person, need not institute a suit for declaration that the property is his.[47]

(3) Where objections are recorded, at request of objector, without his asking for an investigation of the claim, this does not amount to an order against the objector, within O. 21, R. 63, Civil Procedure Code.[48] Similarly, where objections made are noted as "not pressed, dismissed"[49]; or, they are allowed to be withdrawn, and the claim is treated as if it was never made[50]; or, where the claim is neither admitted nor rejected, but only intimated at the time of sale,[1] or where only the judgment-debtor's share is attached, without dealing with the claim of petitioner,[2] Art. 11 is not applicable.

(4) Where the order of rejection of an objection was a nullity, because there was *no attachment* effected at any time in fact, the order of rejection need not be set aside within a year under Art. 11.[3]

(5) Where in a claim proceeding in respect of an attached property, order is passed against the claimant, his neglect to establish his right by suit within a year from the date of that order estops him from impeaching that order later.[4]

**Conclusiveness against rights in particular property.**

(2) The order is not conclusive against rights not in dispute at the time of the passing of the order in claim proceedings. Where rights have been acquired in the property after the order was passed, it can have no binding effect on the same. O. 21, R. 63 is a bar only to a subsequent suit, instituted to establish the right which the plaintiff claimed to the property which was in dispute, in the proceeding in which the objection was raised. It has no application to a suit by the unsuccessful claimant who had purchased the property from the judgment-debtor to recover from the judgment-debtor the sale consideration paid by him to the latter.[5] It was held in *Rama*

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[46] *Ponaka Balarami* v. *Haji Mahomed,* (1915) 26 I.C. 532 (Mad.).

[47] *Gollapalli* v. *Sankara,* 42 I.C. 683 (Mad.).

[48] *Ayya Pattar* v. *Attupuratti,* (1919) 52 I.C. 938 (Mad.).

[49] *Lakshmi Narasamma* v. *Pydanna,* (1924) 80 I.C. 233; *Lingama* v. *Official Receiver,* (1928) 110 I.C. 511 (Mad.).

[50] *Ibid.;* also see S. 1026, *post.* **"Effect of order on particular attachment".**

[1] *Jodoonath* v. *Radhamonee,* (1867) 7 W.R. 256 (F.B.).

[2] *Saharabi* v. *Ali,* (1922) 1923 Mad. 295, *supra;* also see and cf. *Udit Narain* v. *Murtaza,* 27 All. 464.

[3] *Muthiah Chetti* v. *Palaniappa,* (1928) 51 Mad. 349=1928 P.C. 139 (P.C.).

[4] *Yashwant Shenwi* v. *Vithoba Sheti,* (1887) 12 Bom. 231.

[5] *Rati Ram* v. *Birmajit,* (1923) 77 I.C. 82=46 All. 45 (47)=1924 All. 302.

*Aiyar* v. *Palaniappa Chetty*,[6] that parties to proceedings under S. 278, Civil Procedure Code (1882), and persons claiming through them who would be estopped by orders passed under Ss. 280-282 do not cease to be parties to such proceedings and to be so estopped because subsequent to such order they acquire rights which enable them to stand in the shoes of the judgment-debtor. The order is conclusive only against **the particular property in dispute.**

*Illustrations.*

(1) In *Dinkar* v. *Hari*,[7] Jardine, J., was of opinion "that the provisions about claims to attached property were not intended to apply to dealing with the titles to other lands not in suit". Further, "that between the parties the orders to which S. 283 of the Civil Procedure Code, 1882 (now O. 21, R. 63) refers, are subject to the result of a suit, if any conclusive; but this conclusiveness exists only as regards the particular property in dispute".

(2) Their Lordships of the Privy Council have observed in *Radha Prasad Singh* v. *Lal Sahib Rai*,[8] that "assuming that the respondents are barred from seeking relief against the attachment and sale of their interest in mahal U, the decree . . . . does not disable them from claiming relief against the attachment and sale of their interest in N, or in any other property which was not included in the judicial sale of U".

(3) An order in a claim case on the question of the validity of a *wakf* was held not conclusive, where the property in dispute was not that which was the subject of the claim case.[9]

**Party to claim proceedings.**

(3) The order can bind only the party against whom it is made, and those claiming title from him subsequent thereto. Art. 11 does not apply to a person who was not a party to the proceedings in which the order sought to be set aside was made.[10]

*Illustrations.*

(1) Where a claim was preferred by a defendant's predecessor in title, and was disallowed, but no suit was brought within one year to set aside the order, it was held that the defendant was concluded by that adverse order, even if he was not the plaintiff in the suit, to establish her right to the property in dispute.[11] There is nothing in O. 21, R. 63 to show that the conclusive effect referred to in it attaches to the order only when the party against whom it is made is plaintiff in the suit, in which it is set up as a bar.[12]

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[6] (1910) 35 Mad. 35=1910 M.W.N. 589=8 M.L.T. 181=21 M.L.J. 756=8 I.C. 17.

[7] (1889) 14 Bom. 206 (212).

[8] (1890) 13 All. 53 (62)=17 I.A. 150 (P.C.).

[9] *Asna Bibi* v. *Jaigunnissa*, 37 I.C. 887=44 Cal. 698=21 C.W.N. 222.

[10] *Karm Narain* v. *Salamat Rai*, (1920) 57 I.C. 52 (Lah.); also see *Barkat Ali* v. *Dost*, (1919) 53 I.C. 260 (Cal.).

[11] *Surnomoyi Dasi* v. *Ashutosh Goswami*, (1900) 27 Cal. 714.

[12] *Ibid.*

(2) This view is in accordance with that taken by the Bombay High Court in *Nemagauda* v. *Paresha*.[13]

(3) Unless a suit is brought as provided in O. 21, R. 63, Civil Procedure Code, the party against whom an order under R. 61 or R. 62 has been made cannot assert either as plaintiff, or as a defendant in any other suit, or as a party to any other proceeding the right denied to him by the order.[14]

**Orders without jurisdiction.**

**1021.** It has been noticed in para. 1017 *ante*, that every order which is not in favour of a claimant is not necessarily an order against him.[15] An order without jurisdiction is a nullity, and of no effect, and it would not be necessary under O. 21, R. 63, Civil Procedure Code, to set it aside, within the period of one year mentioned in Art. 11.[16]

*Instances.*

(1) In a suit on a mortgage-bond a Small Cause Court has no jurisdiction to make a decree providing, on default of payment, for the sale of the immoveable property pledged, and a Civil Court has no jurisdiction to allow the sale in execution of such a decree.[17]

(2) An order on a claim petition, declining to investigate the claim for or against the claimant for want of jurisdiction is not an order passed under O. 21, R. 63, Civil Procedure Code.[18]

(3) Where the decree-holders made a default in proceeding with their execution, and the attachment thereon came to an end, the application of the objectors had no longer any object existing on which to operate and the Court had no power to pass any further order on the objection.[19]

(4) In a suit brought by a claimant it would be open to him to show that as a matter of fact there was no attachment, or the attachment, if any, was invalid.[20] Their Lordships of the Privy Council observed that "unless there has been an attachment there can be no order made on an objection

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[13] (1897) 22 Bom. 640 (*Held,* "that the successful objector or intervenor, whether he happens to be the plaintiff or defendant in the regular suit, is equally bound by the order in the miscellaneous proceedings, and that the only way open to him is to establish his right by a regular suit brought within twelve months, at the expiry of which the order becomes conclusive against him").

[14] *Ma Pyaw Gyi* v. *Letchmanan,* (1931) 131 I.C. 727=1931 Rang. 183.

[15] *Saharabi* v. *Ali,* (1922) 44 M.L.J. 141=1923 Mad. 295=72 I.C. 857=17 L.W. 182.

[16] *Lalla Goondur* v. *Hubeeboonissa,* (1871) 15 W.R. 311.

[17] *Lalla Goondur* v. *Hubeeboonissa,* (1871) 15 W.R. 311; also see *Sadek Ali* v. *Samed Ali,* (1924) 80 I.C. 300 (Cal.) (Attachment of immoveable property before judgment by a Provincial Small Cause Court, a nullity).

[18] *Lakshmi Ammal* v. *Kadiresan,* 1921 Mad. 488=41 M.L.J. 198=63 I.C. 431.

[19] *Fateh Din* v. *Qutab Din,* (1921) 3 Lah. 7.

[20] *Muthiah* v. *Palaniappa,* (1928) 51 Mad. 349=55 M.L.J. 122=55 I.A. 256 (P.C.), reversing 45 Mad. 90.

to it, nor can any claim be made to the property so attached; and without such an order, there is no *terminus a quo* for the running of limitation and with this the limitation itself is non-existent".[21]

(5) An unsuccessful application for possession, by the reversioners, against the widow, not followed by a suit under O. 21, R. 63 (S. 283, old Code), does not debar him from filing a regular suit. Such an application is not competent during the widow's lifetime.[22]

(6) Article 11 was held not applicable to the statutory claim of an Official Receiver based upon S. 34 of the old Provincial Insolvency Act III of 1907, which is not a claim under O. 21, R. 58, Civil Procedure Code.[23]

(7) When a claim under O. 21, R. 58, Civil Procedure Code, is rejected by the Court which declines jurisdiction on the ground that the claimant has no *locus standi*, Art. 11 would apply to bar a suit after one year; but where the matter is one to which O. 21, R. 58, Civil Procedure Code, is not applicable, Art. 11 will not govern the suit.[24]

**Mortgage decree: Procedure in.**

**1022.** In *Dayachand Nenchand* v. *Hemchand*,[25] it was held that in order to enforce a decree which establishes a mortgage, and directs a sale of the mortgaged property in satisfaction of the mortgage, it is not necessary to issue an attachment, as the direction for sale in the decree is itself sufficient authority for the sale. Accordingly, where in execution of a mortgage decree for sale of mortgaged property, a private purchaser intervened, and the Court stopped the sale, it was held that the order was without jurisdiction and proceedings by way of claim were not applicable.[26] In the **High Court of Madras** on the original side it has been the practice to have sales made in execution of mortgage decrees by auction, without the intervention of process of attachment.[27] Proceedings by way of claim are applicable only to cases of money decrees where property has been attached, and not to claims preferred to properties directed to be sold under mortgage decrees.[28] In *Mathra Das* v. *Amin Chand*,[29] the Lahore High Court, likewise, held, that this article does not apply unless there has been attachment in the manner prescribed by law. In cases where the property has been, or is sought to be, sold under a mortgage decree, there can be no attachment, and a suit to contest an order passed on an objection to such a sale need not be filed within one year. A **Full Bench** of Lower Burma Chief Court, however, has held that proceedings by way of attachment are not applicable to mortgage-decrees, but claims and objections will be dealt with under O. 21, R. 58, if the decree-holder applies for and obtains an order for attachment.[30]

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[21] *Muthiah* v. *Palaniappa*, (1928) 51 Mad. 349=55 M.L.J. 122=55 I.A. 256 (P.C.).

[22] *Tai* v. *Ladu*, (1895) 20 Bom. 801.

[23] *Official Receiver* v. *Veeraraghavan*, (1921) 45 Mad. 70.

[24] *Sri Krishna Sahu* v. *Dhiraj Mahto*, (1934) 150 I.C. 40=1935 Pat. 31.

[25] (1880) 4 Bom. 515 (F.B.).

[26] *Himmat Ram* v. *Kushal*, (1893) 18 Bom. 98.

[27] *Venkata Narasimha* v. *Ramiah*, (1879) 2 Mad. 108 (112).

[28] *Deefholts* v. *Peters*, (1887) 14 Cal. 631.

[29] 1933 Lah. 75 (76)=141 I.C. 252=33 P.L.R. 1033.

**Order disallowing claim in execution proceeding.**

**1023.** An order rejecting a claim petition under S. 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree.[31] An order directing the removal of the obstruction made under S. 336 of the Civil Procedure Code, which the *defendant* failed to contest by means of a suit, becomes final and the defendant is bound by it after the expiry of one year from the date thereof.[32] Article 11 and not Art. 141 is applied to a suit for possession of property under O. 21, R. 103, Civil Procedure Code.[33] The conclusive effect of an order under S. 335, Civil Procedure Code, 1882, attached to it even when the party against whom it was made was not a plaintiff but a defendant in the suit in which it was set up as a bar.[34] An order upon a claim petition which expresses no final judgment on the rights put forward, but simply directs the sale after notifying the claim, is *"an order against the claimant"* for the purposes of O. 21, R. 63, Civil Procedure Code.[35]

Where an order on a claim petition adverse to the defendant is not set aside, he cannot take advantage of a suit filed by the plaintiff to re-agitate the question of his title.[36]

*Illustrations.*

(1) Where *L* attached certain alleged family lands of his judgment-debtor *S*, and *K* intervened and objected to the attachment, but the same being disallowed no suit was brought by *K*, but *L* sued as the purchaser of the rights of *S* in joint family property within one year, it was held that *K* was estopped from again pleading that the same property was not family property or partible.[37]

(2) This was followed in *Peela Yarakayya* v. *Kanumuri*,[38] where certain properties were attached in execution of a decree, and defendant whose claim was disallowed brought no suit to establish his title to the property attached, it was held that the order on the claim petition was conclusive,

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30. Cf. *Mg. Mra Tun* v. *U Kaing*, 29 I.C. 941 (U.B.) (F.B.).

31. *Achuta* v. *Mammavu*, (1887) 10 Mad. 357; Folld. *Velayuthan* v. *Lakshmana*, 8 Mad. 506.

32. (1921) 61 I.C. 764=45 Bom. 573=1921 Bom. 122.

33. *Chail Behari Lal* v. *Kidar Nath*, 1 Lah. 57.

34. *Bisan Ram Patri* v. *Satish Chandra Sarma*, (1917) 38 I.C. 216 (Cal.).

35. *Ramalingappa* v. *Alluru Narayanappa*, (1924) 82 I.C. 737=1925 Mad. 368.

36. *Krishna Rau* v. *Lakshmana*, (1881) 4 Mad. 302.

37. *Ibid*.

38. (1917) 41 I.C. 684=6 L.W. 281.

so far as the defendant was concerned, and that the latter could not take advantage of the suit filed by the plaintiff to re-agitate the question of his title. The fact that both the plaint and the written statement in the subsequent suit were within one year from the date of the order did not affect the question.

(3) In certain execution cases for sale of certain oil mills, in which royalties due from certain companies had also been placed under attachment, and subsequently an application for attachment of a house and site was made, a claim, under O. 21, R. 58, objecting to attachment was made but the Court in dealing with the matter of royalties only released the attachment, and case was noted as closed. *Held,* that the time for purposes of suit began to run from dismissal of *first* application under O. 21, R. 58: and not from date of second application which was unnecessary and superfluous.[39]

**Garnishee orders.**

**1024.** The rule is that an unsuccessful intervenor in execution proceedings must establish his right by a regular suit within one year, at the expiration of which the order passed in execution becomes conclusive against him.[40] Where certain property was attached in execution of a money decree and *A* intervened as a mortgagee under certain mortgage-bonds, but the Court passed an order directing the property to be sold subject to certain mortgages only, and subsequently the auction-purchaser sued to redeem those mortgages, it was held that *A* could not claim in respect of the remaining mortgages, as the order had become conclusive against him at the expiration of one year from the date thereof. O. 21, R. 58 applies in terms to any property attached in execution and thus relates to debts so attached. Under O. 21, R. 63, Civil Procedure Code, 1908, it is not open to a *garnishee* to plead a defence which has been already in an execution enquiry been unsuccessful, except in a suit instituted within one year from the date of the adverse order.[41] A *garnishee,* whose objection to the attachment of the debt on the ground that no debt is due by him to the judgment-debtor is disallowed, is bound to bring a suit within a year to set aside the order: otherwise, failing to do so, the order becomes final and conclusive.[42] The Bombay view is followed by the Lahore High Court in *Piara Ram* v. *Ganga Ram.*[43] If no suit for a declaration within a year from the date of the order passed against the alleged debtor is brought, the *garnishee* cannot assert in answer to a suit brought by the auction-purchaser of the debt for the recovery of the debt that no debt was due from him.

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[39] *Ma Pyaw Gyi* v. *Latchmanan,* 1931 Rang. 183=131 I.C. 727.

[40] *Nemagauda* v. *Paresha,* (1897) 22 Bom. 640 (643); also see *Badri Parsad* v. *Mohammad Yusaf,* 1 All. 381 (F.B.); *Surnamoyi* v. *Ashutosh,* 27 Cal. 714 and *Bibi Aliman* v. *Dhakeswar,* (1904) 1 C.L.J. 296 (299).

[41] *Tyab Ali* v. *Atmaram,* (1914) 25 I.C. 375=38 Bom. 631; cf. 1931 Bom. 238=133 I.C. 248.

[42] *Subbier* v. *Moideen,* (1923) 72 I.C. 558=44 M.L.J. 588.

[43] (1923) 71 I.C. 45=1924 Lah. 367.

**By judgment-debtor.**

**1025. SUIT TO ESTABLISH RIGHT CLAIMED.**—A judgment-debtor is **not necessarily a party** against whom an order is made within the meaning of the term as used in S. 283 of the Code of Civil Procedure, 1882 (O. 21, R. 63, Civil Procedure Code, 1908) so as to preclude his instituting a suit after the lapse of one year from the date of such order, under Art. 11, to establish his title to, and to recover possession of, the property which has been the subject-matter of a claim in execution proceedings, and in respect of which an order has been made under S. 280 of the Code.[44] In proceedings under S. 278 (O. 21, R. 58) the **real question** for decision is not whether the title to the property belongs to the judgment-debtor or the claimant but **whether the property should be released** from the attachment or not.[45] The observations of their Lordships of the Privy Council in *Sardhari Lal* v. *Ambika Pershad*,[46] would indicate that besides the claimant, the only other party within the meaning of S. 280 (old Code) is the judgment-creditor. Where the judgment-debtor was not a party to claim proceedings, the party aggrieved by the order therein can institute a suit to establish his right after the expiry of a year from the date of the order and the suit will not be barred under Art. 11.[47] **The Bombay High Court** held in *Shivapa* v. *Dod Nagaya*,[48] that **whether a judgment-debtor is** to be regarded as **a party** to an investigation under S. 278 of the Code, must depend upon the facts of each case. The material fact for inquiry is, whether the claimant held possession, and the fact of possession may be investigated in a proceeding between the decree-holder and claimant only.[49] A judgment-debtor will not be bound by an order on a claim petition unless he has been a party to it and also *unless the order in terms adjudi-*

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[44] *Kedarnath Chatterji* v. *Rakhal Das*, (1888) 15 Cal. 674; cf. *Najimunnessa* v. *Nachamuddin*, 51 Cal. 548=83 I.C. 233=1924 Cal. 744 (751) (*Held*, that where a claim under O. 21, R. 58, Civil Procedure Code, is dismissed, but the property is subsequently released from attachment within the period limited by O. 21, R. 63, it is not incumbent on the unsuccessful claimant to institute a title suit within one year); also see *Ajibal Narasinha* v. *Shirekoli Timapa*, (1892) 17 Bom. 629.

[45] *Morshia Barayal* v. *Elahi Bux Khan*, (1905) 3 C.L.J. 381.

[46] 15 Cal. 521 (525)=15 I.A. 123 (P.C.).

[47] *Sadaya Pillay* v. *Amurthachari*, (1910) 8 I.C. 157=34 Mad. 533 =8 M.L.T. 417; also see *Imbichikoya* v. *Kakkunnat*, 1 Mad. 391 (Judgment-debtor not made a party to a claim proceeding, held not bound to sue within one year).

[48] (1886) 11 Bom. 114.

[49] *Ibid.*, 11 Bom. 114 (118); Folld. in *Moidin Kutti* v. *Kunhi Kutti Ali*, 25 Mad. 721 (723); contra *Netietom Perengaryprom* v. *Tayanbarry*, 4 M.H.C.R. 472 (F.B.) (Not good law in view of observations in 15 I.A. 123, *supra*); also see *Cheriyarakel* v. *Vayaka*, (1871) 6 M.H.C.R. 416.

*cates on his title.*[50] Where the only matter adjudicated on by the claim order is as to who is in possession and the conclusive effect predicated by **O. 21, R. 63,** Civil Procedure Code, **only affects possession and not the title,** the order does not bind the judgment-debtor even though he is a party and actively contests the claimant's right, and the judgment-debtor or his heirs are not bound to sue to establish their title within a year of the date of the order.[1] In *Guruva* v. *Subbarayudu,*[2] it was distinctly stated that even if the judgment-debtor had notice, the order will not bind him. The order must be against him in effect. In *Muthusami Mudaly* v. *Ayyalu Bathadu,*[3] evidence was given against the claimant by the judgment-debtor. It was held that his having notice of the claim and of the adjudication will not bind him, if his rights were not adjudicated upon. At least it would be necessary to show that the judgment-debtor was summoned, and he was not a mere nominal party[4]; and that **notice of the claim** was served on him before he can be held to be bound by the order of the Court.[5] If the judgment-debtor intervenes and actively opposes the claim along with the decree-holder and the claim petition succeeds, he may be bound by the order unless he sets it aside within one year, as the **order** may then be said to be **passed against him** also.[6] The **Patna High Court** has relied upon Calcutta and Madras rulings for the view that an order made in proceedings under O. 21, R. 58, Civil Procedure Code, is an order between the claimant on the one hand and the decree-holder on the other, and is not binding on the judgment-debtor.[7] Where on a sale of certain ancestral property in execution, the son's objection against the attachment and sale was disallowed, and a suit for declaration under O. 21, R. 63 also failed, and a fresh suit was brought by them for possession of the land sold in execution and purchased by the decree-holder, *held,* that the cause of action for the suit being the alienation effected in execution, and a suit for possession not being competent in the father's lifetime, the suit was not barred under Art. 11.[8]

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[50] *Vedalingam* v. *Veerathal,* (1920) 54 I.C. 530=37 M.L.J. 547; Reld. on 13 Mad. 366 and 13 M.L.J. 367; Folld. in *Sabella Appanna* v. *Mallidi,* (1914) 25 I.C. 700 (Judgment-debtor when party to suit).

[1] *Ibid.,* (1920) 54 I.C. 530=37 M.L.J. 547=26 M.L.T. 513=1920 M.W.N. 77.

[2] 13 Mad. 366.

[3] 13 M.L.J. 367.

[4] *Mannu Lal* v. *Harsukh Das,* 3 All. 233; Reld. in *Kurriyil Parkum* v. *Varanakat,* (1911) 10 I.C. 424=9 M.L.T. 423=21 M.L.J. 550.

[5] *Krishnasami Naidu* v. *Somasundaram Chettiar,* 30 Mad. 335=17 M.L.J. 95 (F.B.); *Vaidapalli Narasimham* v. *Dronam,* 31 Mad. 163=3 M.L.T. 256=18 M.L.J. 26.

[6] *Velu Padayachi* v. *Arumugam Pillai,* (1920) 56 I.C. 481=38 M.L.J. 397.

[7] *Munshi Lal* v. *Bishun Prasad,* 120 I.C. 762=1929 Pat. 604=10 P.L.T. 581; Reld. on *Kedarnath Chatterji* v. *Rakhal Das,* 15 Cal. 674 and *Krishnasami Naidu* v. *Somasundaram Chettiar,* 30 Mad. 335=17 M.L.J. 95=2 M.L.T. 116 (F.B.).

**Claimants and decree-holder.**

1026. In *Sardharilal* v. *Ambika Pershad,*[9] their Lordships of the Privy Council held that Art. 11 of the Limitation Act is aimed against persons who object to orders passed in claim proceedings;

> "and it is not suggested that there can be any person against whom an order can be passed under S. 280 (old Code) except the decree-holder himself. He, therefore, is the very person who by S. 283 is empowered to institute a suit to establish his claims, and who, by Art. 11 of the Limitation Law, is confined to one year for the institution of that suit".

A suit by a decree-holder under O. 21, R. 63, Civil Procedure Code, to declare an alienation by his judgment-debtor fraudulent lies within one year, under Art. 11, from the date of an adverse order. But, a suit by any other creditor would lie within six years under Art. 120 of the Limitation Act.[10] Under the Civil Procedure Code of 1882, Ss. 280-283, a decision on the merits after investigation was required. But where an objector produced his witnesses, and the decree-holder failed to produce his evidence in spite of several adjournments granted for the purpose, and finally the case was decided *ex parte* allowing the objection, in the absence of the opposite party, and any rebuttable evidence, it was held that the objector was not to be deprived of an adjudication, in claim proceedings, because the decree-holder chose to absent himself and never produced his evidence.[11] Where on the date of hearing the claimant failed to produce evidence, and his petition for grant of time was refused, it was held that Art. 11 applied to the suit brought to challenge the validity of the order of dismissal.[12]

**Two rival claimants.**

Where the same property is attached in execution of different decrees, and all the attachments are removed in consequence of the claim of an objector, in claim proceedings, it is not necessary for each attaching creditor to bring a separate suit.[13] If one of the creditors brings a suit against the objector, and therein sets up the right of ownership of the original judgment-debtor, he effectually gets rid of the claim of the objector, and leaves the road open for other parties having a lien on the property.[14]

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[8] *Harchand Singh* v. *Sulekh Chand,* (1932) 139 I.C. 522=1932 Lah. 460=33 P.L.R. 882.

[9] 15 Cal. 521=15 I.A. 123 (P.C.).

[10] *Jagiri Lal* v. *Tara Chand,* 138 I.C. 412=33 P.L.R. 759=1932 Lah. 516.

[11] *Jiwani* v. *Nathumal,* 28 P.R. 1910=5 I.C. 890.

[12] *Doorgaram Roy* v. *Rajah Nuro Singh,* (1869) 11 W.R. 134; also see *Chintamani* v. *Iswur,* (1869) 3 Ben. L. R. Appx. 122 (Art. 11 not applied to a suit between rival claimants of attached property, or rival attaching creditors).

[13] *Chintamonee Sein* v. *Issur Chunder,* (1869) 12 W.R. 221.

**By auction-purchaser.**

**1027.** The auction-purchaser of the property after rejection of the claim, though not actually a party to the proceedings, may urge that the claimant is not entitled to question the conclusiveness of the order.[15] A purchaser of the interest of an objector to sale in execution may bring a suit under O. 21, R. 63 (S. 283, old Code). The right conferred by this section is not a personal right confined to the original claimant.[16] Parties to proceedings under S. 278 (old Code) and persons claiming through them who would be estopped by orders passed under Ss. 280-282 (old Code) do not cease to be parties to such proceedings and to be so estopped because subsequent to such order they acquire rights which enable them to stand in the shoes of the judgment-debtor.[17] Where on an attachment in execution of a decree, an application has been made by a third person to raise the attachment, but the Court only declares a lien in his favour, the auction-purchaser can question the existence of the lien, inasmuch as the order passed by the Court as to the lien could not be regarded as one passed against the auction-purchaser regarded as a representative either of the judgment-debtor, or the judgment-creditor.[18]

**By assignees.**

**1028.** It may be that the auction-purchaser is the representative of the judgment-debtor and not the decree-holder, but that is a proposition which can be accepted subject to certain limitations.[19] A person who is an assignee of the judgment-creditor auction-purchaser is bound by an order against the judgment-creditor in the claim proceedings, and a suit by him must be brought within the period prescribed by Art. 11.[20] But, this article does not apply to a claim by a purchaser from the judgment-debtor, suing against the judgment-debtor for refund of consideration money paid by the claimant for its purchase.[21]

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[14] *Chintamonee Sein* v. *Issur Chunder,* (1869) 12 W.R. 221.

[15] *Nemagauda* v. *Paresha,* (1897) 22 Bom. 640 (645); *Velu Padayachi* v. *Arumugham,* (1919) 38 M.L.J. 397=56 I.C. 481.

[16] *Ganesh Prasad* v. *Kashi Nath Tiwari,* (1903) 26 All. 89.

[17] *Rama Ayyar* v. *Palaniappa,* 35 Mad. 35=8 I.C. 117=1910 M.W.N. 589=21 M.L.J. 756 (F.B.) (Orders under O. 21, Rr. 58-62 may determine questions of title, not merely possession).

[18] *Narayan* v. *Umbar,* 35 Bom. 275 (277); Folld. in *Vasanji Haribhai* v. *Lallu Akhu,* (1885) 9 Bom. 285 and *Vishwanath* v. *Subraya,* (1890) 15 Bom. 290.

[19] *Rama Aiyar* v. *Palaniappa,* 35 Mad. 35 (F.B.).

[20] Cf. *Krishna Bhupati* v. *Vikrama,* 18 Mad. 13 (Auction-purchaser represents execution creditor's right to bring property to sale).

[21] *Rati Ram* v. *Berhamji,* 46 All. 45=1924 All. 302=21 A.L.J. 770.

The effect of an order under O. 21, R. 60, Civil Procedure Code, allowing a claim is to make it obligatory on the Court to release the property from attachment; but the order of release is only provisional and is liable to be set aside by a regular suit. Where after the order of release and before the institution of a regular suit by the decree-holder to establish the right which he claims to the property comprised in the order, the successful claimant assigns the property, the assignee must take the risk of the decision in the regular suit; but in order that he may be bound by the result of the suit, he must be made a party thereto.[22]

**By Official Receiver.**

1029. Where a debt due to *A* from *B* was attached before judgment, and *A* was thereafter adjudged insolvent, and an application by Official Receiver, under S. 34 of the Provincial Insolvency Act, for payment of money to him and to the attaching creditor, was dismissed; it was held that the petition was not one under O. 21, Rr. 58-63, nor under provisions of the Civil Procedure Code, but a statutory claim, which accordingly was not governed by Art. 11 of the Limitation Act.[23] Art. 11 was not applied, further, for the reason that it was a case of attachment before judgment, and an official had no interest in the money under O. 21, R. 59, Civil Procedure Code.

1030. **STARTING POINT.**—A suit against the order on a claim petition is governed by Art. 11, and is in time if instituted within a year of the date of the order though more than a year from the date of attachment and sale of the properties.[24] The "*date of the order*", is the date on which the order is signed, not that on which it is verbally made.[25] The word "order" in the article refers only to a subsisting order. Where, therefore, there was an appeal against the order of a single Judge, it is the date of the order of the Appellate Court, that gives the starting point of limitation.[26] The mere fact that a matter is litigated both in the Court of first instance, and again, though only in part, in the Court of appeal, cannot convert or split the suit into two, and there can be only one final decree in that suit, *viz.*, the decree of the Court of appeal, which is the only subsisting decree in the suit.[27] An appellate judgment, even where it confirms the lower Court's decision, supersedes the judgment of the first Court.[28] Where the order is not appealable, the time spent on appeal cannot be excluded under S. 14 of the Limitation Act.[29] However, time spent in revision proceedings may, under proper circumstances, be excluded under S. 14.[30] Article 11 (*a*) does not contemplate computation of the period of limitation from the date of any order passed in revision.[31]

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[22] *Protap Chandra Gope* v. *Sarat Chandra Gangopadhya,* (1921) 62 I.C. 348=1921 Cal. 101=33 C.L.J. 201=25 C.W.N. 544.

[23] *Official Receiver* v. *Veeraraghavan,* 45 Mad. 70=1922 Mad. 189 =41 M.L.J. 334=69 I.C. 326.

[24] *Basivi Reddi* v. *Ramayya,* (1916) 36 I.C. 445=40 Mad. 733=31 M.L.J. 394.

[25] *Bapu* v. *Lakshmanan,* (1873) 10 B.H.C.R. 19.

[26] *Venugopal* v. *Venkatasubbiah,* (1915) 28 I.C. 367=17 M.L.T. 208=1915 M.W.N. 211=39 Mad. 1196; Folld. *Sabapathi* v. *Narayanasami.* 25 Mad. 555=11 M.L.J. 340; also see **S. 1041,** *post*: **"The date of the order".**

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 11-A. | By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for possession of immoveable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order. | One year. | The date of the order. |

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[27] *Krishnama Chariar* v. *Mangammal*, 26 Mad. 91.

[28] *Asma Bibi* v. *Ahmad Husain*, 30 All. 290=A.W.N. (1908) 109 =5 A.L.J. 584.

[29] *Mg. Tun U* v. *Palaniappa Chetty*, (1915) 27 I.C. 829 (U.B.).

[30] *Laxmandas* v. *Chunilal*, 1931 Nag. 17 (19)=130 I.C. 57.

[31] *Ibid.*; also see *Daya Ram* v. *Goverdhan Das*, (1904) 28 Bom. 458 (Where there was no appeal to lower Court, and High Court refused to interfere on revision, as more than one year had elapsed from date of order of first Court).

## SYNOPSIS.

1031. **Corresponding provisions:** Act XV of 1877.
1032. „ „ Act IX of 1871.
1033. „ „ Act XIV of 1859.
1034. Change of law.
1035. Dismissal without inquiry.
1036. **Scope of Art. 11-A:**
    - (*i*) Order in summary proceeding.
    - (*ii*) Cause of action.
1037. Finality of order not challenged by suit.
1038. Proceedings under O. 21, R. 100, C. P. Code.
1039. Applicability of O. 21, R. 103, C. P. Code.
1040. Suit for present possession.
1041. The date of the order.

## NOTES.

**1031. CORRESPONDING PROVISIONS.**—In the Act XV of 1877, this article was included in Art. 11. The old article ran thus:—

**Act XV of 1877.**

> "By a person against whom an order is passed under S. 280, 282 or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order—one year—the date of the order."

In the present Act, the old article was split up into two parts, and Art. 11-A is made a separate provision dealing more elaborately with that portion of Art. 11 of the old Act, which concerned the suits against orders passed under S. 335 of Civil Procedure Code, 1882, corresponding to O. 21, Rr. 97 to 103. Section 335 of Civil Procedure Code, 1882, enacted as follows:—

> "If any purchaser of any such property is resisted or obstructed by any person other than the judgment-debtor claiming in good faith a right to the present possession thereof, or if, in delivering possession thereof, any such person is dispossessed, the Court, on the complaint of the purchaser or the person so dispossessed, shall inquire into the matter of the resistance, obstruction or dispossession, as the case may be, and pass such order thereon as it thinks fit."

> "The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property; but subject to the result of such suit, if any, the order shall be final."

"The policy of the Legislature required," as pointed out in *Venkapa* v. *Chenbasappa,*[32] "that a person who has commenced to litigate should carry his litigation to an end within a reasonable time." And, this being the reason for the one year rule, applied as well to one who connected himself with litigation, either by intervening to prevent the sale of property under an attachment or by becoming a purchaser of property sold in execution as to a party to the litigation.[33] "It had no necessary application to a person who had not been connected in any such way with litigation, or whose rights, even though in a certain sense represented, had not been properly protected in litigation, of which he had been kept in ignorance."[34] A suit by a reversioner to establish his title to property sold in execution of decree obtained against a widow, who was collusively acting in fraud of the plaintiff's right was not held governed by Art. 12, cl. (*a*) of Sch. II of the Limitation Act, 1877.[35]

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[32] (1879) 4 Bom. 21.

**Act IX of 1871.**

**1032.** The Limitation Act, IX of 1871, did not contain any specific provisions corresponding to the present article. A suit to establish a plaintiff's right to immoveable property sold in execution of a decree to which the plaintiff was not a party did not fall within the terms of Sch. II, cl. 15, Act IX of 1871, as held by the **Calcutta High Court**[36]; but the **Bombay High Court** took the view that such cases were governed by cl. 15, which provided for suits "to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit".[37] A longer period of twelve years thus prevailed under Act IX of 1871, according to the rule laid down in Calcutta cases, up to 1st October, 1879, when Art. 11 of the Limitation Act, XV of 1877, prevented a suit of this nature from being brought after one year from the order in execution proceedings.[38] The **Bombay High Court** held, however, that a person who had been unsuccessful in a proceeding under S. 246 of Act VIII of 1859, and who sued to establish his right, or to recover the attached property from the purchaser at the Court sale, may be said to sue, not to set aside the sale, but to set aside the order of the Court under S. 246, Civil Procedure Code, 1859.[39]

**Act XIV of 1859.**

**1033.** There was no corresponding provision in the Limitation Act, XIV of 1859. There was a general provision in S. 1, cl. 5, corresponding to the present Art. 13 of Act IX of 1908.

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[33] *Parekh Ranchor* v. *Bai Vakhat,* (1886) 11 Bom. 119 (124).

[34] *Ibid.*

[35] *Ibid.*

[36] *Matonginy Dassee* v. *Chowdhry Junmunjoy,* 25 W.R. 513; *Koylash* v. *Preonath,* 4 Cal. 610; *Joyram Loot* v. *Paniram Dhoba,* 8 C.L.R. 54; *Rajchunder* v. *Shama Charan,* 10 C.L.R. 435=8 Cal. 395 (396).

[37] *Venkapa* v. *Chenbasappa,* (1879) 4 Bom. 21; *Jetti* v. *Syed Hosein,* 4 Bom. 23 (note); *Krishnaji Vithal* v. *Bhaskar Rangnath,* 4 Bom. 611.

[38] *Raj Chunder* v. *Shama Charan,* 10 C.L.R. 435=8 Cal. 395 (396); also see *Luchmi Narain* v. *Assrup Koer,* 9 Cal. 43; *Gopal Chunder* v. *Mohesh Chunder,* 9 Cal. 230=11 C.L.R. 363.

[39] *Venkapa* v. *Chenbasappa,* (1879) 4 Bom. 21; Folld. in *Krishnaji* v. *Bhaskar,* 4 Bom. 611.

The one year rule of limitation was contained in S. 269, Act VIII of 1859, dealing with a case of resistance or obstruction by claimants other than defendants.

Section 335 of Act of 1877, corresponded to S. 269 of the Code of 1859.

1034. **CHANGE OF LAW.**—It has been pointed out in notes under Art. 11, paragraph 1000, *ante*, that there appears to have been a deliberate change in the language of the article, in the new Act. Those observations may not apply to Art. 11-A, which corresponds to a portion of Art. 11, in the Act of 1877.

Under Act XV of 1877, Art. 11 applied only when there was an order passed after due inquiry as contemplated by S. 335 of the Civil Procedure Code, 1877. The words used in the section left no doubt in the matter, and the authorities interpreted the words

*"shall inquire into the matter of resistance, etc., and pass such order thereon as it thinks fit"*

as meaning an essential condition precedent.

Where on an application by a decree-holder, purchaser in execution sale, to be put into possession, against the opposition of judgment-debtor's son, the Court, to which the application was made, refused to enter into evidence, or make any enquiry, leaving the decree-holders to establish their right by a regular suit, it was held that the one year's limitation provided by Art. 11 of Act XV of 1877, did not apply to the suit so brought.[40]

Article 11 of the Limitation Act, 1877, had no application to a case where the Court declined to pass an order under S. 335, Civil Procedure Code, after summary investigation, but referred the purchaser to a separate suit to enforce his purchase.[41]

**Dismissal without inquiry.**

**Patna view.**

1035 According to **Patna High Court,** Art. 11-A of Sch. I, to the Limitation Act, is sufficiently wide to cover cases brought under O. 21, R. 103 of the Civil Procedure Code, and there is no justification for restricting the operation of the article only to those cases where investigation of the claim as to merits has taken place.[42] Reliance is placed for this view on the policy of the Act of 1877, as explained by their Lordships of the Privy Council, in the case of *Sardhari Lal* v. *Ambika Prasad*,[43] observing that "it is still the policy under the present Code, and the Limitation Act"; and, that "the language of Art. 11 of the present Limitation Act is more general than that of the Act of 1877". This view of the matter is supported by the decisions of **Calcutta**,[44] **Madras**[45] and **Allahabad**[46] High Courts noticed in the judgment. Also see *Ponnusami Pillai* v. *Samu Ammal*[47] and *Satindra Nath* v. *Siva Prasad*.[48]

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[40] *Rash Behary Bysack* v. *Buddun Chunder Singh,* (1883) 12 C.L.R. 550.

[41] *Meerudin* v. *Rohisa,* (1903) 27 Mad. 25 (26); Reld. on 12 Cal. 550, *supra.*

[42] *Raziuddin Hossain* v. *Bindesri,* (1920) 58 I.C. 37=1 P.L.T. 559 =5 P.L.J. 652.

**Calcutta.**

On the other hand, in *Nirode Boroni Dassi* v. *Monindra Narayan Chandra*,[49] Sir N. R. Chatterjea and Pearson, JJ., have held with reference to the provisions in O. 21, Rr. 97, 100, 101 and 103, that

> "there is no doubt that upon an application being made to Court under O. 21, R. 100, the Court has to hold some sort of investigation as expressly laid down by sub-R. (2) of R. 100 and R. 101".[50]

The decisions relating to claim cases based upon the alteration in the wording of R. 63, O. 21, Civil Procedure Code, 1908, as compared with S. 283 of the old Codes of 1877 and 1882, are distinguished on the ground that

> "so far as the provisions of R. 103 are concerned, there has been no change in the Civil Procedure Code as compared with Ss. 332 and 335 of the old Code".[1] "Sub-R. (2) of R. 100 and R. 101 (as also Rr. 97 to 99) expressly provide that the Court shall investigate the matter and any order made under R. 101 (or R. 99) must, therefore, be the result of such investigation".[2]

Rule 103 evidently contemplates an order passed after investigation as laid down in Rr. 97 to 99, or Rr. 100 and 101.[3] "The conclusiveness, therefore, attaches to an order made after investigation under those rules."[4]

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[43] 15 I.A. 123 (127)=15 Cal. 521=7 Ind. Dec. (N.S.) 931 (P.C.).

[44] *Nogendra Lal* v. *Fani Bhusan*, 44 I.C. 265=23 C.W.N. 375=45 Cal. 785.

[45] *Machi Raju Venkataratnam* v. *Vadrevu Ranganayakamma*, 48 I.C. 270=41 Mad. 985=1918 M.W.N. 599=35 M.L.J. 335 (F.B.).

[46] *Gokul* v. *Mohri Bibi*, 44 I.C. 1005=40 All. 325=16 A.L.J. 256.

[47] 38 I.C. 937=31 M.L.J. 247.

[48] 64 I.C. 713=26 C.W.N. 126.

[49] (1922) 68 I.C. 524=1922 Cal. 229=35 C.L.J. 537=26 C.W.N. 853 (856).

[50] *Ibid.*, 68 I.C. 524 (526).

[1] *Ibid.*, 68 I.C. 524 (527).

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*; also see *Chinna Brahmayya* v. *Venkamma*, 1933 M.W.N. 924 (*Held*, that a petition dismissed as "not pressed, as the decree-holder has a

This question has been considered with reference to S. 335 of the old Code in the case of *Kunj Behari Lal* v. *Kandh Prasad,*[5] where it was held that

> "it is manifest, therefore, from the language of the Code itself, that the only order upon which the character of finality is impressed, is an order made upon inquiry".

**Allahabad.**

One year's rule has been applied by the **Allahabad High Court** in certain cases, where the dismissal of the application was not for default of appearance, but where the applicants though present did not adduce any evidence.[6]

**The conclusion,** formed by the **Calcutta High Court,** after a discussion of case-law, is that Art. 11-A refers to a suit by a person against whom an order has been made under the Code (among others) upon an application by a person dispossessed of immoveable property in the delivery of possession thereof to the decree-holder or purchaser. But although the article does not refer to any section the order must be an order under O. 21, R. 103, which retains the language of old Ss. 332 and 335, Civil Procedure Code, 1882. Accordingly, an order dismissing the application under O. 21, R. 101 for default is not barred by the provisions of Art. 11-A of the Limitation Act.[7]

**1036. SCOPE OF Art. 11-A.**—The correct view of Art. 11-A, as taken in *Nirode Baroni* v. *Monindra*[8] noticed above, is that Art. 11-A applies to such orders in summary proceedings under the Civil Procedure Code, O. 21, Rr. 98, 99 and 101 providing for investigation into a petition of objection, which are against the rights claimed, and which would become conclusive but for a contrary decision in a suit to establish right to present possession, where the relief is prayed against the person in whose favour the order in the claim case was made.

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separate suit for the purpose," was not disposed of after enquiry or investigation, and Art. 11-A did not apply).

[5] 6 C.L.J. 362; approved *Sarat Chandra* v. *Tarini Prasad,* 34 Cal. 491=11 C.W.N. 487.

[6] Cf. *Shagun Chand* v. *Shibbi,* 10 I.C. 401=8 A.L.J. 626; cf. *Chandi Prasad* v. *Nand Kishore,* 20 I.C. 369 (All.); also see and cf. *Hari Saday* v. *Mahendra,* 39 C.W.N. 164 (165) (Where Art. 11-A was applied to a case of a suit by auction-purchaser under O. 21, R. 103, where the application was dismissed "after investigation", though the auction-purchaser adduced no evidence).

[7] *Nirode Boroni* v. *Monindra Narayan,* 1922 Cal. 229=68 I.C. 524 =35 C.L.J. 537=26 C.W.N. 853 (856); cf. 45 Cal. 785 (Under Art. 11, *held,* that by reason of change in language, *Art.* 11 governs a case in which the claim petition has been dismissed for default of appearance).

[8] 1922 Cal. 229=26 C.W.N. 853=35 C.L.J. 537.

**(i) Order in summary proceeding as an obstacle to be removed.**

**(ii) Cause of action.**

The ruling in *Shrinivas* v. *Hanmant,*[9] and the cases there cited show that when the right to recover depends, as on a condition precedent, upon the preliminary removal of an obstacle the remedy against which is barred by a provision of the Limitation Act, the difficulty cannot be evaded by proceeding as if that obstacle did not exist, and by having recourse to another article of the schedule providing for circumstances in which the obstacle to be removed is not included.[10] Where an order has been passed in summary proceedings that a certain property belonged to the defendant, the plaintiff is under an obligation to displace that order by a suit instituted within one year from its date.[11] Similarly, where an application to be placed in possession by an execution-purchaser, who is not entitled to possession is disallowed under R. 99 of O. 21, Civil Procedure Code, and he brings a suit for possession, such suit must be brought within one year from the date of the order disallowing the application.[12] A person claiming to get rid of the effect of an order under O. 21, R. 100, Civil Procedure Code, is bound to bring his suit for such a purpose within the period mentioned in Art. 11-A of the Limitation Act.[13] But where the cause of action arises subsequent to the date of the order made on the application under O. 21, R. 100, Civil Procedure Code, as for example, by the dispossession of the plaintiff by reason of the defendant taking away the crops growing on the property, time will begin to run from the date of such dispossession.[14] The suit contemplated in R. 103 of O. 21, Civil Procedure Code, is a suit by a person who is kept out of possession of property purchased in execution of a decree and claims possession under his auction-purchase. The rule does not concern itself with any other cause of action which such person, apart from his character as auction-purchaser, may have against the defendant.[15]

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[9] (1899) 24 Bom. 260 (F.B.) (*Held,* that a suit for a declaration that the adoption was invalid, was governed by Art. 118, and if barred by time under Art. 118, the whole claim for possessory relief was time-barred).

[10] *Mahadev* v. *Babi,* (1902) 26 Bom. 730 (734, 735) (*Held,* that Art. 136 could not apply to the claim that the vendor was entitled to possession, where an order under S. 335 had negatived this claim).

[11] *Bai Jamna* v. *Bai Ichha,* (1886) 10 Bom. 604 (Auction-purchaser neglecting to register sale-certificate obstructed by defendant claiming property; *held,* that plaintiff failing to institute suit within one year of date of adverse order in summary proceeding was barred by Art. 11, Limitation Act).

[12] *Baldeo* v. *Kanhaiya Lal,* (1920) 58 I.C. 21=24 C.W.N. 1001=16 N.L.R. 103 (P.C.).

[13] *Atarmoyi* v. *Ramananda,* (1922) 84 I.C. 876=50 Cal. 311=1923 Cal. 601.

[14] *Ibid.*

**Finality of order not challenged by suit.**

1037. In cases where the application of Art. 11-A is in question, the important thing to see is what was asked in the claim proceedings, and what is asked in the subsequent suit.[16] Under O. 21, R. 103, Civil Procedure Code, the party against whom an order for possession is made under O. 21, R. 101, may institute a suit to establish his right to *present possession* of the property but, on his failing to do so, the order becomes final.[17] The suit contemplated by O. 21, R. 103, Civil Procedure Code, is not confined to a suit for possession of property; it is a suit to *establish* a right which the plaintiff claims to the present possession of property. Even if such a suit is brought on basis of a *title,* it must be brought within one year of the date of the adverse order.[18] The law provides *ut sit finis litium* that a person defeated in claim proceedings shall not ask for the same relief that was denied him in those proceedings, which are summary except in suit filed within a year of the order.[19]

*Illustrations.*

(1) In *Ganpat Rai* v. *Husain Begum*,[20] the plaintiff's father was resisted in attempting in execution to get present possession of a house that he had purchased in Court-auction and an order was passed against him. *Held,* that the failure of the auction-purchaser to sue within one year under Art. 11-A was fatal to his suit for separation and present possession of a share of the same property by virtue of his possession.[20]

(2) An order for partition of joint family property cannot be passed in execution proceedings, and, therefore, a subsequent suit for that relief is not barred either by S. 47, C. P. Code (S. 244 of C. P. Code, 1882), or by failure to appeal against an order made under O. 21, R. 95 (old S. 318).[21] This case, however, did not deal with the application of Art. 11-A.

(3) In *Bhimappa* v. *Irappa*,[22] a purchaser at a Court-sale applied for removal of obstruction in taking possession. *Held,* that a suit, brought more than a year after the rejection of his application, in the form of a suit for partition was in substance a suit for possession of that very property under the self-same right covered by the order in miscellaneous proceedings, and was consequently barred under Art. 11-A.

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[15] *Ambika Charan* v. *Ram Prosad,* (1925) 90 I.C. 575=1926 Cal. 377.

[16] *Shanmugam Pillai* v. *Panchali Ammal,* (1926) 95 I.C. 209 (211)=1926 Mad. 683=49 Mad. 596=50 M.L.J. 681.

[17] *Ibid.*

[18] *Lakshman* v. *Dattatraya,* 53 Bom. 668=1929 Bom. 379=120 I.C. 362=31 Bom. L. R. 765.

[19] *Shanmugam Pillai* v. *Panchali Ammal,* (1926) 95 I.C. 209 (211).

[20] 60 I.C. 905=19 A.L.J. 53.

[21] *Yelumalai* v. *Srinivasa,* 29 Mad. 296; cf. 60 I.C. 905=19 A.L.J. 53, *supra.*

[22] 26 Bom. 146=3 Bom. L. R. 594; cf. *Shanmugam* v. *Panchali,* 95 I.C. 209.

(4) Where the plaintiff's **suit is not** one **under** the provisions of **O. 21, R. 103,** C. P. Code, but is based on an entirely different cause of action, it is not governed by Art. 11-A of Schedule, and is consequently not barred if not brought within one year of date of order.[23]

(5) Where the decree-holder got possession, and was then **dispossessed by** reason of an **order passed under S. 332,** C. P. Code, 1882, *held,* that the **suit** brought **for possession** of immoveable property after establishment of title was not governed by Art. 120, but by Art. 142, under which the period of limitation is twelve years.[24]

(6) Where the plaintiff unsuccessfully obstructed to delivery of possession to defendant against the latter's tenant under a decree on the basis of an arbitration award, and subsequently the plaintiff **sued for possession and for declaration that the decree on basis of award was collusive and void,** *held,* that the suit did not fall under Art. 11-A, Limitation Act, inasmuch as it was not one to establish the plaintiff's right to the present possession of the property which he claimed in the execution proceedings, and was not therefore barred.[25]

(7) If an execution purchaser has no cause of action for being put in actual possession, and his application is dismissed under O. 21, R. 99 a **suit to obtain actual possession** must be brought within one year of date of order, under Art. 11-A.[26]

(8) Where an objection under S. 335, Civil Procedure Code, 1882, was rejected, the objector was held not precluded by Art. 11-A, from instituting **a suit to enforce his mortgage lien** over the property comprised in the order rejecting the application, more than a year after the date of the order.[27]

(9) Where the plaintiff made an application under O. 21, R. 100, Civil Procedure Code, and that application was dismissed, but the plaintiff was **actually dispossessed** by the defendants long **after the date of the order** dismissing the application and the plaintiff instituted a suit for establishing his title and for recovery of possession, *held,* that the suit was governed by Art. 142, and not by Art. 11-A, Limitation Act.[28]

(10) Similarly, where plaintiff filed an application under O. 21, R. 100, for restoration of possession, and the application having failed, he sued for possession on basis of a subsequent dispossession, the suit was held not governed by Art. 11-A of the First Schedule.[29]

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[23] *Ambika Charan* v. *Ram Prosad,* (1925) 90 I.C. 575=1926 Cal. 377=42 C.L.J. 578=30 C.W.N. 163.

[24] *Maindi Sardar* v. *Akoor Chandra,* (1912) 14 I.C. 92=16 C.W.N. 971.

[25] *Rukmabai Datusa* v. *Fakirsa Hanmantsa,* (1927) 101 I.C. 40=29 Bom.L.R. 230=51 Bom. 158=1927 Bom. 184.

[26] *Baldeo* v. *Kanhaiya Lal,* 16 N.L.R. 103=58 I.C. 21=24 C.W.N. 1001 (P.C.) (*Held,* that the important thing is to see what was asked for in the claim proceeding, and what is asked for in the present suit).

[27] *Bhiku* v. *Shujat Ali,* (1901) 29 Cal. 25.

[28] *Satyanarain Mullick* v. *Jinsi Sah,* (1929), 117 I.C. 634=1929 Pat. 553=10 P.L.T. 872.

[29] *Pahal Ghorai* v. *Fazal-ud-din,* (1923) 76 I.C. 407=1924 Cal. 97=38 C.L.J. 150.

**Proceeding under O. 21, R. 100.**

1038. An order in proceeding under O. 21, R. 100 is not conclusive, but is subject to the right of the person aggrieved to bring a suit.[30] But, the right to apply under O. 21, R. 100 does not stand on the same footing as a right to maintain a suit, if the application under O. 21, R. 100 is dismissed.[31] If the application for restoration of possession is dismissed on the ground that the plaintiff was in possession of the disputed plot of land, the plaintiff is not under any necessity to go to a Civil Court for the useless formality of asking for confirmation of possession of the property, when, as a matter of fact, he remains in possession thereof. His suit based on a subsequent dispossession would not be governed by Art. 11-A, Limitation Act.[32] All that the applicant has to establish in a proceeding under O. 21, R. 100 is that he was possessed of the property on his own account or on account of some other person than the judgment-debtor; but if he is compelled to institute a suit he has to establish the right which he claims to the present possession of the property. The question is not solved by a reference to the provisions of O. 21, R. 103 of the Code.[33] An application under O. 21, R. 100 is not an application in execution proceedings, but is an original matter in the nature of a suit, and O. 9, R. 4 would apply by force of S. 141 to the original matters in nature of suits.[34]

**Applicability of O. 21, R. 103.**

1039. The **Allahabad Full Bench** decision in *Bohra Sobha Ram* v. *Tursi Ram,*[35] has held that

> "there can be no doubt that after an auction-sale has taken place and it has been confirmed, the property vests in the auction-purchaser. The auction-purchaser can obtain delivery of possession against his judgment-debtor. For this remedy is provided for under the Code. If, however, there is some person other than the judgment-debtor, who is not his representative and not holding the property on his behalf and who resists or obstructs his possession there are two remedies open to the auction-purchaser, namely, either to bring a regular suit for possession against that person, or to have recourse to a summary remedy by way of an application as provided in O. 21, R. 97.[36] It is well-settled that the auction-purchaser is not bound to have recourse to the second remedy. It is open

**Summary remedy optional.**

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[30] *Hari Charan Ghosh* v. *Manmatha Nath Sen,* 19 I.C. 683=41 Cal. 1=18 C.W.N. 343; also see and cf. *Pahal Ghorai* v. *Fazal-ud-din,* 76 I.C. 407=1924 Cal. 97=38 C.L.J. 150 (Suit based on a subsequent dispossession not governed by Art. 11-A).

[31] *Sheonandan* v. *Debi Lal,* (1923) 71 I.C. 484=4 P.L.T. 93=1923 Pat. 239=2 Pat. 372=1 P.L.R. 134.

[32] *Pahal Ghorai* v. *Fazal-ud-din,* (1923) 76 I.C. 407=1924 Cal. 97=38 C.L.J. 150.

[33] *Sheonandan* v. *Debi Lal,* (1923) 71 I.C. 484 (486).

[34] *Ibid.*

[35] (1924) 83 I.C. 923=46 All. 693=22 A.L.J. 626 (F.B.).

[36] Per Sulaiman, J., in 83 I.C. 923 (924, 925) (F.B.).

to him to do so if he wants to save time. Of course if he does and fails then his remedy to bring a regular suit is curtailed and the period of time is prescribed by Art. 11-A of the Limitation Act."[37]

The main questions, therefore, are whether there was or was not an application made under O. 21, R. 97, and an order passed under R. 99, rejecting the application.[38] Where there is no application by the decree-holder there can be no order under O. 21, R. 100, Civil Procedure Code, and the period of one year cannot commence to run against the decree-holder.[39]

In this case, the plaintiff having obtained a decree in a suit for sale on a mortgage, himself became the auction-purchaser. He made an application alleging that the judgment-debtor's sons were in possession on his behalf. But the Court found that they were in possession on their own behalf. The order dismissing the application under O. 21, R. 95, Civil Procedure Code, could not be held to fall under R. 99, and Art. 11-A was held inapplicable; as the order in question would not be conclusive under O. 21, R. 103, Civil Procedure Code.

**Suit for present possession.**

**1040.** In *Bhimappa* v. *Irappa,*[40] this article was applied to a suit for partition which was in substance a suit for possession of the property covered by the order in miscellaneous proceedings. The plaintiff had purchased the interest of a coparcener, and became entitled to joint possession with the rest of the family members. He had a right of present possession and could proceed under S. 335, Civil Procedure Code, 1882. But the case would be different where the purchase did not confer a right to present possession. The **Madras High Court** holds that the alienee from a coparcener in a joint Hindu family is not entitled to possession of the alienor's share as a tenant in common. His only right is to obtain by partition the share to which the alienor was entitled.[41] A purchaser has only an equity as against the other members of the coparcenary to work out his interests by a suit for general partition.[42] Such suits with a right to obtain relief by way of partition will not be governed by Art. 11-A.[43] This article does not apply unless the **right to present possession** is asserted **at the time of the claim and of the suit.**[44]

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[37] *Bohra Sobha Ram* v. *Tursi Ram,* (1924) 83 I.C. 923 (924, 925) (F.B.).

[38] *Ibid.*

[39] *Milkhi Ram* v. *Basant Singh,* (1931) 132 I.C. 844 (2)=1931 Lah. 686.

[40] *See* S. 1037; Illustration (3), *ante,* 26 Bom. 146=3 Bom. L. R. 594.

[41] *Kota Balbhadra* v. *Khetra Doss,* (1917) 37 I.C. 168=31 M.L.J. 275=1917 M.W.N. 149=4 L.W. 99; Relied on *Nanjaya Mudali* v. *Shanmuga,* 38 Mad. 684=22 I.C. 555=26 M.L.J. 576; also see *Suraj Bunsi* v. *Sheo Prosad,* 5 Cal. 148=6 I.A. 88=4 C.L.R. 226 (P.C.) and *Hardi Narain* v. *Ruder Perkash,* 10 Cal. 626 (637)=11 I.A. 26 (P.C.).

**Person against whom suit is brought.**

The person against whom suit is brought must be the same, not a person who was not a party to the claim proceeding respecting present possession of the property claimed in the order.[45] The order in the claim proceeding would not operate to conclude the right of the claimant. A plaintiff though a *benamidar* was entitled to sue as the person against whom the order was made under S. 335, Civil Procedure Code.[46]

**1041. THE DATE OF THE ORDER.**—Art. 11-A does not contemplate computation of the period of limitation from the date of any order passed in revision.[47] However, time spent in revision proceedings may, under proper circumstances, be excluded under S. 14 of the Limitation Act.[48] In *Venugopal* v. *Venkatasubbiah,*[49] the word "order" was construed as meaning the only subsisting order in the case, which is the order passed on appeal. But, it must be the decision passed in a competent appeal. The *obiter dicta* in that case as to the decision on revision interfering with the original decision, being on the same footing as the decision passed in a competent appeal, was not agreed to by the Nagpur Judicial Commissioner's Court in *Laxmandas* v. *Chunnilal.*[50] The power exercised in revision is entirely discretionary with the High Court, and is limited. When the High Court declines to exercise this power, it cannot be said that the order rejecting a petition for revision is the only subsisting order in the case, like the appellate Court's order dismissing the appeal.[1]

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42. *Subba Goundan* v. *Krishnamachari,* 1922 Mad. 112=45 Mad. 449 =68 I.C. 869=42 M.L.J. 372.

43. *Shanmugam* v. *Panchali,* 95 I.C. 209=49 Mad. 596=1926 Mad. 683.

44. *Rukhmabai* v. *Fakirsa,* 51 Bom. 158=1927 Bom. 184; also see *Ambika* v. *Ram Prosad,* (1925) 90 I.C. 575=1926 Cal. 377.

45. *Aiyyam* v. *Poongavanam,* 18 M.L.J. 464.

46. *Venkatachala* v. *Subramania,* (1910) 8 I.C. 264 (Mad.).

47. *Laxmandas* v. *Chunnilal,* 1931 Nag. 17=130 I.C. 145=27 N.L.R. 251.

48. *Ibid.,* 1931 Nag. 17=130 I.C. 145; Referred in *Appa Row* v. *Murala,* (1912) 17 I.C. 593; *Hamida Bibi* v. *Fatima,* (1918) 45 I.C. 991.

49. (1916) 39 Mad. 1196=28 I.C. 367.

50. 1931 Nag. 17=130 I.C. 145=27 N.L.R. 251.

1. *Laxmandas* v. *Chunnilal,* 1931 Nag. 17; also see S. 1030, *ante,* "starting point".

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 12. | To set aside any of the following sales:—<br>(*a*) sale in execution of a decree of a Civil Court;<br>(*b*) sale in pursuance of a decree or order of a collector or other officer of revenue;<br>(*c*) sale for arrears of Government revenue, or for any demand recoverable as such arrears;<br>(*d*) sale of a Patni Taluq sold for current arrears of rent.<br>*Explanation.*—In this article "Patni" includes any intermediate tenure saleable for current arrears of rent. | One year. | When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought. |

## SYNOPSIS.

1042. Corresponding provisions.
1043-1046. Scope of Art. 12.
1043. Binding sales.
1044. Parties bound.
1045. Strangers not affected.
1046. No interest of judgment-debtors.
1047. Void sales.
*Illustrations.*
1048-1052. Minor not properly represented.
1048. *Privy Council.*
1049. *Bombay.*
1050. *Calcutta.*
1051. *Lahore.*
1052. *Madras.*
1053. Plaintiff, party in a different capacity.
1054. Court without jurisdiction.
1054-A. *Illustrations.*
1055-1060. Decree obtained fraudulently.
1055. Privy Council.
1056. Calcutta.
1057. Madras.
1058. Allahabad.
1059. Patna.
1060. Bombay.
1061-1068. Voidable sales.
1062. Privy Council.

1063. Allahabad.
1064. Bombay.
1065. Calcutta.
1066. Madras.
1067. Lahore.
1068. Oudh.
1069. Suit to set aside sales.
1069. Consequential relief.
1070. Suit for redemption.
1071. Suit by auction-purchaser.
1072. Suit for possession.
1073. Article inapplicable to defence.
1074. Commencement of Limitation.
1075. Clause B.
1076. Clause C.
1077. Clause D.

## NOTES.

**1042. CORRESPONDING PROVISIONS.**—This article is the same as Art. 12 of Act XV of 1877.

The corresponding article in Act IX of 1871 was Art. 14, Sch. II of that Act.

In Act XIV of 1859, S. 1, Cl. (3) was the provision corresponding to this article.

**1043. SCOPE OF Art. 12.**—This article refers to certain public sales, and is intended to protect the purchaser after the lapse of one year from the confirmation of sale, or other official proceedings to which the law gives a particular conclusive effect if no suit is brought.

**Binding sales.**

Article 12 refers to orders and proceedings of a public functionary, to which by law is given a particular effect in favour of one person against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside.[2] When an order does not fall within the authority of an official who makes it, it is legally a nullity, and therefore need not be set aside.[3]

The words "*set aside*" are inapplicable to the case of a sale which is null and void.[4] That which is a nullity cannot, from its very nature, be set aside.[5]

Where the plaintiff admits the validity of the sale, and does not seek to set it aside, Art. 12 cannot apply. For example, where the plaintiff, a puisne mortgagee, did not seek to set aside the sale held at the instance of a prior mortgagee, but only applied to Court for payment of certain amount out of the sale proceeds, the suit was held not to fall under this article.[6]

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[2] *Shivaji Yesji Chawan* v. *The Collector,* (1887) 11 Bom. 429.

[3] *Ibid.*

[4] *Shirin Begum* v. *Agha Ali Khan,* (1895) 18 All. 141=16 A.W.N. (1896) 9.

[5] *Shivaji Yesji* v. *The Collector,* (1887) 11 Bom. 429.

[6] *Sivarama* v. *Subramanya,* 9 Mad. 57.

**1044.** Article 12 (*a*) is not applicable to a case in which the plaintiff was not a party to or bound by the sale.[7] The ground of decision appears to be that Art. 12 is inapplicable to suits in which dispossession is the cause of action, since dispossession may not have taken place till sometime after the confirmation of the sale.[8]

**Parties bound.**

A person cannot be bound by a suit and sale to which he was neither a party either in person or by representation.[9] Where an heir of a deceased debtor is not made a party to a suit brought by a creditor of the deceased against his estate, the Court has no jurisdiction to sell, in execution of the decree passed against the deceased's estate, the property inherited by the heir from the deceased. As against the heir the decree and the sale are a nullity.[10] If the transaction in question cannot affect the title of the plaintiff, it is not necessary for him to have the sale set aside.[11] Where a sale is in effect a nullity, no question of limitation under Art. 12 does arise.[12]

The article does not apply to suits to set aside a sale held in execution of a decree, where the plaintiff does not sue as one who would have been bound by the sale if the suit had not been brought,[13] but he is suing in order to obtain a declaration that he was not bound by it, the decree under which the sale was held having been fraudulent and collusive[14]; or, he is suing that he is not bound by the proceedings in which he had not been properly represented.[15] Where an auction sale takes place, there are always certain people who are bound by it to this extent that if they wish to avoid it they must sue directly to have it set aside; and there are also persons who may simply ignore the sale with reference to this.[16] If plaintiff objectors were not parties to the decree or the execution, and in no way claim under any of those parties, and their original title to the property in suit is not denied, Art. 12 does not apply at all.[17] Such a suit would be governed by Art. 144, as the plaintiff being entitled to ignore the sale altogether, would not be governed by Art. 12 of Sch. I, Limitation Act.[18]

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[7] *Kader Hussain* v. *Hussain Saheb,* (1896) 20 Mad. 118=7 M.L.J. 52 (F.B.); Relied on 5 Mad. 54; 7 Mad. 512; 9 Mad. 460; 5 All. 614; 11 Bom. 119 and 11 Bom. 130.

[8] *Kader Hussain* v. *Hussain Saheb,* (1896) 20 Mad. 118 (F.B.), *supra.*

[9] *Baswantapa* v. *Banu,* (1884) 9 Bom. 86.

[10] *Premraj* v. *Javarmal,* (1913) 18 I.C. 381 (Bom.).

[11] *Kader Hussain* v. *Hussain Saheb,* 20 Mad. 118 (F.B.) (O. R. *Suryanna* v. *Durgi,* 7 Mad. 258).

[12] *Bulaki Das* v. *Kesari,* 1928 All. 363=50 All. 686=113 I.C. 725=26 A.L.J. 716; Relied on *Thakur Brahma* v. *Jiban Ram,* (1913) 41 Cal. 590=21 I.C. 936=41 I.A. 38 (P.C.); also see *Joggeswar* v. *Jhapal,* 82 I.C. 848=51 Cal. 224=1924 Cal. 638.

[13] *Parekh Ranchor* v. *Bai Vakhat,* (1886) 11 Bom. 119 (Art. 95 applied).

[14] *Ibid.,* 11 Bom. 119.

[15] *Vishnu Keshav* v. *Ramchandra Bhaskar,* (1886) 11 Bom. 130; Relied on 5 Mad. 54.

**Strangers not affected.**

**1045.** Article 12 applies only to parties to the suit or to the execution proceedings in question, and not to strangers.[19] A stranger whose property is sold behind his back without his authority does not need to have his sale set aside at all.[20] A third party is not bound to go and urge his claim to a property advertised for sale in execution, or to sue within one year from the date of delivery to the auction-purchaser.[21]

**The Lahore High Court** has held that Art. 12 refers to suits brought by parties to the decree which resulted in the sale, or by parties to the proceedings in which the sale took place, or by persons who claim through them.[22] It does not apply where a suit is instituted by persons who are not bound by the sale, that is, where a suit is instituted by a stranger to the sale proceedings or by plaintiffs who were never validly made parties to the execution proceedings.[23]

**The Oudh Chief Court** takes a similar view:

> "A Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record. As against such persons decrees and sales would be a nullity and might be disregarded without any proceedings being taken to set them aside."[24]

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[16] *Saif-ud-din* v. *Hans Raj,* 15 P.R. 1912=11 I.C. 76=203 P.L.R. 1911=252 P.W.R. 1911.

[17] *Ibid.,* 15 P.R. 1912; Followed in *Azim Khan* v. *Karim,* 71 I.C. 822 (Lah.).

[18] *Azim Khan* v. *Karim,* 71 I.C. 822 (Lah.).

[19] *Ma Nge Ma* v. *Ma Shwe Hnit,* (1916) 36 I.C. 3 (U.B.); Relied on *Vishnu Keshav* v. *Ramchandra,* (1887) 11 Bom. 130.

[20] *Ahmed Ally* v. *Maung Shwe Thin,* 1 L.B.R. 53; *Narasimha Naidu* v. *Ramasami,* (1895) 18 Mad. 478; also see *Hajee Goya Kaka* v. *Zaccheus,* 4 L.B.R. 40 and *Brij Mohan* v. *Munni Bibi,* (1912) 13 I.C. 803=14 Oudh Cas. 343.

[21] *Nito Kalee Debee* v. *Kripanath Roy,* (1867) 8 W.R. 358.

[22] *Tara Chand* v. *Abdul Ahad,* (1922) 67 I.C. 894 (Lah.); also see *Azim Khan* v. *Karim,* 71 I.C. 822=1924 Lah. 396.

[23] *Alam Din* v. *Allahdad,* (1922) 5 L.L.J. 44; also see *Hira Singh* v. *Ghulam Qadir,* 113 P.R. 1918; Relied on *Purno Chandra* v. *Bejoy Chand,* 18 C.L.J. 18.

[24] *Luchmi Narain* v. *Nazeer Fatima,* (1926) 94 I.C. 927; Relied on 32 Cal. 296 and 57 I.C. 526.

**No interest of judgment-debtor.**

1046. "In judicial sales in execution of decrees of Court there is ordinarily no warranty of title of the judgment-debtor in the property sold on the part of the decree-holder or of the officer conducting the sales."[25] Accordingly, when the property of a judgment-debtor is sold in execution of a decree against him, the purchaser can acquire no higher title than the judgment-debtor would be competent to convey were he selling the property privately.[26] It follows that where the judgment-debtors have no interest in the property in suit, the purchaser takes no higher title than they could have conveyed to him by private sale, that is to say, he takes nothing.[27] And, the true owner of the property may treat the erroneous sale as a nullity.[28] And he would not be barred under Art. 12, from recovering possession of his property at any time within 12 years from the date when he lost possession. The general rule of 12 years' limitation applies to a suit to recover possession of property sold in execution of a decree against a judgment-debtor to whom the property was wrongly alleged to belong.[29]

1047. **VOID SALES.**—A suit to set aside a sale is a very different thing from a declaration that the sale is null and void *ab initio*.[30] The former relief assumes that the Court had power to sell while the latter denies the existence of that power.[31]

"Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference."[32]

When an order does not fall within the authority of an official who makes it, it is legally a nullity, and therefore need not be set aside.[33] Article 12 was held inapplicable to a suit by a reversioner to establish his title to property sold in execution of decree obtained against a widow representative of her deceased husband's estate; for although the plaintiff sued to set aside a sale held in execution of a decree, he did so not as one who would have been bound by the sale if the suit had not been brought but in order to obtain a declaration that he was not bound by it, the decree under which the sale was held having been fraudulent and collusive.[34]

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[25] *Raja Enaet Hossain* v. *Girdhari*, (1869) 12 M.I.A. 366 (P.C.).

[26] *Sukhdeo* v. *Jumna*, (1900) 23 All. 60.

[27] *Jawala Sahai* v. *Masiat Khan*, (1904) 26 All. 346 (353).

[28] *Ibid.*

[29] *Muddun Mohun Tewaree* v. *Joy Koomaree Bibi*, (1866) 6 W.R. 296.

[30] *Shirin Begum* v. *Agha Ali Khan*, (1895) 18 All. 141=16 A.W.N. (1896) 91.

[31] *Ibid.*

[32] Per Lord Hobhouse, in *Moti Lal* v. *Karrabuldin*, (1897) 25 Cal. 179 (186) (P.C.).

[33] *Shivaji Yesji Chawan* v. *The Collector*, (1887) 11 Bom. 429.

[34] *Parekh Ranchor* v. *Bai Vakhat*, (1886) 11 Bom. 119. *See* **Ss. 1055-1060: "Decree obtained fraudulently".**

*Illustrations.*

**No party to decree.**

(1) Where *V* bought lands from *A*, whose husband *B*, deceased, acquired them at a Court-sale, sued *S* in ejectment in 1879; *S* pleaded limitation under Art. 12; but, *held*, that as *A* was no party to the decree or the execution proceedings under which *B* purchased, it was not necessary for *V* to set aside the sale to *B* in this suit.[35]

(2) A suit brought in 1892 to recover possession of the plaintiff's share of land sold by mistake in execution of a decree against his uncle in 1881 was not barred by limitation under Art. 12.[36]

(3) A suit for setting aside sale of immoveable property of the plaintiff which had been sold in execution of a decree as belonging to another, and for possession of such property is one to which twelve years' limitation applies.[37]

(4) Similarly, a suit to recover possession of certain shares of a tenure which had been wrongly taken possession of by defendant under cover of a purchase at a sale in execution, was held not to be barred by limitation, by one year's rule under Art. 12.[38]

(5) Where a decree against some of several heirs of a deceased Muhammadan was passed, but the daughter of the deceased was not made a party to the suit: *held*, that her interest in the property was not affected by the decree and did not pass under the sale.[39]

**Property illegally sold.**

(6) Where plaintiff was dispossessed under a wrong certificate of sale, which was not conformable to, or warranted by the sale itself, it was held that a suit for restoration of property illegally sold in execution could be brought within twelve years under Art. 144, Limitation Act.[40]

(7) Where the decree-holder got certain property inserted in the sale-certificate in excess of that which had been sold, their Lordships of the Privy Council refused all effect to the confirmation of the sale and the sale-certificate and all subsequent proceedings of the auction-purchaser. The sale of the excess share being a nullity, no question of limitation could arise under Art. 12, Limitation Act.[41]

(8) A sale of an aboriginal tenure, contrary to provisions of Bengal Tenancy Act, is a nullity, and an application to set aside such a sale is not governed by Art. 12 of the Limitation Act.[42]

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35. *Venkata Narasiah* v. *Subbamma,* 4 Mad. 178.

36. *Kader Husain* v. *Hossein Saheb,* (1895) 20 Mad. 118=7 M.L.J. 52 (F.B.).

37. *Nathu* v. *Badri Das,* (1888) 5 All. 614=3 A.W.N. (1883) 165.

38. *Gedroo Sircar* v. *Beharee Lal,* (1873) 20 W.R. 165.

39. *Mirkha Imamkha* v. *Bhagirathi,* (1919) 51 I.C. 18=43 Bom. 412=21 B.L.R. 329; also see *Lala Miya* v. *Manu Bibi,* (1923) 73 I.C. 246=1923 Bom. 411=47 Bom. 712.

40. *Bheen Goyalee* v. *Khoobun,* (1872) 17 W.R. 429; also see *Muhammad Baksh* v. *Balkishan,* (1915) 29 I.C. 731 (Punj.).

41. *Thakur Brahma* v. *Jiban Ram,* (1913) 41 Cal. 590=21 I.C. 936 =41 I.A. 38 (P.C.).

42. *Jogeshwar* v. *Jhapal,* (1924) 82 I.C. 848=51 Cal. 224=1924 Cal. 638=28 C.W.N. 536.

(9) When the sale under the Sales Act is a nullity, there is no need to set it aside, and S. 33 of the Sales Act and Art. 12 of the Limitation Act are not applicable to such a sale.[43]

(10) When notice has not been served under S. 10 of the Public Demands Recovery Act, 1895, and a suit is brought to set aside the sale and to recover possession of the property sold, Art. 142 and not Art. 12 of the Limitation Act is applicable.[44]

(11) Where certain immoveable property was sold as belonging to the judgment-debtor, which in fact belonged to a third person, who had no notice of the sale, it was held that the true owner of the property so sold was competent to treat the sale a nullity, and to bring his suit for recovery of possession at any time within twelve years from the date when he lost possession.[45]

**Plaintiff's interest not sold.**

(12) If plaintiff was not the judgment-debtor, but his right, title and interest have been affected under colour of sale of the judgment-debtor's property, the plaintiff is not bound to bring his suit under Art. 12, but he can treat the excess sale as of no validity.[46]

**Two judicial sales of same property.**

(13) Where after a judicial sale of the property in execution of a decree the same property was sold in execution of another decree, *held,* that after the first sale there had been no interest left to be sold to another purchaser, so that the second purchaser had no title against the first. Consequently, there was no occasion for the setting aside the second sale within the meaning of Art. 12, Limitation Act.[47] Similarly, where a tenure had once been sold for its own arrears, it could not be again put up to sale for the arrears due on account of a previous period.[48]

(14) Art. 12 does not apply to a suit to recover property sold ostensibly in execution of a decree, but the sale of which was in fact not authorized by the decree under which the said property purported to have been sold.[49]

(15) If a decree under which the sale is held was passed against the *karnavan* of a *tarwad,* as such, the other members being bound by the sale must sue within a year, under Art. 12, Limitation Act.[50]

(16) A suit to recover land alleged to have been sold under the provisions of the Rent Recovery Act, could not proceed without setting aside the sale. Consequently, Art. 12 would apply to such a suit.[1]

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[43] *Ahmed Yar Khan* v. *Dina Nath Sadhu Khan,* 1925 Cal. 1148=90 I.C. 40=42 C.L.J. 69.

[44] *Purna Chandra* v. *Dinabandhu,* (1907) 34 Cal. 811=11 C.W.N. 756=5 C.L.J. 696=2 M.L.T. 371.

[45] *Jowala Sahai* v. *Masiat Khan,* (1904) 26 All. 346; Reld. on *Nathu* v. *Badri Das,* (1883) 5 All. 614.

[46] *Sharafutunnissa* v. *Lachmi,* (1875) 7 A.H.C. 288; *Mahomed Baksh* v. *Mahomed Hossein,* (1868) 3 Agra H. C. 171; *Tonoo* v. *Mohesur,* (1875) 24 W.R. 302; *Mir Khan* v. *Kadam,* 1881 A.W.N. 135.

[47] *Moti Lal* v. *Karrabuldin,* (1897) 25 Cal. 179 (P.C.).

[48] *Prangour Mozoomdar* v. *Himanta Kumari,* (1886) 12 Cal. 597.

[49] *Nazar Ali* v. *Kedar Nath,* (1897) 19 All. 308=17 A.W.N. (1897) 71.

[50] *Haji and Mussa* v. *Atharaman,* 7 Mad. 512.

[1] *Ragavendra* v. *Karuppa,* 20 Mad. 33=6 M.L.J. 278.

### 1048-1052. MINOR NOT PROPERLY REPRESENTED.

**Privy Council.**

—Where a minor had not been properly represented in the litigation, it was held by their Lordships of the **Privy Council** that a suit lay to set aside the decree and sales which had taken place in execution of them as to which there was an allegation of fraud and breach of trust.[2]

**(i) Bombay.**

1049. The **Bombay High Court** has held in *Vishnu Keshav* v. *Ram Chandra,*[3] that where a creditor obtained a money decree against a minor, whose estate was under administration of a collector, in a suit in which he was only represented by his mother, and guardian, the minor suing one year after attaining majority to recover property sold in execution of the decree obtained against him during minority, was held not barred under Art. 12, which did not apply to the suit. Similar view was taken in *Daji Himat* v. *Dhirajram Sadaram,*[4] where *P* sued, in 1881, to recover possession of property sold during his minority, in 1870, and the decree was passed against *P,* in 1869, without proper representation, it was held that Art. 12 did not apply as the minor was not bound by that decree, or by the sale in execution.

**(ii) Calcutta.**

1050. The **Calcutta High Court** held in the case of *Narsingh Narain* v. *Johi Mistry,*[5] that the proceedings were a nullity so far as the minor was concerned, where a married woman was appointed as the guardian of the minor contrary to the provisions of S. 457, old Code. In *Dinabandhu* v. *Mashuda,*[6] where the minors were not represented, the decree was held "absolutely null and void". A decree against a person, who is neither a party nor is properly represented on the record, is a nullity and may be disregarded without any proceeding to set it aside.[7] A knowledge or ignorance of the parties as to minority does not affect the position in any way.[8]

**(iii) Lahore.**

1051. The **Punjab Chief Court** has followed the above authorities in the case of *Hira Singh* v. *Ghulam Qadir.*[9] Where in execution of an *ex parte* decree against a minor, who was not properly represented in the suit, certain house property was put to auction, and on attaining majority he sued to recover possession of the property from the auction-purchaser, it was held that the decree was null and void and the Court had no jurisdiction to sell his property, and that the auction-purchaser was not protected by the fact that he was not a party to the suit but a stranger. Article 12 had no application to such cases, and the plaintiff was entitled to ignore the sale. The **Lahore High Court** has likewise held that a suit by the minor sons of a judgment-debtor, after attaining his majority, to set aside an auction-sale on the ground that they were not properly represented, and the guardian appointed had collusively or negligently failed to protect their interest, was not governed by Art. 12, but by Art. 144 of the Limitation Act.[10]

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[2] *Rashid-un-nissa* v. *Muhammad Ismail,* (1909) 31 All. 572=3 I.C. 864=36 I.A. 168 (P.C.); also see *Khirajmal* v. *Diam,* (1904) 32 Cal. 296 =32 I.A. 23 (P.C.).

[3] (1887) 11 Bom. 130.

[4] (1887) 12 Bom. 18.

[5] 13 I.C. 414=15 C.L.J. 3.

[6] 17 I.C. 263=10 C.L.J. 318; cf. *Narendra Chandra* v. *Jogendra Narain,* 27 I.C. 139=20 C.L.J. 469=19 C.W.N. 537.

[7] *Purna Chandra* v. *Mahatap Bahadur,* (1913) 18 I.C. 859 (Cal.).

[8] *Ibid.*

[9] (1918) 48 I.C. 399=113 P.R. 1918.

**(iv) Madras.**

**1052.** In a Madras case, where a minor widow sued for declaration that she was brought on record as legal representative of her deceased husband, judgment-debtor, and the Court kept in ignorance of her minority, and, consequently the sale in execution was a nullity, it was held that her suit was not barred under Art. 12, or Art. 166 of Sch. I of the Limitation Act.[11] On the other hand it has been held that where a decree has been made against a minor duly represented by his guardian, and the minor attaining his majority seeks to set aside the decree by a separate suit, he can only succeed on proof of fraud or collusion on the part of his guardian, in a suit instituted within one year of the confirmation of sale as provided in Art. 12, Sch. I, Limitation Act.[12] In *Ganesha* v. *Tuljaram*,[13] a *guardian ad litem* acting in a different capacity adverse to minor's interests was held not to represent them.

**Plaintiff party in a different capacity.**

**1053.** If plaintiff was a party in a different capacity, his suit will not be governed by Art. 12.[14] Where after the death of the widow of *K*, the plaintiff sued as the heir of *K*, to recover certain immoveable property alleged to have been granted to the widow for life by *K* for her maintenance; and in a previous suit he was sued as representing the estate of the widow, and the property in question was sold in execution of that decree, held that a suit to set aside the execution sale was not necessary under Art. 12, as the present plaintiff was not a party *in her own character* to the suit in execution of the decree in which the property was sold.[15] In *Rupa Jagshet* v. *Krishnaji Govind*,[16] certain lands were sold to the first defendant in execution of a decree against the plaintiff as the representative of his deceased father and brother. The plaintiff sued to recover them as one of the donees from a former owner of lands; and it was held that the plaintiff's suit was not to set aside the sale, but was one as a trustee of an endowment to recover the property to which the limitation of 12 years was applicable.

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[10] *Alam Din* v. *Allahdad*, (1922) 67 I.C. 547=1922 Lah. 447=5 Lah. L. J. 44.

[11] *Pasumarti Payidanna* v. *Ganti*, (1915) 29 I.C. 314=38 Mad. 1076 (1081).

[12] *Imam Din* v. *Puran Chand*, (1920) 1 Lah. 27=55 I.C. 833=84 P.L.R. 1920=37 P.W.R. 1920; Reld. in *Sadasheo* v. *Karim*, (1926) 92 I.C. 241=1926 Nag. 267; also see *Seshagiri Rao* v. *Hanumantha*, (1915) 39 Mad. 1031 and *Kuppusami* v. *Kamalammal*, (1920) 39 M.L.J. 375.

[13] (1913) 40 I.A. 132=36 Mad. 295=25 M.L.J. 150 (P.C.); also see *Kavari* v. *Hari Shenoy*, (1916) 3 L.W. 301=34 I.C. 428 (A case of a lunatic).

[14] *Kali* v. *Anandamoni*, (1881) 9 C.L.R. 18.

1054. **COURT WITHOUT JURISDICTION.**—Where the decree under which the sale then impugned took place was passed by a Court which had no jurisdiction, Art. 12 was held inapplicable.[17] When an order does not fall within the authority of an official who makes it, or is otherwise void, it is legally a nullity, and therefore need not be set aside.[18] An order for sale and a sale under such order are *ultra vires*, and nullities when in fact there was no jurisdiction in the Court to make the order.[19] This view of the **Allahabad High Court** is supported by several decisions of the **Calcutta High Court** to the effect that Art. 12 applies only to cases in which a sale would be binding on the plaintiff if not set aside.[20] A Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. It has been noticed already that persons who are not parties to a decree are not bound by it, and ordinarily a sale in execution of a decree does not operate to pass the property of any person who is not bound by the decree.[21] *See* **S. 1043,** *ante.* Where a Court takes proceedings wholly without jurisdiction a defendant, who is not before the Court, can treat them as a nullity, and remain unaffected by them.[22] The point has been fully discussed in *Malkarjun* v. *Narhari*,[23] by their Lordships of the **Privy Council,** where a clear distinction has been drawn between cases where the proceedings in Court amount to a mere *irregularity,* in which case the suit to set aside the voidable sale would have to be dismissed if barred by time under Art. 12 of the Limitation Act, and cases where the Court proceedings being *without jurisdiction,* the sale is a nullity, and Art. 12 would not operate in limitation of a suit to set aside the sale. Where the non-compliance with the statutory provisions involves no failure of jurisdiction, the sale to be impeached can be impugned only in a suit instituted within one year from the date mentioned in Art. 12 of the Limitation Act.[24] Execution of a decree by the assignees of the decree without giving notice on the assignor of the decree, as required by O. 21, R. 16, Civil Procedure Code, is not merely irregular but illegal, and a sale held in such execution proceedings is therefore void.[25]

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[15] *Kali* v. *Anandamoni,* (1881) 9 C.L.R. 18.

[16] (1884) 9 Bom. 169.

[17] *Sadagopa* v. *Jamuna Bhai,* 5 Mad. 54; Reversed on another point in 7 Mad. 56.

[18] *Baijnath Sahu* v. *Sital Prasad,* 2 B.L.R. 1 (F.B.); cf. *Raj Chandra* v. *Kinoo Khan,* 8 Cal. 329.

[19] *Balwant Rao* v. *Muhammad Hussain,* (1893) 15 All. 324=13 A.W.N. (1893) 140; also see *Chunni* v. *Lala Ram,* (1893) 16 All. 5=13 A.W.N. (1893) 141.

[20] *Ramlal Moitra* v. *Bama Sundari,* 12 Cal. 307; *Mubaruk Lal* v. *Secretary of State,* 11 Cal. 200 and *Dakhina Churn* v. *Bilas Chander,* 18 Cal. 526.

[21] *Khiaraj Mal* v. *Daim,* (1904) 32 Cal. 296 (312) (P.C.).

[22] *Seshagiri Rao* v. *Tangaturi,* (1916) 32 I.C. 391 (Mad.); Reversed on another point in (1917) 37 I.C. 387 (Mad.).

[23] 25 Bom. 337=27 I.A. 216=2 Bom. L. R. 927=5 C.W.N. 10=10 M.L.J. 368 (P.C.).

### 1054-A. ILLUSTRATIONS.—

**Unauthorised sale.**

(1) Where a Collector had made an unauthorised sale, purporting to act under Act XI of 1859 (Bengal Revenue Sale Law), for a supposed arrear of revenue; and, there was however only an erroneous debit in the Collectorate books against the estate, in excess of the revenue actually assessed upon it chargeable against it, and due from it; *held,* that the Civil Court had jurisdiction to declare the sale void.[26]

(2) Where plaintiff's share of land was sold by mistake in execution of a decree against his uncle, Art. 12 was held no bar to a suit to recover possession of plaintiff's land.[27] The decision in *Suryanna* v. *Durgi*[28] was dissented from.

(3) In a suit on a mortgage-bond, a Small Cause Court has no jurisdiction to make a decree providing; on default of payment, for the sale of immoveable property pledged, and a Civil Court has no jurisdiction to allow the sale in execution of such a decree.[29]

(4) Where a plaintiff sued to recover land alleged to have been sold under the provisions of the Rent Recovery Act, VIII of 1865 (Madras), alleging that the provisions of the Act had not been complied with; *held,* that the sale was not illegal, and the suit could not proceed without setting aside the sale, within one year under Art. 12.[30]

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[24] *Ragavendra Ayyar* v. *Karuppa Goundan,* (1896) 20 Mad. 33=6 M.L.J. 278.

[25] *Umamoyi Dassia* v. *Jatan,* (1927) 105 I.C. 193=54 Cal. 624=1927 Cal. 781 (Where an execution sale is a nullity, no question of limitation arises); also see *Ram Narain Roy* v. *Baij Nath,* (1901) 29 Cal. 36 (42) (Art. 12 applies where judicial sale is null and void *ab initio*).

[26] *Balkishen Das* v. *Simpson,* (1898) 25 Cal. 833=2 C.W.N. 513 =25 I.A. 151 (P.C.).

[27] *Kadar Hussain* v. *Hussain Saheb,* 20 Mad. 118=7 M.L.J. 52 (F.B.).

[28] 7 Mad. 258 (Where Art. 12 was applied to a suit to recover land sold in execution of a decree for arrears of revenue).

[29] *Goondur Lal* v. *Hubeeboonissa,* (1871) 15 W.R. 311.

[30] *Ragavendra Ayyar* v. *Karuppa Goundan,* (1896) 20 Mad. 33=6 M.L.J. 278.

(5) An order for sale and a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made.[31]

(6) Where *M* had a decree against *A* and *B* and *C*, which was assigned to *S*, who executed the decree against the property of *A*: and that property was purchased benami for *B* and *C*, by *S*; it was held that *S* had consequently no right to execute it against the property of *A*. In a suit brought by *A* against *B*, for the purpose of recovering the property, it was held that the benami purchase by the joint judgment-debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself, which was not void, but only voidable and Art. 12 applied to the suit.[32]

(7) Art. 12 does not apply to a suit to recover property sold ostensibly in execution of a decree, but the sale of which was in fact not authorised by the decree under which the said property purported to have been sold.[33]

### 1055. DECREE OBTAINED FRAUDULENTLY.—

**(i) Privy Council.**

Their Lordships of the Privy Council have held that a suit to set aside a decree, and the sale in execution is maintainable, on the ground that the plaintiff had no interest in the land, in respect of which the arrears of rent were alleged to be due, and the decree and sale had been obtained by processes which were fraudulent and void.[34] The attack not being exclusively on the regularity or sufficiency of summons or the proceedings, but on the whole suit in which the decree had been obtained fraudulently.[35] A purchase by a decree-holder who has not obtained permission to bid at an execution sale is neither void nor a nullity but is only to be avoided on the application of the judgment-debtor or some other person interested.[36] In *Malkarjun* v. *Narhari*,[37] their Lordships have distinguished between a total absence of jurisdiction, and an erroneous working out of a valid decree against an estate after its owner's liability is established.

**(ii) Calcutta.**

1056. According to the **Calcutta High Court**, a sale in execution of a fraudulent decree is not void, but voidable.[38] So long as such decree is not successfully impeached as fraudulent the sale thereunder must stand operative.[39] A decree obtained by fraud, collusion or any other unlawful means, is a pronouncement of a Court of Justice, and cannot be treated as waste paper.[40] The only objection that can be made to a decree as being void, or a nullity must be on the ground that it was passed without jurisdiction.[41] Where a decree is passed by a Court which had jurisdiction over the subject-matter of the suit, a plaintiff will not succeed in obtaining any relief in respect of it unless he gets it vacated.[42] A suit for a declaration that a decree and auction-sale thereunder are not binding on the plaintiff, is not a mere declaratory suit but in substance a suit to set aside the decree on the ground of fraud, and is governed by Art. 95 of Sch. I to the Limitation Act.[43] When one of several co-sharers fraudulently contrived to have an estate brought to sale for arrears under Bengal Act XI of 1859, and purchased it in the benami of his son, it was held that another co-sharer aggrieved by the sale could maintain a suit to have the property reconveyed, though the period for a suit to set aside the sale had expired.[44] Where *A* instituted a suit to set aside a sale held under the Public Demands Recovery Act, on the allegation that the defendants, who were his co-sharers, fraudulently suppressed the notice under S. 10 of the Act, and purchased the property in name of their agent, it was held that the suit to set aside the sale was governed not by Art. 12, but either by Art. 95 or Art. 120 of the Limitation Act.[45]

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[31] *Chunni* v. *Lala Ram*, (1893) 16 All. 5=13 A.W.N. (1893) 141.

[32] *Abul Munsoor* v. *Abdool Hamid*, (1876) 2 Cal. 98.

[33] *Nazar Ali* v. *Kedar Nath*, (1897) 19 All. 308=17 A.W.N. (1897) 71; Reld. on 12 Cal. 307; 15 All. 324; 11 Cal. 200; 18 Cal. 526; 11 Cal. 287 and 5 Mad. 54.

[34] (1901) 28 Cal. 475 (P.C.).

[35] (1902) 29 Cal. 395 (P.C.).

[36] *Radhakrishna* v. *Bisheshwar Sahay*, (1922) 67 I.C. 914=1922 P.C. 336=27 C.W.N. 294 (P.C.).

[37] 25 Bom. 337=27 I.A. 216=2 Bom.L.R. 27 (P.C.).

[38] *Rajkumar Sarkel* v. *Rajkumar Mali*, (1916) 33 I.C. 765=20 C.W.N. 659; Relied in *Fazluddin* v. *Khetra*, (1925) 90 I.C. 866=1926 Cal. 167.

**(iii) Madras.**

1057. A similar view is taken by the **Madras High Court.** A suit for the cancellation of sale on the ground of fraud is governed by Art. 95 of the Limitation Act.[46] The absence of notice of sale is a mere irregularity, and does not render the sale null and void.[47] A suit to recover possession of land, sold for arrears of revenue, from the purchaser who was alleged to be party to the fraud is governed by Art. 95 of Sch. I, Limitation Act.[48] Article 12 of the schedule which prescribes a period of one year for suits to set aside sales for arrears of revenue is intended to protect *bona fide* purchasers only.[49]

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[39] *Rajkumar Sarkel* v. *Rajkumar Mali,* (1916) 33 I.C. 765=20 C.W.N. 659.

[40] *Fazluddin Mahammad* v. *Khetra Ghorai,* (1925) 90 I.C. 866=1926 Cal. 167=30 C.W.N. 59.

[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid.*, 90 I.C. 866; also see *Matilal Chakrabutty* v. *Russick Chandra,* (1896) 26 Cal. 326.

[44] *Bhoobun Chunder* v. *Ram Soondur,* (1877) 3 Cal. 300.

[45] *Syamlal Mandal* v. *Nilmony Das,* (1907) 34 Cal. 241=5 C.L.J. 385; Relied on 3 Cal. 300; 6 All. 406; 13 Bom. 221; also see and cf. 6 All. 75 (12 years' rule applied).

[46] *Venkata Suryanarayana* v. *Goluguri,* (1910) 7 I.C. 60=34 Mad. 143=1910 M.W.N. 286.

[47] *Vappu Sitaramayya* v. *Minchula,* (1919) 53 I.C. 257 (Mad.).

[48] *Venkatapathi* v. *Subramanya,* (1886) 9 Mad. 457.

1058. The **Allahabad High Court** is also of the same opinion.

**(iv) Allahabad.**

Where relief is sought on the ground of fraud, the limitation applicable is Art. 95 only, and not any other law of limitation.[50] A suit to set aside a sale in execution proceedings is not to *set aside* an auction sale, but to have it declared that the sale being tainted with fraud cannot affect the rights of the plaintiff in respect of the property sold and is, therefore, not barred by limitation if brought beyond the period of limitation provided for the setting aside of auction-sales.[1]

1059. The **Patna High Court** is in line with other High

**(v) Patna.**

Courts in holding that a suit for recovery of possession of immoveable property, on the ground that the decree on the basis of which the defendants dispossessed the plaintiff was obtained by fraud is governed by Art. 95 of the Limitation Act.[2] In *Rameshwar Narayan* v. *Mahabir Prasad,*[3] it was held that a suit to set aside a sale of a holding held under the provisions of Chhota Nagpur Tenancy Act on the ground of fraud, is not a suit instituted under the provisions of the Act as contemplated by S. 231 of the Act, and consequently the period of limitation applicable to such a suit is not the one provided by that section but the one laid down in Art. 95, and time begins to run from the date on which the fraud becomes known to plaintiff.

1060. In *Bajaji Krishna* v. *Pir Chand,*[4] the **Bombay High**

**(vi) Bombay.**

**Court** has applied Art. 12 to a suit to recover possession of land sold for arrears of Government revenue, or at any rate a sale for arrears of rent recoverable as arrears of revenue. It was observed that the plaintiff, as occupant of the land, was bound by the sale, unless and until it was reversed, and the title of the purchaser at the sale was a perfectly good title until the sale was set aside in due course of law. It was held also that the plaintiff's allegation that the sale took place in consequence of the fraud of the *Inamdar,* would make not Art. 144, but Art. 95 applicable to the case.[5] In *Parekh*

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[49] *Venkatapathi* v. *Subramanya,* (1886) 9 Mad. 457.

[50] *Nath Singh* v. *Jodha Singh,* (1884) 6 All. 406=4 A.W.N. (1884) 140.

[1] *Sitaram* v. *Subheda Kuar,* (1914) 24 I.C. 695 (All.).

[2] *Jugdev Singh* v. *Ayodhya Singh,* (1919) 49 I.C. 953 (Pat.); Relied in *Madho Saran Singh* v. *Manna Lal,* 1933 Pat. 473=14 P.L.T. 441.

[3] (1925) 90 I.C. 325=1926 Pat. 47; also see (1926) 96 I.C. 529=1926 Pat. 401=5 Pat. 759 and 1933 Pat. 473=14 P.L.T. 441.

[4] 13 Bom. 221.

[5] *Ibid.*

*Ranchor* v. *Bai Vakhat,*[6] where plaintiff sued as reversioner to establish his title to property sold in execution of decree obtained against a widow representative of her deceased husband's estate, it was held that Art. 12 did not apply;

> "for, although the plaintiff sued to set aside a sale held in execution of a decree, he did so not as one who would have been bound by the sale if the suit had not been brought, but in order to obtain a declaration that he was not bound by it, the decree under which the sale was held having been fraudulent, and collusive".

Art. 95 was therefore applied to the suit, so that the cause of action could only have arisen when he became aware of the fraud.[7]

**1061. VOIDABLE SALES.**—It has been noticed that the Privy Council ruling *Malkarjun* v. *Narhari,*[8] makes a clear distinction between sales which are void, and those which are voidable merely.

**Bombay Full Bench.**

In the Bombay Full Bench case of *Erava* v. *Sidramappa,*[9] the facts were briefly as follows:—*N* mortgaged certain property to *D,* in 1877. Shortly after *H* obtained a money decree against *N,* but judgment-debtor died before it could be executed. The decree-holder sought execution against *R,* the deceased's nephew as his heir. But, *R* stated that the heirs of *N* were his daughters who were not made parties to the execution proceedings. Sale in execution took place without notice to legal representatives. The mortgaged property was sold in execution, and was bought by *D* (the mortgagee), subject to his mortgage. The sale was confirmed in 1880, and formal possession was given to the mortgagee (auction-purchaser). In 1889, the plaintiffs, daughters of the deceased-mortgagor, sued to redeem the mortgage. The defendant pleaded bar by limitation as purchasers at a Court-sale.

It was held by Candy and Jardine, JJ., that even assuming that the execution proceedings and sale had conveyed an absolute title to the purchaser, the suit brought within twelve years of the sale did, in effect, challenge the sale, and that the plaintiffs were, therefore, entitled to redeem. Ranade, J., was of opinion, that, in respect of the plaintiffs who were not parties, the sale proceedings could not be valid, and they were null and without jurisdiction; and a suit brought within twelve years was maintainable.

**Privy Council.**

**1062.** The Judicial Committee of the Privy Council, however, took the view in *Malkarjun* v. *Narhari,*[10] that the omission to issue a notice of sale upon the judgment-debtor, or his representatives, is a mere irregularity and does not necessarily invalidate the sale. In one passage in their judgment, their Lordships observe that omission to serve notice on the legal representatives is a serious irregularity sufficient by itself to entitle the plaintiff to vacate the sale, and then they add that there may be defences to such a proceeding and justice cannot be done unless those defences are examined by legal methods. They then add as follows:—

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[6] 11 Bom. 119.

[7] *Parekh Ranchor* v. *Bai Vakhat,* 11 Bom. 119.

[8] (1901) 25 Bom. 337 (P.C.) [O. R. (1897) 21 Bom. 424 (F.B.)].

[9] (1897) 21 Bom. 424 (F.B.).

[10] 25 Bom. 337=27 I.A. 216 (P.C.); also see *Levenia Ashton* v. *Madhabmoni Dasi,* (1910) 5 I.C. 390=11 C.L.J. 489=14 C.W.N. 560;

> "If the sale is a reality at all, it is a reality defeasible only in the way pointed out by law; and it seems to their Lordships that the case must fall either within S. 311 of the Code, or within Art. 12 (*a*) of the Limitation Act of 1877, or within both; any way there exists a bar by one year's delay."[11]

In other words, a sale impeached for such irregularity must be set aside by an appropriate application in the execution proceedings (*Sahdeo* v. *Ghasi Ram*[12]), or by a suit (*Gopal Chunder* v. *Gunnamoni*[13]). In *Ganpat Lal* v. *Binda Basini,*[14] it has been held by the Judicial Committee, that after the sale has taken place, the owner holds as purchaser, and is entitled to raise all the defences that belong to him as such, and unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in that action, the Court cannot interfere with the possession which has been given to the purchaser. In *Rao Radha Krishna* v. *Bisheshar Sahay,*[15] it has been held that where the decree-holder buys without permission or where he has applied and been refused the permission the sale is voidable only and not void and Art. 12 applies to suits to set aside the auction-sale, and the suit must be brought within one year.

**Allahabad.**

**1063.** Art. 12 of the Limitation Act does not apply to a suit to recover property sold ostensibly in execution of a decree, where the sale is in its inception void, and a nullity.[16] But S. 12 applies to cases in

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compare *Khiarajmal* v. *Daim,* 32 Cal. 296=32 I.A. 23 (P.C.) and *Raghunath Das* v. *Sundar Das,* 24 I.C. 304=42 Cal. 72=18 C.W.N. 1058=20 C.L.J. 555=41 I.A. 251 (P.C.).

[11] *Malkarjun* v. *Narhari,* 25 Bom. 337=27 I.A. 216 (P.C.).

[12] 21 Cal. 19.

[13] 20 Cal. 370.

[14] (1920) 56 I.C. 274=47 Cal. 924=47 I.A. 91 (P.C.); Followed in *Bhan Prasad* v. *Bhirgu Nath,* (1929) 116 I.C. 543=1929 Pat. 323.

[15] 1922 P.C. 336=67 I.C. 914=49 I.A. 312=1 Pat. 733=44 M.L.J. 718 (P.C.).

[16] *Nazar Ali* v. *Kedarnath,* 19 All. 308=17 A.W.N. (1897) 71; Relied on *Ram Lall* v. *Bama Sundari,* 12 Cal. 307; *Balwant Rao* v. *Muhd. Husain,* 15 All. 324; *Mobaruk* v. *Secretary of State,* 11 Cal. 200; *Dakhina Churn* v. *Bilas Chunder,* 18 Cal. 256; also see *Nathu* v. *Badri Das,* (1883) 5 All. 614; *Sukhdeo Prasad* v. *Jamna,* (1920) 23 All. 60; *Jawala Sahai* v. *Masiat Khan,* (1904) 26 All. 346 and *Bulaki* v. *Kesari,* 50 All. 686=1928 All. 363=26 A.L.J. 716.

which a sale would be binding on the plaintiff if not set aside.[17] An illustration of an order for sale, and a sale under such order being *ultra vires* and nullities, is to be found where the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made.[18] Similarly, where the Court had no authority or jurisdiction to sell the property, and the sale being a nullity, no interest in the property passed to the auction-purchaser thereunder, and it was unnecessary to bring a suit under Art. 12, to set aside the sale.[19]

**Bombay.**

**1064.** The **Bombay Full Bench** ruling in *Erava* v. *Sidramappa*,[20] is not a binding authority on the legal effect of absence of sale notice. However, Art. 12 would not apply if sale proceedings are null and void, or the order passed in execution is without jurisdiction, *e.g.*, where the minor judgment-debtor has not been properly represented, or the decree and sale in execution were illegal.[21] But this article would apply to cases in which the plaintiff would be bound by the suit, if he did not succeed in getting it set aside.[22] Where a house not included in the mortgage was sold by mistake in execution of a mortgage-decree, a suit to set aside the sale which is voidable merely falls under Art. 12.[23] But, in the case of a sale by the Revenue Courts for arrears of assessment, where there were no arrears due, would be invalid.[24] A sale held in contravention of O. 34, R. 14, Civil Procedure Code, is valid until set aside, the contravention being merely an irregularity.[25]

**Calcutta.**

**1065.** Where a revenue sale is illegal, *e.g.*, where the sale of a holding under the Bengal Land Revenue Sales Act (XI of 1859) has taken place before the last date of the month of June of the year following that in respect of which the rent is due, there is no need to bring a suit to set it aside, and the provisions of S. 33 of the Bengal Land Revenue Sales Act, 1859, or of Art. 12 of Sch. I to the

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[17] *Nazar Ali* v. *Kedarnath*, 19 All. 308=17 A.W.N. (1897) 71; Relied on *Mahomed Hossein* v. *Purunder Mahto*, 11 Cal. 287.

[18] *Chunni* v. *Lala Ram*, (1893) 16 All. 5=13 A.W.N. (1893) 141.

[19] *Har Prasad* v. *Jagan Lal*, (1904) 27 All. 57; Relied in *Durpati* v. *Rambach*, (1909) 31 All. 527 (529).

[20] (1897) 21 Bom. 424 (F.B.); cf. *Malkarjun* v. *Narhari*, 25 Bom. 337=27 I.A. 116 (P.C.).

[21] *Daji Himat* v. *Dhirajiram Sadaram*, (1887) 12 Bom. 18; *see* **S. 1047**, *ante* (**"*Minor not properly represented*"**).

[22] *Vishnu Keshav* v. *Ramchandra Bhaskar*, (1886) 11 Bom. 130.

[23] *Nagabatta* v. *Nagappa*, 46 Bom. 914=24 Bom.L.R. 423=67 I.C. 857=1923 Bom. 62.

[24] *Mahadev Narayan* v. *Sadashiv Keshav*, (1921) 59 I.C. 118=45 Bom. 45=25 Bom.L.R. 1082.

[25] *Bhaichand* v. *Rancherdas*, (1920) 45 Bom. 174.

Limitation Act, have no application.[26] This article does not apply to cases where the properties claimed have been sold in execution of a decree against a third party, the plaintiff not being bound by that sale.[27] Art. 12 does not apply to a suit to recover property by setting aside a wrong certificate of sale,[28] or where the sale is held without jurisdiction.[29] The question of limitation arises only where a sale is a valid sale until it is set aside,[30] *i.e.*, where the sale is *voidable, e.g.*, where there is a defective sale notification,[31] or an irregularity in sale within thirty days of the proclamation,[32] or a sale under an application for execution which was barred by time.[33] A notice under S. 7 of the Bengal Public Demands Recovery Act may be signed by the certificate officer with a lithographic signature, and failure to give notice to the certificate debtor before drawing up the sale proclamation is a mere irregularity.[34] A sale in contravention of S. 99, Transfer of Property Act (O. 34, R. 14, Civil Procedure Code) is merely irregular not void.[35]

**1066.** **Madras.** A distinction has to be drawn in cases where the sale to be set aside is illegal or merely irregular. In *Raman* v. *Chandan,*[36] it was held that a sale under *Abkari Notification* referring to Madras Act II of 1864, was *ultra vires,* and that the plaintiff having brought his suit within the twelve years' period of limitation was entitled to recover the property sold, from the defendant who had purchased it, and been placed in possession. But, in *Ragavendra Ayyar* v. *Karuppa Goundan,*[37] where a plaintiff sued to recover land alleged to have been sold under the provisions of Rent Recovery Act, it was held that the suit could not proceed without setting aside the sale, within the period of one year prescribed under Art. 12, Limitation Act.

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[26] *Ahmad Yar Khan* v. *Dinanath,* (1926) 90 I.C. 40=1925 Cal. 1148=42 C.L.J. 69.

[27] *Khiarajmal* v. *Daim,* (1904) 32 I.A. 23=32 Cal. 296 (P.C.); *Motilal* v. *Karrabuldin,* (1897) 25 Cal. 179=24 I.A. 170 (P.C.); *Purna Chandra* v. *Bejoy Chand,* (1913) 18 I.C. 858=17 C.W.N. 549; also see *Ram Narain* v. *Baijnath,* 29 Cal. 36; *Purna Chandra* v. *Dinabandhu,* 34 Cal. 811 (F.B.); *Ahmad Yar Khan* v. *Dinanath,* 90 I.C. 40=42 C.L.J. 69.

[28] *Baboo Pertaub* v. *Brojolal,* (1867) 7 W.R. 253 (F.B.); *Bheem* v. *Khoobun,* (1872) 17 W.R. 429.

[29] *Ramlall* v. *Bama,* (1885) 12 Cal. 307.

[30] *Joggeswar* v. *Jhapal,* 82 I.C. 848=51 Cal. 224=1924 Cal. 638=28 C.W.N. 556.

[31] *Baijnath* v. *Rameshwar,* 6 C.L.J. 163.

[32] *Tasudduk* v. *Ahmed,* 21 Cal. 66 (P.C.) and *Kokil* v. *Edal,* 31 Cal. 385.

[33] *Mahomed Hossein* v. *Purunder,* 11 Cal. 287 (292).

[34] *Hara Parsad* v. *Gopal Chandra,* (1927) 100 I.C. 997=1927 Cal. 315 =31 C.W.N. 299 (301, 304).

[35] *Raghunath* v. *Sundar,* 41 I.A. 251=42 Cal. 72 (P.C.).

[36] (1892) 15 Mad. 219.

[37] (1896) 20 Mad. 33=6 M.L.J. 278.

In *Suryanna* v. *Durgi,*[38] the Madras High Court took the view that Art. 12 does not apply to a suit for recovery of possession by a stranger,

> "not because he was not a party to the suit, but because the Court did not profess to sell his interest in the property".

But this has been overruled by the Full Bench decision in ***Kadar Hussain*** **v.** ***Hussain Saheb,***[39] which lays down that

> "Art. 12 (*a*) is not applicable to a case in which dispossession is the cause of action, and in which the plaintiff was not a party to, or bound by the sale".

*See* S. **1043,** *ante,* as to **"scope of Art. 12".** Where a sale in execution of a decree is void as against a party, and he applies for relief under S. 47, Civil Procedure Code, or otherwise, the case is governed by Art. 181 of the Limitation Act.[40] In a declaratory suit brought to contest the sale in execution of a decree as not binding on the plaintiff, without regard to the provisions of S. 47, Civil Procedure Code, it was held that the suit brought within three years of the plaintiff's attainment of majority was not barred, Art. 166 and S. 12 of the Limitation Act being alike inapplicable.[41] A sale in contravention of S. 99 of the Transfer of Property Act is not void, but being voidable, if it is not avoided by proceedings in execution prior to the confirmation of the sale, the right of the mortgagor, and those who represent him, to redeem is absolutely extinguished, whether the purchaser of the sale be an outsider or the mortgagee bidding by leave of the Court.[42] A suit brought by a Hindu son after attaining majority for setting aside the sale of his share in Court auction in execution of a decree against his father is governed by Art. 12, Limitation Act, inasmuch as the sale is not void, but voidable, and the plaintiff cannot recover his share without setting aside the sale.[43] Where a suit against a minor defendant was continued notwithstanding his attainment of majority, and a decree passed against him was followed by a sale in execution, it was held that a suit to set aside the sale fell under Art. 12 of Sch. I, Limitation Act.[44]

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38. (1883) 7 Mad. 258.

39. (1896) 20 Mad. 118=7 M.L.J. 52 (F.B.).

40. *Rajagopala Aiyar* v. *Ramanujachariar,* (1924) 80 I.C. 92=47 Mad. 288=1924 Mad. 431 (F.B.).

41. *Pasumarti Payidanna* v. *Ganti Lakshminarasamma,* (1915) 29 I.C. 314=38 Mad. 1076=28 M.L.J. 525.

42. *Arjuna Reddi* v. *Venkatachala Asari,* (1916) 32 I.C. 611 (Mad.); Relied on *Lal Bahadur Singh* v. *Abharan Singh,* 27 I.C. 795=13 A.L.J. 138=37 All. 165 and *Dharanikota* v. *Budharazu,* 30 Mad. 362=17 M.L.J. 325; Followed in *Chinnakannu Padayachi* v. *Paramasiva Mudaliar,* (1927) 101 I.C. 89=1927 Mad. 1135; also see *Rajagopala Ayyar* v. *Ramanujachariar,* (1923) 47 Mad. 288=46 M.L.J. 104 (F.B.).

43. *Narayana Naicken* v. *Venkatasami,* (1926) 98 I.C. 31=1926 Mad. 1190.

44. *Seshagiri* v. *Hanumantha,* 39 Mad. 1031.

**Lahore.**

1067. In *Sewa Ram* v. *Khushi Ram*,[45] the Punjab Chief Court took the view that the sale following upon an imperfect attachment and no publication at all, was *ipso facto* void; and, that Art. 12 had no application as the suit was based on the allegation that the sale proceedings were *ab initio* void and a nullity, and the defendant being in wrongful possession, Art. 142 was applicable. Similarly, it was held by the **Lahore High Court**, in *Alam Din* v. *Allah Dad*,[46] that where in execution proceedings against the minor son of a judgment-debtor, the representation was not proper and the minor never became a party to the execution proceedings, Art. 12 did not apply to a suit to set aside a sale in execution which was a nullity, and that the suit was governed by Art. 144, Limitation Act.

**Oudh.**

1068. The **Oudh Judicial Commissioner's Court** has held in *Mt. Masuman* v. *Gulzari Lal*,[47] that where the property of a judgment-debtor is attached during his lifetime, but the same is sold after his death without a proper legal representative being brought on the record, the sale is not void, but is merely voidable on proof of prejudice. A suit, therefore, to set aside such a sale is governed by Art. 12 of Sch. I of the Limitation Act.

**Patna.**

1068-A. In *Bhola Jha* v. *Kali Prasad*,[48] it was held that the period of limitation was one year under Art. 12 of the Limitation Act for a suit for redemption of the sons' share of the family property sold in execution of a mortgage-decree against their father. Roe, J., observed that

> "if a suit to redeem is maintainable, the first step necessary for redemption is a declaration that the sale should be set aside".

A sale in contravention of S. 99 of the Transfer of Property Act is only voidable and not. It must be set aside under R. 90 of O. 21, Civil Procedure Code, by a suit within one year of the confirmation of the sale under Art. 12, Sch. I, Limitation Act, before redemption can be allowed.[49] A purchase by a decree-holder who has not obtained permission to bid at an execution sale is neither void nor a nullity but is only voidable by the judgment-debtor, or on the application of some other person interested.[50]

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[45] 76 P.R. 1890; Relied on 11 Bom. 130 and 12 Bom. 18.

[46] (1922) 67 I.C. 547 (Lah.).

[47] (1920) 58 I.C. 549=23 Oudh Cas. 218.

[48] (1916) 34 I.C. 288=1 P.L.J. 180=2 P.L.W. 413; also see *Ranjit Prasad* v. *Ramjatan*, (1917) 37 I.C. 833=1917 Pat. 113.

[49] *Sheo Narain Ojha* v. *Ram Jatan*, (1917) 41 I.C. 533=2 P.L.J. 587.

[50] *Radhakrishna* v. *Bisheshwar*, (1922) 67 I.C. 914=1 Pat. 733=3 P.L.T. 529 (P.C.).

**Consequential reliefs.**

**1069. SUIT TO SET ASIDE SALE.**—Article 12 is not confined to suits which seek no other relief than a declaration that the sale ought to be set aside. It applies even though some other relief consequential on the annulment of the sale is sought. Article 12 will apply if the relief desired is *inconsistent* with the sale, and the plaintiff prays to have it set aside.[1] But, it applies equally if the object is to obtain such relief, though it is not asked for specifically as a prayer. A sale valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside.[2]

> "The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small."[3]

Both the letter and the spirit of the Limitation Act require that a suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article.[4] The argument that if the plaintiff sues for possession ignoring the transfer, he cannot be said to be suing to set aside a transfer, for the question does not arise until the defence is raised is also disposed of by this judgment of the Judicial Committee.[5] A suit to recover from a purchaser at a Court-sale, the property purchased by him is not maintainable until the Court-sale is set aside, unless it is a nullity, even though the suit relates to property included in the sale which is outside the suit and which by mistake was included in the decree.[6]

**Suit for redemption.**

**1070.** Where a mortgagee has, in contravention of S. 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor, in order to establish and enforce his right of redemption and to have accounts taken as between mortgagor and mortgagee, must get the sale set aside in accordance with the procedure, and within the time presribed, before he can sue for redemption.[7] In the case of *Khairaj*

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[1] *Sheo Narain* v. *Ram Ratan,* (1917) 41 I.C. 533=2 Pat.L.J. 587.

[2] *Malkarjun* v. *Narhari,* (1900) 27 I.A. 216=25 Bom. 337 (350)= 10 M.L.J. 368 (P.C.).

[3] *Ibid.*

[4] *Ibid.*

[5] *Fakirappa Limanna* v. *Lumanna Mahadu,* (1919) 58 I.C. 257=44 Bom. 742 (759).

[6] *Nagabhatta* v. *Nagappa,* (1922) 67 I.C. 857=46 Bom. 914=1923 Bom. 62=24 Bom.L.R. 423.

[7] *Uttam Chandra Daw* v. *Raj Krishna,* (1920) 55 I.C. 157=47 Cal. 377=31 C.L.J. 98=24 C.W.N. 229 (F.B.); Followed in *Chinnakannu Padayachi* v. *Paramasiva Mudaliar,* (1927) 101 I.C. 89=1927 Mad. 1135.

*Mal* v. *Daim*,[8] their Lordships, in referring to the right of the mortgagor to redeem in the case of a purchase by a mortgagee under a money-decree not for the mortgage-debt, say that such purchase would not be a case of a nullity for want of jurisdiction but a case of irregularity in procedure only. Where mortgaged property is sold under a decree, and is purchased by the mortgagee, the mortgagee holds as purchaser, and is entitled to raise all defences that belong to him as such, and it has been held that unless the claim to set aside the sale is made in a properly constituted action and properly raised in suitable pleadings in an action to redeem the mortgage, the Court cannot interfere with the possession which had been given him by the purchase.[9] The mortgagors cannot, therefore, sue for a declaration that their right to redeem is not extinguished without a prayer to set aside the sale.[10] A sale in contravention of S. 99 of the Transfer of Property Act is only voidable and not void. It must be set aside under R. 90 of O. 21, Civil Procedure Code, by a suit within one year of the confirmation of the sale under Art. 12, Sch. I of the Limitation Act, before redemption can be allowed.[11] A sale in contravention of the provisions of S. 99, Transfer of Property Act is valid until it set aside before confirmation.[12] A decree on a mortgage against a Hindu father governed by the Mitakshara binds the sons' interest in the joint-estate, and, consequently, where in execution of such a decree the property has been sold, the sons cannot exercise their right to redeem, if any, without first setting aside the sale within the time prescribed by Art. 12 of Sch. I, Limitation Act.[13] Where the interests of all the members of a joint Hindu family liable for payment of money borrowed for a necessary purpose are effectively represented in a mortgage suit in which the family property is sold, one of them cannot afterwards maintain a suit for redemption on the ground that he was no party to the suit.[14] A suit brought by the son after attaining majority for setting aside the sale of his share in Court auction in execution of a mortgage-decree against the father is, therefore, governed by Art. 12 of the Limitation Act.[15]

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[8] 32 Cal. 296 (316)=1 C.L.J. 584=9 C.W.N. 201; Applied in *Ashutosh Sikdar* v. *Behari Lal*, 35 Cal. 61 (F.B.).

[9] *Ganpat Lal* v. *Bindbasini Prashad*, (1920) 56 I.C. 274=47 Cal. 924=47 I.A. 91 (P.C.).

[10] *Ibid.*

[11] *Sheo Narain* v. *Ram Ratan*, (1917) 41 I.C. 533=1 P.L.W. 729 =2 P.L.J. 587; Followed in *Baldeo Singh* v. *Meghu Singh*, (1923) 74 I.C. 202=1919 Pat. 386; also see *Bansidhar* v. *Muhd. Suleman*, (1926) 97 I.C. 181=1926 Lah. 490=8 L.L.J. 464=27 P.L.R. 491 (Case-law discussed).

[12] *Tejpal* v. *Kalyan*, (1926) 97 I.C. 256 (All.).

[13] *Bhola Jha* v. *Kali Prasad*, (1916) 34 I.C. 288=1 P.L.J. 180; Relied on *Ram Taran Goswami* v. *Rameshwar Malia*, 6 C.L.J. 719=11 C.W.N. 1078 (*Held*, that it was impossible to make a decree for redemption without setting aside the sale within one year); Followed in *Bhan Prasad* v. *Bhirgu Nath*, (1929) 116 I.C. 543=1929 Pat. 323=10 P.L.T. 214.

[14] *Ranjit Prasad Tewari* v. *Ramjatan Pandey*, (1917) 37 I.C. 833 (Pat.); Relied on 34 I.C. 288=1 P.L.J. 180 and 6 C.L.J. 719=11 C.W.N. 1078.

**Suit by auction-purchaser.**

**1071.** A suit to set aside sale in execution of a decree is generally brought by the judgment-debtor, or by the third party former owner of the estate or tenure. But, under certain circumstances, an auction-purchaser may maintain a regular suit to set aside the sale in execution of a decree, and Art. 12 will equally apply to such suits. For instance, in *Mahomed Sayad Phaki* v. *Navroji Balabhai,*[16] where the boundaries of a plot of land sold by auction in execution of a decree, included another piece of land, and the auction-purchaser sued to have the sale certificate set aside and his money returned, unless he was put in possession of all the land included in the boundaries mentioned in the proclamation; it was held that the suit regarded as one to set aside the sale was barred by Art. 12.[17]

**Suit for possession.**

**1072.** Where plaintiff cannot succeed in a suit brought to recover possession, without setting aside the execution sale, he would be barred unless the suit is brought within the shorter period provided by Art. 12, Limitation Act.[18] In *Annada Pershad* v. *Prasannamoyi,*[19] the Judicial Committee held that where the plaintiff's title was in no way affected by the sale under order of the Court, it was not necessary for him to have the sale set aside. He was entitled to the possession of land from which the defendant had ousted him, but to which they could show no title, together with mesne profits, from the date of his dispossession. Article 12 of Sch. I to the Limitation Act applies only to parties to an auction-sale. Where the plaintiff in a suit for possession of property sold in execution of a decree, is the original owner of the property, and was not a party to the decree under which the sale took place, nor, a representative of any of the parties he is entitled to ignore the sale altogether, and his suit is governed by Art. 144 and not by Art. 12 of Sch. I to the Limitation Act.[20] Such a sale is not literally set aside, but only declared invalid, and as not affecting plaintiff's right.[21]

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[15] *Narayana Naicken* v. *Venkataswami,* 1926 Mad. 1190=51 M.L.J. 845=98 I.C. 31.

[16] (1885) 10 Bom. 214.

[17] *Ibid.*

[18] *Ragavendra* v. *Karuppa,* (1896) 20 Mad. 33=6 M.L.J. 278; Followed in *Hitendra Singh* v. *Rameswar Singh,* (1925) 87 I.C. 849=1925 Pat. 625.

[19] (1907) 34 Cal. 711=11 C.W.N. 817=6 C.L.J. 17=34 I.A. 138 (P.C.).

[20] *Arim Khan* v. *Karim,* (1923) 71 I.C. 822=1924 Lab. 396.

[21] *Motilal* v. *Karrabuldin,* 25 Cal. 179 (P.C.).

*Illustrations.*

(1) Where a plaintiff sued to recover land alleged to have been sold under the provisions of the Rent Recovery Act, alleging that the provisions of S. 7 of the Act had not been complied with; *held,* that the suit could not proceed without setting aside the sale and that Art. 12 governed the suit.[22]

(2) Where the plaintiffs were the heirs and legal representatives of their mother and claimed through her, *held,* that they were bound by the mortgage-decree and the sale which took place thereunder and they could not sue for possession unless they had cleared the way for such a suit by securing the annulment of the mortgage-decree and the suit.[23]

(3) The plaintiff, having been dispossessed under a sale in execution against other parties is entitled to sue to establish his title and to recover possession at any time within 12 years from the time at which he was dispossessed.[24]

(4) A suit to recover possession of certain shares of a tenure alleged to be ancestral, on the ground that the whole property had been taken possession of by defendant under cover of his purchase of judgment-debtor's under-tenure at a sale in execution was held not barred, under Art. 12, Limitation Act.[25]

**1073. ARTICLE INAPPLICABLE TO DEFENCE.**—A defendant in possession is not precluded from setting up the invalidity of a sale, because his right to have it set aside, was barred at the date of suit by limitation. The defendant being in possession, the plaintiff who sues to oust him can only succeed on the strength of his own title.[26] A defendant in possession is not barred from questioning the validity of the sale, if his right to sue to set aside a summary sale is barred by Art. 12 of the Limitation Act.[27] This is on the principle that a defendant may, by way of equitable defence, set up the invalidity of a deed, although his right to have it avoided by a suit has become time-barred.[28] The first schedule to the Limitation Act only provides periods of limitation within which suits must be brought. It does not provide any period for defences.[29] A judgment-debtor who has allowed an auction-sale of his property in execution of the decree passed against him to be confirmed is not debarred from setting up a defence of fraud in the conduct of sale in answer to a suit brought against him by the auction-purchaser to recover possession of his property.[30]

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[22] *Ragavendra Ayyar* v. *Karuppa,* (1896) 20 Mad. 33=6 M.L.J. 278.

[23] *Hitendra Singh* v. *Rameswar Singh,* (1925) 87 I.C. 849=1925 Pat. 625.

[24] *Jodoonath* v. *Radhamonee,* 7 W.R. 256 (F.B.).

[25] *Gedroo Sircar* v. *Beharee Lall,* (1873) 20 W.R. 165.

[26] *Ramanasari* v. *Muthusami Naick,* (1906) 30 Mad. 248.

[27] *Venkatachalapathi* v. *Padmiah Chetty,* (1907) 30 Mad. 444; Relied on *Lakshmi Doss* v. *Roop Laul,* 30 Mad. 169 (F.B.).

[28] *Lakshmi Doss* v. *Roop Laul,* 30 Mad. 169 (F.B.).

[29] *Gokal Chand* v. *Niadar Mal,* 32 I.C. 485=1 P.R. 1916.

[30] *Dodbasappa* v. *Pradhanappa,* (1925) 91 I.C. 426=1925 Bom. 33 =27 Bom.L.R. 1318.

The **Lahore High Court** has held in *Tara Chand* v. *Abdul Ahad*,[31] that Art. 12 does not prevent a person in possession from *defending* the claim advanced by a plaintiff,

> "as it is well settled that this article refers to suits brought by parties to the decree which resulted in the sale, or by parties to the proceedings in which the sale took place, or by persons claiming through them, and does not apply to suits brought by persons who are not bound by the sale".[32]

Similarly, the **Bombay High Court** takes the view that the law of limitation does not put a bar of time to any defence in any case whatever, except where a suit falls under S. 26 or S. 28 of the Limitation Act.[33] However, where, in a **Calcutta** case, the defence was that the sale under the *Patni* Regulation was void, and therefore no title passed to the vendor of the plaintiff, or to the plaintiff, it was held that a sale under the *Patni* Regulation is not void, but voidable, and that so long as the *Patni* sale stood unreversed, and any suit to set it aside would be barred by time, the title of the auction-purchaser could not be impeached collaterally.[34]

**1074. COMMENCEMENT OF LIMITATION.**—Time runs under Art. 12 from the date of *final* confirmation of sale and not from the date of sale.[35] The Judicial Committee of the Privy Council have observed in *Baijnath Sahai* v. *Ramgut Singh*,[36]

> "that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation".

According to the true construction of S. 7 of Bengal Act VII of 1880, there is no foundation for a sale thereunder, until a certificate has been made by the Collector strictly in manner prescribed thereby, specifying the sum due and the person from whom it is due.[37] Art. 12 of Schedule to the Limitation Act means that time begins to run from the date of confirmation of the sale, only in those cases in which such confirmation is required by the law under which the sale is held, and in other cases from the date on which the sale becomes otherwise final and conclusive by the law under which it is held.[38]

### *Illustrations.*

(1) Where a sale was confirmed by the Collector in 1882, and was upheld in appeal by the Commissioner; but, in 1884 the Revenue Board set

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[31] (1922) 67 I.C. 894 (Lah.).

[32] *Ibid.*

[33] *Mahadev Narayan* v. *Sadashiv Keshav,* (1921) 59 I.C. 118 =45 Bom. 45=1921 Bom. 257=22 Bom.L.R. 1082.

[34] *Ramsona* v. *Nabakumar,* (1911) 10 I.C. 90 (Cal.).

[35] *Hara Prasad* v. *Gopal Chandra,* (1927) 100 I.C. 997=1927 Cal. 315=31 C.W.N. 299=45 C.L.J. 73.

[36] (1896) 23 Cal. 775=23 I.A. 45=5 C.L.J. 687 (P.C.).

[37] *Ibid.*

[38] *Bhuban Mohan Maitra* v. *Girish Narain Moonshi,* (1911) 10 I.C. 87=13 C.L.J. 339.

aside both these orders, and on an application for review the Board discharged its own order in 1886, it was held that a suit within one year of the last order of the Board was in time, though it was more than a year after the order confirming the sale.[39]

**Revenue sales when final.**

(2) So long as a sale is under the consideration of the revenue authorities, under the Bengal Public Demands Recovery Act, it cannot be said to have been confirmed and become final.[40]

(3) Until a sale held under the provisions of the **Rent Recovery Act** was confirmed, it was held that the rights of persons whose interests may be affected by the sale could not be injured so as to give them a right of action as aggrieved persons, within the meaning of S. 59 of the Act.[41]

**Patni sales when final.**

(4) Since sales under Regulation VIII of 1819 of *Patni* tenures for arrears of rent do not require confirmation, time begins to run from the date when the sale becomes final and conclusive, that is, within one year from the date when the full amount of the purchase-money was paid by the purchaser.[42]

(5) Where lands had been sold for alleged arrears of revenue and bought in for Government, but the sale had not been registered under S. 38, Act II of 1864.[43]

**Sales under Madras Estates Land Act.**

(6) A revenue sale under the Madras Estates Land Act I of 1908 becomes final if no application is made under S. 131, or if it is made and rejected.[44]

(7) A sale under S. 118 of the Madras Estates Land Act is not by virtue of an order or a decree of a Collector or other officer of revenue within the meaning of Art. 12 of Sch. I of the Limitation Act, inasmuch as in such a case the Collector does nothing more than merely appoint an officer for conducting the sale under S. 117 of the Act.[45]

(8) Where a tenure is sold under S. 208 of the **Chota Nagpur Tenancy Act** for arrears of rent, a notice under S. 190 of the Act is necessary to give the Court jurisdiction to sell the property. And, if a decree is more than one year old, there is no reason why it should be executed, without notice against a tenure or holding.[46]

**1075. Cl. B.**—Clause B of Art. 12 refers to orders of the nature of a decree or a judicial order passed by a Revenue Officer, and not one passed in an administrative capacity at the mere caprice or discretion of a Revenue Officer.[47] Non-judicial orders of the Collector need not be set aside within one year provided by this article.[48] In *Shankar Sarup* v. *Thejomal*,[49] their Lordships of the Privy Council held with reference to proceedings in execution of a decree as to distribution of assets under S. 295, Civil Procedure Code, 1882, that

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[39] 23 Cal. 775=23 I.A. 45=5 C.L.J. 687 (P.C.).

[40] 100 I.C. 997=1927 Cal. 315, *supra*.

[41] *Sabapathy Chetty* v. *Rengappa Naicken,* 26 Mad. 495=13 M.L.J. 225.

[42] *Bhuban Mohun* v. *Girish Narain,* (1911) 13 C.L.J. 339=10 I.C. 87; also see *Ramsona* v. *Nabakumar,* (1911) 10 I.C. 90=13 C.L.J. 404=16 C.W.N. 805 (Sale under *Patni* Regulation is not void, but *voidable*).

[43] *Karuppa Tevan* v. *Vasudeva,* (1882) 6 Mad. 148 (Provision in S. 38, for Collector making an order confirming the sale).

[44] *Kamalammal* v. *Chockalinga,* (1923) 76 I.C. 840=1924 Mad. 278 =45 M.L.J. 840; Relied on 10 I.C. 87=13 C.L.J. 339.

[45] *Nukala Subbayya* v. *Naragam Kristayya,* (1927) 100 I.C. 1007 =1927 Mad. 480=52 M.L.J. 390.

[46] *Baldeo Das Birla* v. *Lal Nilmani,* (1928) 8 Pat. 122=1928 Pat. 615.

> "the scheme of S. 295 is rather to enable the Judge as a matter of administration to distribute the price according to what seems at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit"

to recover the sale-proceeds on the ground of priority of plaintiff's claim over that of the defendant. Their Lordships approved of the decision on this point in *Vishnu Bhikaji* v. *Achut Jagannath*,[50] on the ground that the order for distribution was an order in a suit in which the decree was made which was in process of execution. Want of notice to the lawful ryot prior to a sale under S. 112 of Madras Estates Act I of 1908 will make the sale a nullity, and Art. 12 (*b*) does not apply to a suit to set aside such a sale.[1] Civil Courts can entertain a suit to set aside illegal sales under Madras Estates Land Act I of 1908 on the ground of fraud.[2]

A suit to set aside a sale held in the enforcement of a certificate under the Public Demands Recovery Act (Bengal Act I of 1895) is not maintainable, but if it be regarded as one to set aside the sale, S. 12 (*b*) would bar such a suit after one year.[3] A sale without prior attachment is irregular but not a nullity. The due making and filing of the certificate gives it the effect of a decree, and therefore non-service of notice under S. 10 of the Act, does not affect the validity of the certificate itself.[4] However, a Full Bench in *Purna Chandra* v. *Dinabandhu*,[5] has taken the view that when notice has not been served under S. 10 of the Act, a suit brought to set aside the sale and to recover possession of the property sold is governed by Art. 142 and not Art. 12 of the Limitation Act, the sale held being wholly without authority and a nullity.

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[47] *Sakharam Vithal* v. *The Collector of Ratnagiri*, (1871) 8 Bom.H.C.R. 219 (F.B.); Referred in *Ladji Naik* v. *Musabi*, (1886) 10 Bom. 665 (668).

[48] *Shivaji* v. *The Collector of Ratnagiri*, (1886) 11 Bom. 429 (432).

[49] (1901) 23 All. 313 (P.C.).

[50] (1884) 15 Bom. 438.

[1] *Kootoorlingam Pillay* v. *Sennappa Reddiar*, 61 M.L.J. 203=1931 Mad. 724=134 I.C. 184; Followed in *Subbayya* v. *Kristayya*, (1926) 52 M.L.J. 390 (A sale under S. 118 of Act I of 1908, Madras, held not in pursuance of a decree or order); Compare *Kamalammal* v. *Chokalingham*, (1924) 45 M.L.J. 840 (Assumed that Art. 12 (*b*) will apply).

[2] *Rajah of Ramnad* v. *Venkatarama Aiyar*, (1922) 45 Mad. 890 =43 M.L.J. 264 (F.B.).

[3] *Barhmdev Narayan Singh* v. *Bibi Rasul Bandi*, (1905) 32 Cal. 691.

[4] *Hari Charan Singh* v. *Chandra Kumar Dey*, (1907) 34 Cal. 787; Followed *Baijnath Sahai* v. *Ramgut Singh*, 23 Cal. 775 (P.C.).

[5] (1907) 34 Cal. 811 (F.B.).

1076. **CLAUSE C.**—Where land had been sold for alleged arrears of revenue, and bought in for Government, but the sale had not been registered, held that the non-compliance with Ss. 38 and 39 of the Revenue Recovery Act, does not affect the validity of the purchase, and a suit brought to set aside the sale after one year from the date thereof against a *bona fide* purchaser for value from Government was barred by limitation.[6] A suit to set aside a sale for arrears of Government Revenue must be brought within one year from the date when the sale becomes final and conclusive.[7] The irregularities in a sale conducted with jurisdiction cannot be made the basis for attacking the sale after the time fixed by law for the setting aside of such a sale has expired.[8]

> "Purchasers in sales held by revenue officers for realisation of public taxes should not have their title remaining in jeopardy for long, and public policy seems to require that when such sales are attacked long afterwards on the ground of want of jurisdiction in the officer conducting the sale, such ground should be strictly established by cogent evidence. . . . . ."[9]

Where there is credible evidence of the service of sale proclamation, and there has been a considerable lapse of time, it is to be presumed that all the necessary formalities were complied with.[10] In view of the provisions of S. 23 of the Bengal Public Demands Recovery Act a sale cannot be set aside by a Certificate Officer without proof of material irregularity and consequent substantial injury, and it cannot be set aside without such proof even in a separate suit.[11] Limitation for a suit to set aside a sale under the Bengal Public Demands Recovery Act runs under Art. 12 of Sch. I of the Limitation Act from the date of the final confirmation of the sale, and so long as the sale is under consideration of the Revenue Authorities it cannot be said to have been confirmed and become final.[12] *"For demands recoverable as arrears of revenue"*, see Bengal Acts XI of 1859 (S. 5), VII of 1868, VII of 1880 and III of 1913 and Madras Acts VII of 1865, S. 2 and I of 1886, S. 28.

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[6] *Karuppa Tevan* v. *Vasudeva Sastri,* (1882) 6 Mad. 148.

[7] *Raj Chundra* v. *Kinoo Khan,* (1882) 8 Cal. 329.

[8] *Muthusamier* v. *Sree Sree Methanithi Swamiyar,* (1913) 19 I.C. 694 (*Held,* that the substantive provisions in the Rent Recovery Act, Ss. 32 and 42, do not apply to a sale under the Local Boards Act).

[9] *Ibid.,* (1913) 19 I.C. 694 (700).

[10] *Barham Deo Narayan Singh* v. *Bibi Rasul Bandi,* (1905) 32 Cal. 691.

[11] *Hara Prasad* v. *Gopal Chandra,* (1927) 100 I.C. 997=1927 Cal. 315.

[12] *Ibid.*

1077. **CLAUSE D.**—For sales of *Patni,* see *Patni* Regulation VIII of 1819, Cls. (2), (3) and S. 8. A sale of a *Patni* or other intermediate tenure for arrears of rent other than current arrears is not governed by Cl. (*d*) of Art. 12, Limitation Act. A *Patni* sale under Bengal Regulation VIII of 1819 does not require to be confirmed by the Collector. The commencing period in third column starts from the date of payment of whole of purchase-money under S. 9 of the Regulation, when the sale becomes final and conclusive by such payment.[13] A sale under the *Patni* Regulation can only be set aside by a suit as provided under S. 14 of the Regulation, and such a suit must be brought within one year under Art. 12 (*d*) of Sch. I of the Limitation Act.[14]

| Article. | Description of Suit. | Period of Limitation. | Time, from which period begins to run. |
|---|---|---|---|
| 13. | To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. | One year. | The date of the final decision or order in the case by a court competent to determine it finally. |

## SYNOPSIS.

1078. Corresponding provisions.
1079. Old cases.
1080. Act IX of 1871.
1081. Scope and applicability.
1082. *Illustrations.*
1083. Orders in a suit.
1084. Orders without jurisdiction.

## NOTES.

1078. **PREVIOUS HISTORY.**—This article corresponds to Art. 15 of Act IX of 1871, and Art. 13 of the previous Act XV of 1877.

In Act XIV of 1859, the corresponding provision was contained in S. 1, Cl. (5) of that Act, which ran as follows:—

> "To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable—the period of one year from the date of the final decision, award or order in the case."

**Old cases.**

1079. Where there was no decision or award under Act XIX of 1841, and the Judge who received the application under that law refused to entertain it, and referred the plaintiff to a regular suit without even citing the defendant, it was held that his order was not such a decision or award under Cl. (5), S. 1, Act XIV of 1859, as required to be contested within one year.[15] The Judge's decision under Act XIX of 1841 simply rules the right of possession, and is on that point final, but his decision is no bar to a regular suit on the part of any unsuccessful applicant who comes into Court, not to impeach the order under that Act, but to establish a right to share in the property in respect to which the Judge in the Act XIX of 1841 did not think there were proper grounds for removing the party in actual possession.[16]

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[13] *Bhuban Mohun* v. *Grish Narain,* (1894) 13 C.L.J. 339; also see *Ram Sona* v. *Naba Kumar,* (1911) 16 C.W.N. 805.

[14] *Nalinakha Sinha* v. *Ram Taran Pal,* (1927) 104 I.C. 151=46 C.L.J. 51=1927 Cal. 733.

The final decision, award or order contemplated by Cl. (5), S. 1, Act 1859, was a **final decision of the Court which had competent jurisdiction to determine the case finally,** and not the order of a Court superior to such Court dismissing an appeal from the decision of such Court for want of jurisdiction.[17]

An action lay in the Civil Court by a decree-holder against the holder of another decree in order to obtain a refund of money which had been paid to the latter under an order passed in the execution department directing the distribution of sale proceeds in contravention of the provisions of S. 270, Civil Procedure Code, 1859.[18] The order was not appealable, but the right of contesting the summary order by a regular suit was not taken away.[19] A suit to set aside a summary order passed under Act XXVII of 1860 could be brought within a year from the date of the order; but, such order was no bar to a suit upon title, though brought after the year.[20] A summary order made under Act XIX of 1841, and intended only to affect the question of possession did not operate as a bar to a regular suit to try the title. Such a suit might be brought within 12 years, according to the general provision in Cl. (12), S. 1, Act XIV of 1859.[21]

**Act IX of 1871 and Act XV of 1877.**

**1080.** Since Act IX of 1871, the wording of Column 3 of Art. 13 gives effect to the view taken as to the meaning of "final decision" in 7 W.R. 151.

**1081. SCOPE AND APPLICABILITY OF ARTICLE 13.**—The provision in Art. 13 applies only when the suit cannot succeed without altering or setting aside the summary order.[22] Orders to which, by law, a *particular* effect is given in favour of one person or against another, subject, in the regular course, to a further judicial proceeding, to quash them or set them aside, must be set aside before they can be deprived of that effect.[23]

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[15] *Mt. Momeedunnissa* v. *Mahomed Ali,* (1864) 1 W.R. 39 (40).

[16] *Ibid.*

[17] *Mt. Oleounnissa* v. *Buldeo Narain,* (1867) 7 W.R. 151.

[18] *Gogaram* v. *Kartick Chunder,* (1868) 9 W.R. 514; also see *Wooma Moyee* v. *Ram Buksh,* (1871) 16 W.R. 11.

[19] *Ibid.,* 9 W.R. 514.

[20] *Kalee Prosunno Mookerjee* v. *Sreemutty Kylash Monee Debia,* (1867) 8 W.R. 126.

[21] *Lokenarayan Singh* v. *Myna Koer,* (1867) 7 W.R. 199 (F.B.).

But, Art. 13 is held inapplicable to *suits* which are not maintainable or not necessary, that is, suits to establish the right when such right can be established without the necessity of setting aside the order.[24] Article 13 is equally inapplicable to orders in the course of a *suit*, by a Civil Court, because it is expressly limited to orders "in any *proceeding* other than a suit".[25]

### 1082. ILLUSTRATIONS.—

(1) A suit to receive the sale-proceeds in execution of a decree alleged to have been drawn out by defendant by virtue of an order of Civil Court, under S. 270, Civil Procedure Code, 1859, was held to be governed by S. 1, cl. 5 of Act XIV of 1859.[26]

(2) Where the summary decision or order can be set up as a bar or impediment to the maintenance of the suit, it must be said that the suit is in effect one to set aside the summary decision or order.[27]

(3) Art. 13 does not apply where there is no decree or order, which it may be incumbent on the plaintiff to have set aside within one year.[28]

(4) "A certificate of heirship confers only the right of management of the property of a deceased, and is intended to give security to third persons in dealing with the person who claims to be the heir."[29] Where the right of the person to whom the certificate of heirship is granted is in controversy, the plaintiff suing for possession need not have the order granting the certificate set aside, and the suit will be within time under Art. 144.[30]

(5) A suit for *declaration* that an order appointing the defendant to be a member of a Temple Committee is illegal and invalid, and consequently null and void, and for an *injunction* restraining the defendant from performing any of the functions devolving on the Temple Committee is *virtually* a suit to set aside that order, to which article applies.[31]

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[22] *Matonginy Dassee* v. *Junmunjoy,* (1876) 25 W.R. 513.

[23] *Shivaji* v. *Collector of Ratnagiri,* (1886) 11 Bom. 429.

[24] *Maindi Sardar* v. *Akoor Chandra,* (1912) 14 I.C. 92; Reld. upon *Ayyasami* v. *Samiya,* 8 Mad. 82; also see *Brahmayya* v. *Appayya Sastri,* 1921 Mad. 121=44 Mad. 351=40 M.L.J. 55 (Suit to set aside execution sale, after confirmation, when not maintainable).

[25] *Ayyasami* v. *Samiya,* 8 Mad. 82 and *Official Receiver* v. *Veeraraghava Pattar,* 45 Mad. 70=41 M.L.J. 334.

[26] *Dwarkanath Biswas* v. *Dhunput Singh,* (1872) 17 W.R. 227.

[27] *Duraram* v. *Nand Coomer,* 1 Shome 336; Reld. on 7 W.R. 199 (F.B.); also see *Babaji* v. *Anna,* (1873) 10 Bom. H. C. R. 479.

[28] *Debi Prosad* v. *Jafar Ali,* 3 All. 40.

[29] *Shriput Ramchandra* v. *Vithoji,* 4 Bom. H. C. R. A. C. J. 178.

[30] *Bai Kashi* v. *Bai Jamna,* (1886) 10 Bom. 449.

[31] *Subramania* v. *Minakshi,* (1892) 3 M.L.J. 126.

(6) Where *notwithstanding* a summary order, a suit may be brought to establish the right, there is no necessity to bring a suit within this article, *e.g.*, in cases of orders under S. 9 of the Specific Relief Act, or S. 89 of Bengal Land Registration Act, VII of 1876, or S. 17 of Act XIX of 1841.[32] Such suits not being governed by any special rule of limitation may be brought within the ordinary period.[32-a] A suit for title may be brought notwithstanding an order under Act XXVII of 1860.[33]

(7) There is a wide difference between setting aside a sale, and deciding that a plaintiff's right was not affected by it. Art. 13 does not apply where a person sues to recover, property sold in execution, from the auction-purchaser, it not being necessary for him to pray for any relief by way of altering or setting aside an adverse summary decision under O. 21, R. 100, Civil Procedure Code.[34]

(8) Where the Court had no jurisdiction to make the order, it need not be set aside or altered within one year under Art. 13.[35]

(9) Where property had been improperly sold by the guardian of a minor under an order of the Civil Court, it was not necessary to set aside such order,[36] and under present law, such a suit is not now maintainable and Art. 13 can have no application.[37]

(10) A suit for recovery of possession of immoveable property against persons who have successfully objected to delivery of possession in proceedings under Ch. VII of the Presidency Small Cause Courts Act is not governed by Art. 11-A or Art. 13, but the proper article applicable is either Art. 120 or Art. 144, Limitation Act.[38]

(11) Where property purchased from a judgment-debtor was attached in execution of another decree against the judgment-debtor and the purchaser's objection was dismissed, but the attachment was subsequently set aside on the purchaser satisfying the decree: it was held that a suit by the purchaser for declaration against his vendee, the judgment-debtor, was not barred by the fact that the order dismissing his objection was not questioned or set aside by a suit within the period of limitation prescribed by Art. 13 of the Limitation Act, inasmuch as that article had no application to the facts of the present case.[39]

(12) Where property is attached in execution of a decree, and a claim preferred to it by an alleged purchaser from the judgment-debtor is dismissed on the ground that the alleged purchase was fraudulent, but the attachment is subsequently withdrawn, the unsuccessful claimant is not

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[32] Mitra's Limitation Act, Vol. II, p. 1099; also see p. 1100.

[32-a] *Loknarain* v. *Ranee Myna,* (1867) 7 W.R. 199 (F.B.) and *Luchman* v. *Kunchan,* (1884) 10 Cal. 525.

[33] *Kalee* v. *Srimuttee Kylash,* (1867) 8 W.R. 126 and *Bai Kashi* v. *Bai Jamna,* (1886) 10 Bom. 449.

[34] *Moti Lal* v. *Karrabuldin,* (1897) 25 Cal. 179=24 I.A. 170 (175) (P.C.).

[35] *Wooma* v. *Ram Buksh,* (1871) 16 W.R. 11 (13).

[36] *Sikher* v. *Dulputty,* (1879) 5 Cal. 363.

[37] *See* S. 48, Act VIII of 1890.

[38] *Hyder Ali Saheb* v. *Amir-ud-din Saheb,* (1929) 115 I.C. 504=1929 Mad. 69=56 M.L.J. 199; Refd. *Shanker Sarup* v. *Mejo Mal,* 23 All. 313 (322)=28 I.A. 203 (P.C.).

[39] *Lal Shaha* v. *Kado Mahto,* (1921) 60 I.C. 849=1921 Pat. 1=2 Pat. L. T. 345=6 P.L.J. 85 (F.B.).

bound to bring a suit to contest the order within the special period of limitation under Art. 13, Limitation Act.[40]

(13) A suit to recover property that has been released from attachment under O. 38, R. 8, Civil Procedure Code, is not governed by Art. 13 of the Limitation Act. Such a suit is not one to set aside an order of a Civil Court within the meaning of Art. 13, and the existence of the order releasing the attachment before judgment is no bar to it.[41]

**Orders in a suit.**

1083. In *Ayyasami* v. *Samiya,*[42] the **Madras High Court** held that Art. 13 cannot apply to a suit to establish right to the property under the provisions of S. 332 of Civil Procedure Code, which was not a suit to set aside the order under that section. To the same effect is the view taken in *Narasimma* v. *Appalacharlu.*[43]

The **Calcutta High Court,** in *Maindi Sardar* v. *Akoor Chandra Ghosh,*[44] follows the Madras view, though a different view had been taken in *Gowri Prosad Kundu's case.*[45]

The **Bombay High Court** dissented from the Calcutta decision in *Gowri Prosad's case,* and has held that an order made under S. 295, Civil Procedure Code, 1882, is no bar to a suit for refund of assets wrongly paid to defendant, consequently such a suit is not governed by Art. 13 of the schedule to the Limitation Act.[46] It is not necessary for the plaintiff to sue to set aside any order, inasmuch as S. 295 of the Code of 1882 (now S. 73, Civil Procedure Code, 1908), expressly permits a suit of this kind. Further, if it be held that the relief sought by the plaintiff necessarily involves the reversal of the Civil Court's order, still the order made under S. 295, Civil Procedure Code, 1882 (now S. 73, Civil Procedure Code, 1908), is not apparently an order in a *"proceeding other than a suit,"* within the meaning of Art. 13 of the Limitation Act, inasmuch as all proceedings in execution are proceedings in the suit in which the decree under execution is made.[47]

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[40] *Manilal Girdhar* v. *Natha Lal,* (1921) 59 I.C. 774=45 Bom. 561 =22 Bom. L. R. 1446.

[41] *Ramanamma* v. *Bathula Kamaraju,* (1917) 39 I.C. 863=5 L.W. 704.

[42] 8 Mad. 82; also see *Sivarama* v. *Subramania,* (1885) 9 Mad. 57 (61).

[43] (1888) 12 Mad. 294 (296).

[44] (1912) 14 I.C. 92=16 C.W.N. 971.

[45] 13 Cal. 159; Folld. 9 W.R. 514 and 16 W.R. 17 (Rulings under old Code of 1859).

[46] (1890) 15 Bom. 438.

[47] 15 Bom. 438; Reld. on *Ayyasami* v. *Samiya,* 8 Mad. 82 and *Mungul Pershad Dichit* v. *Grijakant Lahiri,* 8 Cal. 51=8 I.A. 123 (P.C.); also see *Govinda* v. *Ganu,* (1908) 10 Bom. L. R. 749.

In *Shankar* v. *Mejo Mal,*[48] their Lordships of the Privy Council have approved of the Bombay view, holding that the order under S. 295 (old Code), *re.* distribution of assets realised is an administrative order not conclusively adjudicating the rights of rival decree-holders which are expressly left to be subsequently re-adjusted by a *suit* in the Civil Court. And, further the order is not in a proceeding other than the suit in which the decree under execution is made.

> "Art. 13 does not apply to proceedings in *suits,* in other words, it relates to orders passed in disputes which did not begin with the filing of a plaint in a suit, such as disputes initiated by applications under Guardian and Wards Act, the Succession Certificate Act, and so on, such applications and the proceedings connected with such applications being not proceedings in suits."[49]

This has been followed in *Baij Nath* v. *Ramadoss,*[50] where it was held that a suit by a plaintiff to recover from a defendant money paid to him under S. 73 of the Civil Procedure Code is a suit to recover from the defendant money paid to him for plaintiff's use and should therefore be brought within 3 years under Art. 62, and within six years, under Art. 120, Limitation Act.

**Orders without jurisdiction.**

**1084.** An order without jurisdiction being a nullity in law is not one that need be *set aside.*[1] Art. 13 cannot therefore apply, where the order of Court has been made without jurisdiction.[2] The period of limitation prescribed by Art. 15, Act IX of 1871 (present Art. 13), for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it.[3] Where property is attached before judgment, and the judgment-debtor is adjudged insolvent after judgment, it is not open to the Official Receiver to attack the attachment as being invalid or improper on the date when it was effected.[4] When his application to raise attachment is disallowed, the period of limitation within which a suit must be brought to set aside an order refusing application is that prescribed by Art. 120

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[48] (1901) 23 All. 313=28 I.A. 203 (P.C.).

[49] *Official Receiver* v. *Veeraraghava Pattar,* (1922) 69 I.C. 326=1922 Mad. 189=45 Mad. 70=41 M.L.J. 334.

[50] (1915) 26 I.C. 219=39 Mad. 62=27 M.L.J. 640; also see *Hyder Ali Saheb* v. *Amir-ud-din Saheb,* (1929) 115 I.C. 504=1929 Mad. 69=56 M.L.J. 199.

[1] *Debi Prosad* v. *Jafar Ali,* (1880) 3 All. 40; also see *Wooma* v. *Ram Buksh,* (1871) 16 W.R. 11; cf. *Anpurnabai's case,* 11 Bom. 160 *n.*

[2] *Ram Kishan* v. *Bhawani Das,* (1876) 1 All. 333 (336) (F.B.).

[3] *Kristodass Kundoo* v. *Ramkant,* (1880) 6 Cal. 142=7 C.L.R. 396.

[4] *Official Receiver* v. *Rangan Pattar,* (1922) 69 I.C. 326=1922 Mad. 189=45 Mad. 70=41 M.L.J. 334.

of Limitation Act.[5] A suit to set aside a decree or order in a suit is not governed by Art. 13.[6]

*Illustrations.*

(1) Where the Court had wrongly ordered the holder of the decree charging the lands to refund to the attaching creditor the sale proceeds paid to him, and he brought a suit to recover the money by the establishment of his prior right to the same, and to cancel the order of the Court compelling him to refund the money, as it was made without jurisdiction, *held*, by the majority of the Full Bench, that the suit was one for money received by defendant for the plaintiff's use: and the minority of Full Bench held that the suit was one for which no period of limitation was provided elsewhere, and the general residuary article governed the suit.[7]

(2) A suit for recovery of possession of immoveable property against persons who have successfully objected to delivery of possession in proceedings under Ch. VII of the Presidency Small Cause Courts Act is not governed by Art. 13 of Sch. I of the Limitation Act, the proper article applicable being either Art. 120 or Art. 144.[8]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 14. | To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for. | One year. | The date of the act or order. |

### SYNOPSIS.

1085. **Corresponding provisions.**
1086. *Scope and applicability: I. Voidable act or order.*
1087. Allahabad.
1088. Bombay.
1089. Calcutta.
1090. Lahore.
1091. Madras.
1092. *Void act or order.*
1093. *Illustrations.*
1094. Act or order of Government Officer.
1095. Order as between parties—Illustrations.

### NOTES.

**Act XIV of 1859.**

**1085. CORRESPONDING PROVISIONS.**—There was no specific provision in **Act XIV of 1859,** corresponding to this article. And, any person aggrieved by an act or order of the officials of Government in any department, suing to set aside the order, would have time-

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5. *Official Receiver* v. *Rangan Pattar,* (1922) 69 I.C. 326=1922 Mad. 189=45 Mad. 70=41 M.L.J. 334.

6. *Ayyasami* v. *Samiya,* (1884) 8 Mad. 82; *Official Receiver* v. *Rangan Pattar,* (1922) 69 I.C. 326=1922 Mad. 189.

7. *Ram Kishen* v. *Bhawani,* (1876) 1 All. 333 (336) (F.B.).

8. *Mir Hyder Ali* v. *Amir-ud-din,* 56 M.L.J. 199=115 I.C. 504=1929 Mad. 69.

limit of six years under the General Clause 16 of S. 1 of Act XIV of 1859.[9]

**Act IX of 1871.**

In Act IX of 1871, the corresponding provision was made in its Art. 16 of Sch. II to the Act. The words "or order" were not present in the first and third columns of that article. These words were added in Act XV of 1877, Art. 14, which has been re-enacted in Art. 14 of the present Act.

**Act XV of 1877.**

**I. Voidable act or order.**

1086. **SCOPE AND APPLICABILITY.**—This article applies only to suits "*to set aside any act or order*" "of an officer of Government in his official capacity, not herein otherwise expressly provided for", *i.e.*, to suits, where the relief sought for by the plaintiff cannot be given without setting aside the order, which stands in his way.[10]

For comments on an act or order of a Government Officer, *see* S. 1094, *post* and for acts or orders which are voidable and must be set aside, *see* Ss. 1087-1091. Acts or orders which are void or nullities need not be set aside, *see* S. 1092 and S. 1093, *post*.

**Allahabad.**

1087. In *Raghunath Prasad* v. *Kaniz Rasul,*[11] the **Allahabad High Court** applied the principle of the ruling in *Malkarjun* v. *Narhari,*[12] to a suit for recovery of possession by plaintiff where it amounted in effect to a prayer to set aside the order of Collector, by which the sale in plaintiff's favour was set aside by the Collector. It was necessary to have this order set aside before the plaintiff could obtain a decree for possession. The dictum of Strachey, C.J., in *Banke Lal* v. *Jagat Narain,*[13] was referred to in support of the above view. It was observed that

> "the previous sale having been set aside, a suit for confirmation of the sale and for reversal of the order setting aside the sale might be brought at any time up to a year from the date of the order".[14]

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[9] *Kebul Ram* v. *The Government,* (1866) 5 W.R. 47.

[10] *Raghunath Prasad* v. *Kaniz Razul,* (1902) 24 All. 467 (469); *Nagu* v. *Salu,* (1890) 15 Bom. 427 (437); *Ganesh Shesho Deshpande* v. *Secretary of State,* (1920) 57 I.C. 587=44 Bom. 451; *Pearey Lal* v. *Secretary of State,* (1924) 83 I.C. 446=1924 Cal. 913 and *Wasif Ali* v. *Saradindu,* (1925) 89 I.C. 193=1925 Cal. 953; also see *Parbati Nath* v. *Raj Mohun,* (1901) 29 Cal. 367; *Subbamma* v. *Secretary of State,* (1915) 31 I.C. 267 and *Onkar Lal* v. *Shaligram,* 1922 Nag. 76=65 I.C. 970=5 N.L.J. 199.

[11] (1902) 24 All. 467 (469).

[12] (1900) 25 Bom. 337 (P.C.).

[13] (1900) 22 All. 168.

[14] *Ibid.*

**1088.** Where the suit having regard to the cause of action as stated in the plaint, is virtually one to set aside the order of an officer, the real question being whether or not that officer was right in making the order he did, the limitation provided is one year under Art. 14, from the date of the order in question.[15] Article 14 of Sch. I to the Limitation Act operates to bar a suit to recover possession of lands forming a river-bed leased by the Collector, unless brought within one year of the date of the Collector's order under S. 37 of the Bombay Land Revenue Code, declining to entertain such claim.[16] It is true that the party aggrieved need not apply to the Court. He may content himself with the various appeals allowed to the Revenue Authorities, until he reaches the Governor-in-Council. But, the Limitation Act, Art. 14, provides that if he wishes to have resort to the Court in order to get the order of Revenue Authorities set aside, that he must put his plaint on the file within one year.[17] Where the order in question is *intra vires* of the authority, a suit brought to have that order set aside more than a year after the date of the order is beyond time under Art. 14 of the Limitation Act.[18]

**Bombay.**

**1089.** Article 14 of Sch. I to the Limitation Act applies only to acts or orders done in the exercise of powers legally exercisable by the executive; in other words it applies to acts or orders which need to be set aside.[19] In order to fall within the purview of Art. 14, an order must be one which the officer is empowered under the law to pass and which would be effective unless set aside and which is an order which under the ordinary law is liable to be set aside by a suit in the Civil Court.[20] Where the Revenue Authorities had jurisdiction to enquire into a plea, in a partition proceeding that certain land measured as part of the estate under partition was not part of that estate, a suit brought for a declaration that the disputed land belonged to plaintiff, was held barred after the lapse of one year from the date of the order.[21]

**Calcutta.**

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[15] *Nagu* v. *Salu,* (1890) 15 Bom. 424 (437).

[16] *Chhotubhai Govindji* v. *Secretary of State,* (1920) 55 I.C. 591=22 Bom. L. R. 146; also see *Surajlal Munshilal* v. *Secretary of State,* (1926) 95 I.C. 950=1926 Bom. 467=28 Bom. L. R. 641 (Art. 14 applied to suit to prove title to and possession of lands submerged under water).

[17] *Ganesh Shesho Deshpande* v. *The Secretary of State,* (1920) 57 I.C. 587=44 Bom. 451=22 Bom. L. R. 212.

[18] *Manibhai Govindbhai Patel* v. *The Nadiad City Municipality,* (1927) 100 I.C. 98=51 Bom. 105=1927 Bom. 55.

[19] *Peary Lal Ray* v. *The Secretary of State,* (1924) 83 I.C. 446=1924 Cal. 913=39 C.L.J. 454; Folld. in *Secretary of State* v. *Abdul Rahim,* (1929) 114 I.C. 626 (635)=1928 Mad. 1246.

[20] *Wasif Ali Mirza* v. *Saradindu Narain,* (1925) 89 I.C. 193=1925 Cal. 953=29 C.W.N. 839.

[21] *Parbatinath Dutt* v. *Rajmohun Dutt,* (1901) 29 Cal. 367; cf. *Ananda Kishore* v. *Daiji Thakurani,* (1909) 1 I.C. 549 (551)=36 Cal. 726 =10 C.L.J. 189 (Where the order was *ultra vires* and a nullity).

1090. **Lahore.** Article 14 of the Limitation Act is a general residuary article intended to provide a period of limitation for all suits which do not fall within the purview of any of the Arts. 11, 11-A, 12 and 13 of the Limitation Act.[22] A mortgagor who does not take advantage of the summary procedure provided for redemption of mortgages by the Punjab Redemption of Mortgages Act may bring a suit within the ordinary period of limitation; but if he does take advantage of the summary procedure provided by the Act he must, if unsuccessful, bring a suit to establish his rights within the comparatively short period of one year from the date of the order under Art. 14, Sch. I, to the Limitation Act.[23] The suit referred to in S. 12 of the Punjab Redemption of Mortgages Act is a suit to satisfy an order of the Collector. The cause of action for such a suit is not the original contract between the parties but the order of the Collector which aggrieves the party suing.[24] That order unless it be set aside is conclusive and if a suit is not brought within the period of limitation provided by Art. 14 of Sch. I to the Limitation Act to set aside the order, a suit to redeem the mortgage is out of time.[25] A **Full Bench of the Lahore High Court** has held in *Gangu* v. *Mahanraj Chand,*[26] approving of the view taken in *Kaura* v. *Ram Chand,*[27] that a suit under S. 12, Redemption of Mortgages Act II of 1913, instituted by a person aggrieved by an order passed by the Collector under S. 6, 7, 8, 9, 10 or 11 of the Act, to establish his right in respect of the mortgage is governed by Art. 14, Limitation Act; and it makes no difference that the suit is one for a mere declaration and no relief to set aside the order of the Collector has been expressly asked in the plaint. The form of the suit in such cases is immaterial.[28] The remarks in *Ramsaran* v. *Mula,*[29] that the summary proceedings under Act II of 1913 cannot affect the rights of the parties, the suit under S. 12 being

> "virtually a defence against an order divesting the mortgagee of possession before payment of the full sum due. In such circumstances the question of limitation does not arise."

were dissented from in view of the well-considered ruling by the learned Chief Justice in the later case.

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[22] *Ram Chand* v. *Kaura,* (1923) 75 I.C. 885=1924 Lah. 690.

[23] *Kaura* v. *Ram Chand,* (1925) 88 I.C. 945=6 Lah. 206=1925 Lah. 385 (L.P.).

[24] *Ibid.*

[25] *Ibid.*

[26] 1934 Lah. 384=15 Lah. 389=149 I.C. 661=36 P.L.R. 337.

[27] 1925 Lah. 385=88 I.C. 945=6 Lah. 206.

[28] *Gangu* v. *Mahanraj Chand,* 1934 Lah. 384 (387); Reld. on *Raghunath Prasad* v. *Kaniz Rasul,* (1902) 24 All. 467=1902 A.W.N. 116 and *Parbati Nath* v. *Rajani Churn,* (1902) 29 Cal. 367=6 C.W.N. 92.

[29] 4 Lah. 346=78 I.C. 103=1923 Lah. 648. **[O.R. in 1934 Lah. 384 (F.B.).]**

**1091.** The **Allahabad**[30] and the **Calcutta view**[31] is followed by the Madras High Court, in drawing a distinction between an order which is a mere nullity, and one bad for irregularity, where it cannot be said that the officer passing the order had no jurisdiction. Article 14 applies only to such latter orders.[32] The net result of the authorities as noticed in *Appeal Suit No.* 355 *of* 1922 is reproduced in *Prasanna Chidambara Reddiar* v. *Nagammal,*[33] as follows:—

**Madras.**

> "The net result of this discussion on limitation is that in any case in which it is shown that the order of enfranchisement was *intra vires,* i.e., that the Inam was granted or continued by Government, the suit is barred under Art. 14, and in any case in which it is shown that the enfranchisement was *ultra vires,* i.e., that the Inam was not granted, or continued by Government, then the suit is within time under Art. 142 or 144."

A suit to set aside the resumption of a personal service *inam* by the Government on the ground of non-performance of services is governed by Art. 14, Limitation Act.[34] According to the Privy Council judgment in *Laxman Rao Madhava Row* v. *Shrinivasa Lingo,*[35] which has been relied upon by Ramesam, Offg. C.J., in *Thiruvenkatacharyulu* v. *Secretary of State,*[36] whether it is an act or an order that is questioned the distinction between that which is *ultra vires,* and that which is not *ultra vires* stands.

> "In the case of an act or order which is *ultra vires,* the action is not strictly an action to set aside but merely for a declaration that it is illegal and does not bind the plaintiff. The phrase *'to set aside'* is *prima facie* applicable to a case vitiated only by some irregularity but otherwise valid. But in the case of an act which is *ultra vires* it has not got to be set aside. Only for the sake of clearness a party may seek a declaration that it is invalid and not binding on him."[37]

For this reason, the learned Judges applied Art. 120 to a suit for declaration and injunction; where the act of Government in question was an act which was illegal or *ultra vires,* and the declaration was sought on that basis. It was observed that

> "it may be that if the ground of such a suit is not that the act of Government was *ultra vires* or illegal, but a mere irregularity which does not vitiate the

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[30] *Raghunath Prasad* v. *Kaniz Rasul,* 24 All. 467=A.W.N. (1902) 116.

[31] *Parbati Nath* v. *Raj Mohan,* 29 Cal. 367=6 C.W.N. 92.

[32] *Subbamma* v. *Secretary of State,* (1915) 31 I.C. 267=1915 M.W.N. 915; Reld. on 24 All. 467 and 29 Cal. 367, *supra*; Reld in *Secretary of State* v. *Abdul Rahim,* 114 I.C. 626 (634)=1928 Mad. 1246.

[33] 1930 Mad. 710=123 I.C. 341=27 L.W. 101.

[34] *Vadlamannati Bala* v. *Secretary of State,* (1927) 106 I.C. 891=1928 Mad. 282=27 L.W. 101.

[35] 1927 P.C. 217=105 I.C. 694=54 I.A. 380=51 Bom. 830 (P.C.).

[36] 1934 Mad. 147=57 Mad. 501=154 I.C. 990=66 M.L.J. 715.

[37] Per Ramesam, J., in 1934 Mad. 147, *supra;* also see *Secretary of State* v. *Abdul Rahim,* 114 I.C. 626 (634)=1928 Mad. 1246.

main proceedings but relates only to some question of detail such as the exact amount to be collected or something of that kind which does not make the proceedings *ultra vires,* in such a case Art. 14 may apply, or in a case falling under the Revenue Recovery Act even S. 59 of the Revenue Recovery Act may apply".[38]

It should be noticed that Art. 14 cannot apply to all orders, as explained in *Rameswaram Devasthanam* v. *Secretary of State,*[39] following the view of the **Calcutta High Court** in the case of *Narendralal Khan* v. *Jogi Hari.*[40]

"It can apply only to orders and proceedings to which by law is given a particular effect. An order to come under Art. 14 must be an order of at least a quasi-judicial character, and not a mere executive order."[41]

**1092.** The **Nagpur Judicial Commissioner's Court** has held that in the matter of limitation, a suit under S. 83 of Act XVIII of 1881 (Central Provinces Land Revenue) is governed by Art. 14 of the First Schedule of the Limitation Act. This view derives some slight additional support from the fact that a suit of this nature is to be filed within one year of the date on which the assessment is offered to the proprietors after the Record of Rights is "duly made and attested".[42] Before, however, Art. 14 of Sch. I to the Limitation Act can apply to a suit, it must be necessary under the law to set aside the order sought to be impeached in the suit. The article will not apply if the incidental effect merely of the plaintiff's suit will be to nullify an order passed by a Government Officer.[43]

**Nagpur.**

**1092-A. VOID ACT OR ORDER.**—It has been noticed above that a clear distinction exists between an order which is a mere nullity and which need not be "*set aside*", and one had for irregularity merely, which would be binding if not set aside within one year under Art. 14, Limitation Act.[44] Reliance has been placed for this distinction on the remarks of Sir John Wallis, in the Privy Council judgment in the case of *Laxmanrao Madhavrao* v. *Shriniwas Lingo,*[45] that **if an order is illegal, the plaintiff is not bound to file a suit to set it aside,** but is entitled to wait until it is enforced against him, and the attempt to enforce it against him gives him a good cause of action, and a fresh start for limitation. Articles 12 and 14 of the Act of 1908 refer to orders and proceedings of a public functionary, to which by law is given a particular effect in favour of one person or against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside.[46] When an order does not fall within the authority of an official who makes it, it is legally a nullity, and, therefore, need not be set aside.[47] A suit is not barred under Art. 14 of the Limitation Act, where the order passed is beyond the scope of an officer's powers, which the plaintiff is not required to set aside.[48] Where the conditions necessary for the exercise of the power of summary eviction conferred by S. 79-A of the Bombay Land Revenue Code, do not in fact exist, the District Deputy Collector cannot be held to act in his official capacity if he evicts a person under that section. So, Art. 14 does not apply to a suit for possession by the evicted person.[49] Jenkins, C.J.'s observations in *Surannanna* v. *Secretary of State*[50] and Trevelyan, J.'s judgment in *Bejoy Chand* v. *Kristo Mohini Dasi*,[1] have been relied upon by the **Bombay High Court** in *Malkajeppa* v. *The Secretary of State*,[2] for the proposition that **Art. 14** of the Limitation Act **does not apply to a suit to set aside an order which is *ultra vires*** of the officer passing the order. This article is applicable to acts or orders done in the exercise of powers legally exercisable by the executive, subject to conditions, the fulfilment of which is denied by the party impugning the act or order, or invested with no finality by the empowering enactment.[3] But, an order which is entirely *ultra vires* of the executive Government is a mere nullity, and no suit is necessary to set it aside.[4] The case-law has been discussed by Sir Asutosh Mookerjee and Rankin, JJ., in *Peary Lal Ray* v. *The Secretary of State*,[5] where it has been held that

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[38] *Thiruvenkatacharyulu* v. *Secretary of State,* 1934 Mad. 147=57 Mad. 501=154 I.C. 990=66 M.L.J. 715.

[39] 1930 Mad. 710=123 I.C. 341=27 L.W. 101.

[40] (1905) 32 Cal. 1107=2 C.L.J. 107.

[41] *Ibid.;* Folld. in 1930 Mad. 710.

[42] *Onkar Lal* v. *Shaligram,* 1922 Nag. 76=65 I.C. 970=5 N.L.J. 199.

[43] *Bala* v. *Girdhar,* (1927) 100 I.C. 4=1927 Nag. 159.

[44] *Subbamma* v. *Secretary of State,* (1915) 31 I.C. 267=1915 M.W.N. 915; *Prasanna Chidambara Reddiar* v. *Nagammal,* 1930 Mad. 710=123 I.C. 341=27 L.W. 101 and *Thiruvenkatacharyulu* v. *Secretary of State,* 1934 Mad. 147=57 Mad. 501=154 I.C. 990=66 M.L.J. 715.

[45] 1927 P.C. 217=105 I.C. 694=54 I.A. 380=51 Bom. 830 (P.C.); Reversed 1922 Bom. 18.

> "Art. 14 has no application where jurisdiction has been usurped and the order is *ultra vires*. An order made without jurisdiction is a nullity and need not be set aside."

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[46] *Shivaji Yesji Chawan* v. *The Collector*, (1887) 11 Bom. 429; also see *Narendralal* v. *Jogi Hari*, (1905) 32 Cal. 1107=2 C.L.J. 107 and *Rameswaram Devasthanam* v. *Secretary of State*, 1930 Mad. 710=123 I.C. 341; also see 104 I.C. 781=39 M.L.T. 633.

[47] *Shivaji Yesji* v. *The Collector*, (1887) 11 Bom. 429.

[48] *Nagendra Lal* v. *Raja Bibi*, (1912) 17 I.C. 504=17 C.W.N. 374.

[49] *Dhanji Jairam* v. *Secretary of State*, 1921 Bom. 381=45 Bom. 920 =61 I.C. 347=23 Bom. L. R. 279.

[50] 24 Bom. 435 (455)=2 Bom. L. R. 261.

[1] 21 Cal. 626.

[2] (1912) 15 I.C. 517=36 Bom. 325=14 Bom. L. R. 332; also see *Nagendra Lal* v. *Jogi Hari*, 32 Cal. 1107 (1117).

[3] *Balvant Ramchandra* v. *Secretary of State*, 29 Bom. 480.

[4] *Ibid.*

[5] (1924) 83 I.C. 446=1924 Cal. 913=39 C.L.J. 454.

This view is supported by a long line of authorities.[6] A useful analogy may be found in the class of cases where the legality of sales for arrears of revenue is called in question, and the action of revenue authorities is challenged on the ground of lack of jurisdiction.[7] Where facts are undisputed and do not give an officer jurisdiction, but he nevertheless holds that he has jurisdiction, his decision must be regarded as *ultra vires.*[8] The applicability of ✓ this article does not depend upon the form of the suit but upon its real substance.[9] Whatever may be the form of the prayer, if the object of the suit is to recover possession of property from the Government, treating the order of resumption as a nullity, Art. 14 will not apply.[10] **But, the case would come under this article, if the plaintiff** did not seek to recover possession but **only wanted the order of revenue authorities to be set aside,** and to obtain any relief in consequence of that order.[11] A suit for setting aside an act or order which is a nullity is not governed by Art. 14 which does not apply to an act done by a Government officer, when such act purports to be done in pursuance of an order, but, is in fact, owing to a mistake, not so done.[12] It does not suffice for an officer to purport to act in his official capacity, if the act is a nullity.[13]

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[6] *Peary Lal Ray* v. *The Secretary of State,* (1924) 83 I.C. 446=1924 Cal. 913=39 C.L.J. 454; Reld. on *Laloo Singh* v. *Purna Chandra,* 24 Cal. 149=12 Ind. Dec. (N.S.) 765; *Raj Chandra Roy* v. *Fazijuddin,* 32 Cal. 716; *Narendra Lal Khan* v. *Jogi Hari,* 32 Cal. 1107=2 C.L.J. 107; *Alimuddin* v. *Ishan Chandra,* 33 Cal. 693; *Ananda Kishore* v. *Daije,* 36 Cal. 726=1 I.C. 549=10 C.L.J. 189; also see *Secretary of State* v. *Ghulam Rasul,* 34 I.C. 535=40 Bom. 392; *Sree Raja Vasireddi* v. *Secretary of State,* 53 I.C. 332=37 M.L.J. 661=10 L.W. 372; *Sri Rajah Kirtibash* v. *Secretary of State,* 9 I.C. 688=15 C.W.N. 300; *Sri Bribar Narayan* v. *Secretary of State,* 11 I.C. 899=14 C.L.J. 151; *Dhiraj Chandra* v. *Hari Dasi,* 29 I.C. 290=42 Cal. 765=42 I.A. 58 (P.C.); *Malkajeppa* v. *Secretary of State,* 15 I.C. 517=36 Bom. 325; *Dhanji Jairam* v. *Secretary of State,* 61 I.C. 347=23 Bom. L. R. 279.

[7] *Peary Lal Ray* v. *Secretary of State,* (1924) 83 I.C. 446=1924 Cal. 913=39 C.L.J. 454; Reld. on *Balkishan Das* v. *Simpson,* 25 I.A. 151 =25 Cal. 833=2 C.W.N. 513 (P.C.); *Harkhoo Singh* v. *Bunsidhar Singh,* 25 Cal. 876=2 C.W.N. 360; *Byjnath Sahoo* v. *Seetul Pershad,* 2 B.L.R. 1=10 W.R. 66 (F.B.); *Mutasaddi Khan* v. *Mahomed Idris,* 34 I.C. 283=19 C.W.N. 764 (P.C.); *Annamalai Velan* v. *Murugappa,* 22 I.C. 826=38 Mad. 837=26 M.L.J. 239 and *Mahadev Narayan Datar* v. *Sadashiv Keshav,* 59 I.C. 118=45 Bom. 45=22 Bom. L. R. 182.

[8] *Manna Sultan* v. *Secretary of State,* (1919) 53 I.C. 332=10 L.W. 372=37 M.L.J. 661=26 M.L.T. 265.

[9] *Dolat Singh* v. *Jorawar,* 33 Bom. L. R. 783.

[10] *Secretary of State* v. *Mahboob Khan,* (1919) 51 I.C. 366 (371) =42 Mad. 673=37 M.L.J. 71.

[11] *Ibid.;* Reld. on *Subbanna* v. *Secretary of State,* 31 I.C. 267= 1915 M.W.N. 915.

[12] *Maharaja of Vizianagram* v. *Satrucherla,* (1906) 30 Mad. 280.

[13] *Ghulam Abu Mahomed* v. *Secretary of State,* (1927) 109 I.C. 545=1928 Bom. 180=30 B.L.R. 431.

## 1093. ILLUSTRATIONS.—

(1) Where the Collector by an order under S. 37 of the Bombay Land Revenue Code (Bombay Act V of 1879) granted a piece of open ground to *N* for building purposes, and a suit was brought against *N*, and the Secretary of State to recover possession of the ground, and to set aside the Collector's order, but more than one year after the date of the Collector's order, *held*, that the suit was time-barred.[14]

(2) Where the Collector orders the forfeiture of land for failure to pay arrears of assessment, a suit in Civil Court to set aside the order of the Revenue authorities, must be brought within one year, under Art. 14, Limitation Act.[15]

(3) Where *A's* estate being under the management of the Court of Wards, a certificate for the realization of arrears of rent due from *B* was issued, a suit for alteration of his rent by *B*, under the guise of a suit for the amendment of a certificate was held barred under Art. 14 or Art. 120 of the Limitation Act.[16]

(4) Where an application by a mortgagor to redeem a mortgage under the provisions of the Punjab Redemption of Mortgages Act was dismissed by the Collector, a suit by the mortgagor in the Civil Court for redemption of mortgage being practically one under S. 12 of Punjab Act II of 1913, fell within the purview of Art. 14 of the Limitation Act.[17]

(5) Where the Collector resumed a *Desabandam Inam* on account of the inamdar's failure to fulfil the conditions of the *inam*, a suit for declaration was held not maintainable without getting the Collector's order, resuming the *inam* set aside, within one year of the date of its passing under Art. 14.[18]

(6) Where under S. 14 of the Patni Regulation the Collector could make only a *summary investigation*, if the Talukdar contested the Zemindar's demand for any arrear, the determination of the rent payable for the tenure in future was held beyond the scope of the Collector's power, and Art. 14 did not bar the suit for refund of excess amount realised by landlord without claiming penalty.[19]

(7) If a Collector purports to deal with land which is *prima facie* the property of an individual who has been in peaceful occupation thereof and not of the Government, he is not dealing with that land in his official capacity but is acting *ultra vires*, and Art. 14 does not apply to a suit to set aside *ultra vires* orders.[20]

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[14] *Nagu* v. *Salu*, (1890) 15 Bom. 424; also see *Chhotubhai Govindji* v. *The Secretary of State*, (1920) 55 I.C. 591.

[15] *Ganesh Shesho Deshpande* v. *The Secretary of State*, (1920) 57 I.C. 587=44 Bom. 451=22 Bom. L. R. 212.

[16] *Ashutosh Nath Ray* v. *Abdool*, (1901) 28 Cal. 676.

[17] *Ram Chand* v. *Kaura*, (1923) 75 I.C. 885=1924 Lah. 690.

[18] *Subbanna* v. *Secretary of State*, (1915) 31 I.C. 267=1915 M.W.N. 915.

[19] *Nagendra Lal* v. *Raja Bibi*, (1912) 17 I.C. 504=17 C.W.N. 374; also see *Rajani Kant* v. *Ram Dulal*, (1912) 17 I.C. 881=17 C.W.N. 55 (Art. 14 not applied to suit for possession of lands about which Collector had no jurisdiction to decide dispute as to title between raiyats).

[20] *Malkajeppa* v. *Secretary of State*, (1912) 15 I.C. 517=36 Bom. 325=14 Bom. L. R. 332.

(8) Art. 14 has no application to a case where a *Zamindar* sues for possession of certain lands of his on the ground that the Collector treated the suit property as the property of the Government, and resumed the lands and re-granted them to the then occupants thereof on *pattas*.[21]

(9) Similarly, where the land in dispute was used as a graveyard and also for storing wood by the plaintiffs, who had been in long undisturbed possession, the order of eviction by the District Deputy Collector, being *ultra vires,* the suit to set aside the order was not barred by Art. 14, Limitation Act.[22]

(10) Where the land resumed lay within the plaintiff's estate, and the Collector was bound by S. 48 to transfer it to the plaintiff, and no one else, the order made by the Collector was without jurisdiction and a nullity when need not be set aside under Art. 14.[23]

(11) Art. 14, Limitation Act, does not bar a suit for possession of lands of which the owners have been dispossessed in pursuance of an order without jurisdiction of the Collector under S. 116 of the Estates Partition Act (Bengal Act VIII of 1876).[24]

(12) Where the Inam Commissioner, with knowledge that lands with which he was dealing were post-settlement *inams,* makes an order in respect thereof in enfranchisement proceedings, his order would not affect the actual rights of the parties entitled to the property, and his proceedings need not be set aside under Art. 14.[25]

(13) A suit for the recovery of possession of property, seized on suspicion of being stolen is maintainable, and if the order directing the property to be forfeited and its sale proceeds to be credited to Government is illegal and without jurisdiction, under S. 524, Cr. P. Code, the fact that such suit is brought more than a year after the order of confiscation is no bar, as it is not necessary to set that order aside.[26]

(14) A settlement of *chaukidari chakran* lands made by the Collector with a person in disregard of the order of the Government is wholly *ultra vires,* and nugatory. A suit by the person entitled to settlement does not raise any question of limitation running under Art. 14, Limitation Act.[27]

(15) Where there is **no order or act** under Bengal Estates Partition Act V of 1897, a suit for declaration of title will lie, even beyond the limit of one year prescribed under Art. 14.[28]

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21. *Sri Raja Satracherla* v. *Secretary of State,* (1914) 25 I.C. 878 (Mad.).

22. *Rasul Khan Hamad Khan* v. *Secretary of State,* (1915) 29 I.C. 490=39 Bom. 494=17 Bom. L. R. 513.

23. *Bejoy Chand Mahtab* v. *Kristo Mohini,* (1894) 21 Cal. 626; Folld. in *Narendra Lal* v. *Jogi Hari,* 32 Cal. 1107 (1117); also see *Sri Kirtibash Hari Chandan* v. *Secretary of State,* (1911) 9 I.C. 688=15 C.W.N. 300 and *Sri Birbar Narayan* v. *Secretary of State,* (1911) 11 I.C. 899=14 C.L.J. 151.

24. *Laloo Singh* v. *Purna Chander,* (1896) 24 Cal. 149; also see *Raj Chandra Roy* v. *Fazijuddin,* (1904) 32 Cal. 716.

25. *Manna Sultan* v. *Secretary of State,* (1919) 53 I.C. 332=10 L.W. 372=37 M.L.J. 661=26 M.L.T. 265.

26. *Secretary of State* v. *Lown Karan,* (1920) 56 I.C. 507=5 P.L.J. 321=1 P.L.T. 451.

27. *Aghorenath Banerji* v. *Kalyaneswari Dasi,* (1918) 46 I.C. 883 (Cal.).

28. *Kedarnath Sanyal* v. *Naresh Chandra Ghosh,* 1931 Cal. 29=130

(16) Similarly, an order made by a Deputy Collector under S. 83 of the Bengal Estates Partition Act, V of 1897, in respect of a *patni* tenure created by one of the proprietors of the estate, and not admitted by all the recorded proprietors to have been so created is without jurisdiction; and Art. 14, Limitation Act, does not apply to a suit asking for a declaration that an allotment made by the Collector is not legally valid.[29]

(17) **A suit** which is **not** brought **for** the purpose of **setting aside any order** of the Revenue Court but merely aims at the recovery of possession of certain lands from which plaintiff has been ejected without jurisdiction, will not come under this article.[30]

(18) A suit for an injunction restraining the Secretary of State from enforcing an order which is *ultra vires* is not governed by Art. 14.[31]

(19) A suit not for setting aside any order of a Government officer, in his official capacity but one for declaration and injunction is not governed by Art. 14, Limitation Act.[32]

### 1094. ACT OR ORDER OF GOVERNMENT OFFICER.

—Art. 14 is applicable to *suits* to set aside an act or order of an officer of Government in his official capacity.

A Collector acting under the Bengal Estates Partition Act,[33] or under the Bombay Land Revenue Code[34] is a Government officer within the meaning of this clause. Other examples of such officers acting in an executive capacity are to be found in the case of a Commissioner,[35] or a settlement officer,[36] or a manager of the Sind Encumbered Estates Act.[37]

**An order made by a Civil Court,** in the exercise of its jurisdiction, **cannot be deemed** to be an order by an officer of Government in his official capacity, **within the meaning of Art. 14.**[38] A *mamlatdar* passing an order under Bombay Act II of 1906 is not an *"officer"*, meaning an executive officer, but has judicial functions as a Court.[39]

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I.C. 232=52 C.L.J. 247; also see *Ajodhya Prasad* v. *Ram Khelawan,* 96 I.C. 632=6 Pat. 73=1926 Pat. 421 and *Wasif Ali* v. *Narain Rai,* 89 I.C. 193=1925 Cal. 953=29 C.W.N. 839.

[29] *Jitendra Gopal Roy* v. *Matangini,* (1919) 49 I.C. 965 (Cal.) (Art. 120 applied); also see and cf. *Haro Mandal* v. *Dhiranath Das,* (1925) 90 I.C. 691=1925 Pat. 784 (Art. 120 applied to suit for declaration as heir to property settled by *prodhan*).

[30] *Rajah Dhakeswar* v. *Gulab,* (1926) 53 I.A. 176=5 Pat. 735 =1926 P.C. 60=97 I.C. 217 (P.C.).

[31] *Patdaya* v. *Secretary of State,* (1924) 82 I.C. 577=48 Bom. 61 =1924 Bom. 273=25 Bom. L. R. 1160.

[32] *Secretary of State* v. *Bagmal Kishendayal,* 98 I.C. 22=1927 Nag. 10=9 N.L.J. 198=22 N.L.R. 147.

[33] *Parbati* v. *Raj Mohan,* 29 Cal. 367.

[34] *Nagu* v. *Salu,* 15 Bom. 424.

[35] *Mani Bhai* v. *Nadiad City Municipality,* 51 Bom. 105; *Dolat Singh* v. *Jorawar Singh,* 1931 Bom. 473=133 I.C. 851=33 Bom. L. R. 783.

[36] *Asutosh* v. *Abdul,* 28 Cal. 676.

[37] *Sufan* v. *Khem Chand,* 124 I.C. 369=1930 Sind 150.

[38] *Maula Baksh* v. *Bhaba Sundari,* (1913) 19 I.C. 968=19 C.L.J. 187; also see *Govindabala* v. *Ganu,* 10 Bom. L. R. 749.

[39] *Bullappa* v. *Basagauda,* 33 Bom. L. R. 517.

The effect of an **order under Land Registration Act, VII of 1876**, is that of "settling the actual possession", and a suit merely for declaration under S. 42, Specific Relief Act, is precluded, although plaintiff may be in physical possession.[40]

A suit for possession or for a declaration of right to immoveable property, notwithstanding any order under the Act, is of the nature contemplated by S. 89 of the Land Registration Act, and is not governed by Art. 14.[41]

An order not having any finality,[42] or being of a temporary or provisional nature, need not be set aside under this article.[43]

It has been noticed in para. 1086, *ante,* that it does not suffice for an officer of Government to purport to act in his official capacity to bring his act or order within the purview of Art. 14, or for the subject to allege that the act was wrong or to refrain from expressly asking the Court to set aside the order to take it out of the purview of the article.[44] Article 14 will not apply where it is wholly superfluous for the plaintiff, suing for declaration of title, or for possession, to ask the additional relief of cancellation of the order. Thus a suit under S. 109 of the Bengal Tenancy Act for a declaration that an undisputed entry in revenue records is erroneous is not governed by Art. 14.[45]

**Orders binding as between parties.**

**1095.** Article 14 relates to an "act" or "order" of a Government officer, and not to a *decision* passed by him. Under **Ss. 20 and 21 of the Khoti Settlement Act,** it is the "decision" on the rival claims of the parties which is open to reversal by the Civil Court and not the consequences of that decision, which as provided by S. 22 are left to the Collector himself to undo or modify in accordance with the decision of the Civil Court.[46] Section 21 of the Act does not contemplate any "order" being made by the survey officer between the parties, and even if framing the register be regarded as an "act" of the survey officer, S. 22 provides for its being amended by the Collector himself, in accordance with the decision of the Civil Court. Consequently, the claim for a rectification by a competent Civil Court of a decision of survey officer was not barred under Art. 14.[47]

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[40] *Raj Narain Das* v. *Shama Nando,* 26 Cal. 845; Reld. on *Omrunnissa* v. *Dilawar,* 10 Cal. 350 and *Ram* v. *Janki,* 12 C.L.R. 139; also see *Krishna Bhupati* v. *Ramamurti,* (1894) 18 Mad. 405.

[41] *Luchman* v. *Kanchun,* (1884) 10 Cal. 525; *Shyama Sundari* v. *Mahomed Zarip,* (1909) 3 I.C. 693=9 C.L.J. 91; Folld. 10 Cal. 350 and 10 Cal. 525.

[42] *Ramgulam* v. *Bishnu,* 11 C.W.N. 48.

[43] *Vannisami* v. *Chellasami,* 62 I.C. 276=1921 M.W.N. 193.

[44] *Sulleman Aba Mahomed* v. *Secretary of State,* 1928 Bom. 180=109 I.C. 545=30 Bom. L. R. 431.

[45] *Agin Bindh* v. *Mohun,* 30 Cal. 20 (27).

[46] *Ibid.*

Similarly, in the case of a settlement officer acting either under **S. 68 or 72 of the Central Provinces Land Revenue Act,** the decision of the question of rights between the parties, or the making of the disputed entry in the Record of Rights is subject to review by a Civil Court. Consequently, a suit in a Civil Court of competent jurisdiction, for declaration that an entry in settlement papers is erroneous, is not governed by Art. 14 of the schedule.[48] The plaintiff, in a suit for declaration, need not have the order or act set aside to enable him to get relief prayed for.[49] In the case of an order not within the scope of the authority of an official who makes it, carried out in the way of dispossession, that is an act of force, the remedy is the same as if it had been effected by a mere private individual.[50] In *Asutosh* v. *Abdool,*[1] it was held that the Settlement Officer's decision as to the question of rent has the force of a decree, and a suit for alteration of the rent is not permissible after the period of limitation under Art. 14 or Art. 120 of the Limitation Act, under the guise of a suit for the amendment of a certificate. **This article does not apply if the plaintiff's claim is independent of the order of the Government officer.**[2]

*Illustrations.*

(1) A suit which is essentially one for a declaration of title under S. 66 (2) of Central Provinces Land Revenue Act does not fall under this article, even though its effect is to set aside an order passed by a Settlement Officer. Such a suit falls under Art. 120.[3]

(2) A suit to obtain possession of lands dealt with in a partition proceeding under the Bengal Estates Partition Act, which were struck off by the Collector upon an enquiry under S. 115 of that Act, was held not governed by Art. 14, as it was not a suit to set aside the order of a Collector between the parties.[4]

(3) Similarly, a suit for possession of lands of which the owners have been dispossessed in pursuance of an order of the Collector under the Bengal Estates Partition Act will lie, even though no suit is brought to

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[47] *Faki Ghulam Mohidin* v. *Sajnak,* (1893) 18 Bom. 244.

[48] *Naboghan Badhai* v. *Raghunath,* (1915) 30 I.C. 61=21 C.L.J. 646=19 C.W.N. 1303; Relied on 30 Cal. 20 (27)=7 C.W.N. 314 and 29 Cal. 367=6 C.W.N. 92.

[49] *Agin Bindh* v. *Mohan Bikram,* 30 Cal. 20 (27)=7 C.W.N. 314; Folld in *Ramgulam* v. *Bishnu,* (1906) 11 C.W.N. 48; cf. *Ram Asray* v. *Sheo Nandan,* (1916) 1 Pat. L. J. 873.

[50] *Shivaji Yesji* v. *The Collector,* (1887) 11 Bom. 429.

[1] (1901) 28 Cal. 676.

[2] *Dolat Singh* v. *Jorawar Singh,* (1931) 133 I.C. 851=1931 Bom. 473=33 Bom. L. R. 783 (Where a Commissioner passed an order directing payment of a cash allowance—*Toda giras hak,* Art. 14 did not bar a suit to recover plaintiff's share of the allowance).

[3] *Rao Sardar Singh* v. *Rao Vishal Singh,* 1930 Nag. 92 (95)=120 I.C. 321=26 N.L.R. 94.

[4] *Rajchandra* v. *Fazijuddin,* 32 Cal. 716.

set aside the Collector's order within one year, as provided in Art. 14.[5] Where property not falling within the estate being partitioned by a Government Officer is allotted to a party, a suit by the owner for declaration of title, or for possession will not be governed by Art. 14.[6]

(4) Where the Revenue Officer rejected plaintiff's application for partition of shamilat, and having no jurisdiction to decide the question of title arising in the case did not profess to decide it, a suit for declaration of title to proportionate share of shamilat area was held not barred under Art. 14, but was governed by Art. 120.[7]

(5) An order passed against the plaintiff under the Land Registration Act, may be treated as a surplusage, in a suit for confirmation of possession of the property by declaration of plaintiff's right and title thereto.[8] A prayer for cancelment of an order passed by the Settlement Officer in defendant's favour was treated as a mere surplusage.[9]

(6) Where the suit does not seek the relief as to setting aside any act or order of a Government Officer, and plaintiff is not required to set aside the order not standing in his way, Art. 14 cannot apply.[10]

**1096. STARTING POINT OF LIMITATION.**—The third column provides that time shall begin to run from the date of the act or order. The Bombay High Court has held that time does not run from the date of the final order in appeal confirming the original order.[11] But it must be brought within one year from the date of the original order.[12] The Allahabad High Court did not find it necessary to decide this point in the case of *Raghunath Prasad* v. *Kaniz.*[13]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 15. | Against Government to set aside any attachment, lease or transfer of immoveable property by the revenue authorities for arrears of Government revenue. | One year. | When the attachment, lease or transfer is made. |

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[5] *Laloo Singh* v. *Purna Chander,* (1896) 24 Cal. 149.

[6] *Ajodhya Prasad* v. *Ram Khelawan,* 6 Pat. 73=1926 Pat. 421=96 I.C. 632.

[7] *Kalu Khan* v. *Umda,* (1916) 47 P.R. 1916=34 I.C. 546=150 P.L.R. 1916=136 P.W.R. 1916.

[8] *Ram* v. *Janki,* 12 C.L.R. 139; *Raj Narain* v. *Shama,* 26 Cal. 845; also see *Omrunnissa* v. *Dilawar,* 10 Cal. 350 and *Luchmon Sahai* v. *Kanchun,* 10 Cal. 525.

[9] *Anup* v. *Sadho,* 1888 A.W.N. 119; also see *Shyama* v. *Mahomed,* (1907) 9 C.W.N. 91.

[10] *Damodar Das Narayan* v. *Secretary of State,* (1930) 55 Bom. 47.

[11] *Chaturbhuj* v. *Secretary of State,* 22 Bom.L.R. 146=55 I.C. 591.

[12] *Ganesh* v. *Secretary of State,* 44 Bom. 451=57 I.C. 587.

[13] (1902) 24 All. 267.

### SYNOPSIS.

1097. Corresponding provisions.
1098. Application of the article.

### NOTES.

**Act XIV of 1859.**

**1097. CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, S. 1, cl. 4, provided a period of one year for suits of this nature. A suit to set aside a transfer of land made by the revenue authorities for arrears of Government revenue come within the words of cl. 4, S. 1, Act XIV of 1859.[14]

The corresponding article in Act IX of 1871 was Art. 17 of Sch. II of that Act and this article has remained unchanged in Act XV of 1877.

**1098. APPLICATION OF THE ARTICLE.**—A suit to set aside a transfer of land made by the Revenue authorities for arrears of Government revenue came within the corresponding cl. 4 of S. 1 of Act XIV of 1859,[15] where a ghatwal became a defaulter. As to attachment for the realization of land revenue in Bombay, see *Samal Das* v. *Secretary of State.*[16] Under the **N.-W. P. Land Revenue Act** (XIX of 1873), Ss. 150 and 154, the defaulter's patti or mahal may be attached and taken under direct management.[17]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 16. | Against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears. | One year. | When the payment is made. |

### SYNOPSIS.

1099. Corresponding provisions.
1100. Scope and application—Payment under protest.
1101. Suits governed by this article.
1102. Suits not governed by Art. 16.

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[14] *Chittro* v. *Assistant Commissioner,* (1879) 14 W.R. 203.

[15] *Ibid.*

[16] (1891) 16 Bom. 455.

[17] *Madho* v. *Surjan,* (1905) 28 All. 281.

## NOTES.

1099. **CORRESPONDING PROVISIONS.**—This clause corresponds to Art. 16 of Act XV of 1877, and Art. 18 of Sch. II of Act IX of 1871. The period of limitation was one year under Act XIV of 1859 also. *Vide* S. 1, cl. 4 of that Act.

1100. **SCOPE AND APPLICATION.**—A suit under cl. 4 of S. 1 of Act XIV of 1859, lay "to recover any money paid *under protest,* in satisfaction of any claim made by the Revenue authorities on account of arrears of revenue, or demands recoverable as arrears of revenue". It was held by Seton-Karr, J., in *Kebul Ram* v. *The Government*[18] that

**Payment under protest.**

> "an appeal to the higher authority, set over the authority which disallows any request is a native's way of *protesting.* If his mode of attempting to vindicate his rights, and what he does when the attempt has failed, may be said, looking to native modes of thought and action, to be done under 'protest'."

Accordingly, where the plaintiff had stated his objections in vain to both Collector and Commissioner, any further or more formal *protest* on his part was not expected. **The appeal was considered as a formal protest,** and all payments made under it, including the first payment by the plaintiff immediately or soon after the order complained of. Macpherson, J., differed from this view, observing that

> "the appeal to the Commissioner is the last indication on record of any *protest,* and I do not understand on what principle it can be held that money paid annually for three years after an order has been made by the Revenue Authorities can be said to be money paid under protest when there is no evidence of actual protest. . . . ."[19]

In this case, it was held that a suit will lie to set aside an order of the Commissioner of *Chota Nagpur,* directing the plaintiff to pay Government revenue at a certain rate, but it would be ineffectual to recover any sum paid after the vain appeal to the Commissioner, unless any such sum had been **paid within one year previous to** the date of institution.[20] Where a person has paid several years' assessment under protest, he can only recover the payment for the last of such years under this article,[21] *i.e.,* payments within one year before suit.[22] Where penal assessment levied for unauthorised occupation of Government land had been paid under coercion, the rule of one year's limitation under Art. 14 or Art. 16 was held applicable.[23]

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[18] (1866) 5 W.R. 47.

[19] *Kebul Ram* v. *The Government,* (1866) 5 W.R. 47 (48).

[20] Per Seton-Karr, J., in 5 W.R. 47 (48).

[21] *Bhujang* v. *Collector,* 11 B.H.C.R. 1.

[22] *Secretary of State* v. *Zemindarani,* (1921) 59 I.C. 98=12 L.W. 334.

**Suits governed by this article.**

**1101. A suit for the refund of** *Tirvajasti,* levied under the provisions of the **Irrigation Cess Act,** is governed by Art. 16 of Limitation Act, and not by S. 59 of the Madras Revenue Recovery Act (II of 1864). A mere demand by the Government purporting to be made under the Rent Recovery Act, will not make S. 59 of that Act applicable as amounting to a proceeding under the Act.[24] It can hardly be said that a person is aggrieved by a mere demand. The mere receipt of the money could not be said to be a proceeding.[25] Therefore a suit for the **recovery of water-cess,** illegally collected without any proceeding under the Rent Recovery Act is governed by Art. 16.[26] Where the Government levy statutory water-cess from the *ryots* of a Zemindar, and not from the Zemindar from whom it ought to have been levied, if leviable at all, a suit lies by Zemindar to recover amount illegally levied, which he may have remitted to the *ryots* out of the rents payable by them, but such suit must be brought within the period of one year prescribed by Art. 16 of the Limitation Act.[27] Under S. 2 of the Madras Irrigation Cess Act (VII of 1865) arrears of water-cess are made recoverable in the same manner as arrears of land-revenue. Where the imposition and collection of penal water-rate is unauthorised and illegal, and the relief claimed is the refund of the amounts thus illegally collected and paid under protest, together with interest, the cause of action is disclosed for a suit falling exactly under the description in column 1 of Art. 16.[28] This view has been followed in several cases that the period of limitation for a suit for refund from Government of water-cess illegally levied on a *ryot* is one year, and not six months.[29] Where the act of the Government in respect of which a declaration and injunction is sought is illegal or *ultra vires,* and not merely irregular in respect of some detail in the proceeding, the suit would fall under Art. 120, and not Art. 14 or S. 59 of Revenue Recovery Act.[30] Where several reliefs are claimed as arising from one cause of action, the fact that one is time-barred, will not disentitle the plaintiff to the grant of any others which may not be time-barred.[31] Thus, where the suit for declaration of plaintiff's right to irrigate lands in a certain village within a proprietary estate free of charge includes a relief for recovery of water-cess wrongfully collected by Government, it is open to the Court to grant the declaratory relief, if plaintiff is in time therefor, even though the other claim is barred under Art. 16.[32]

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[23] *Meera* v. *Secretary of State,* 13 M.L.J. 269; Followed in *Panchalapalli* v. *Secretary of State,* (1922) 70 I.C. 884=46 Mad. 503.

[24] *Ravula Vengala Reddi* v. *Secretary of State,* (1912) 15 I.C. 328 (Mad.).

[25] *Panchalapalli* v. *Secretary of State,* (1922) 70 I. C. 884=46 Mad. 503 (F.N.).

[26] *Ravala Nagamma* v. *Secretary of State,* (1913) 18 I.C. 699=1913 M.W.N. 75; also see *Panchalapalli Pichi Reddy* v. *Secretary of State,* (1922) 70 I.C. 884 (*Held,* that a *"proceeding"* within the meaning of S. 59 of Madras Revenue Recovery Act must refer to such actions of the Government as are referred to in various parts of the Act, for example, seizure of the person or property); cf. *Ramasami Aiyar* v. *Secretary of State,* 26 I.C. 863=1915 M.W.N. 154.

[27] *Secretary of State* v. *Zamindarani of Vegayammapeta Estate,* (1921) 59 I.C. 98=12 L.W. 334.

[28] *Secretary of State* v. *Nagaraja Aiyar,* (1923) 74 I.C. 281=1923 Mad. 665=44 M.L.J. 645=17 L.W. 618=32 M.L.T. 230=1923 M.W.N. 327.

**Suits not falling under Art. 16.**

1102. A local or a special Act may prescribe a different period of limitation, *e.g.,* S. 59 of the Madras Rent Recovery Act, II of 1864, fixes a period of six months, where steps are taken to recover the dues in *proceedings* under that Act.[33] When payment was made on account of a clear and admitted liability, with the object of saving the estate from sale, Art. 16 is inapplicable.[34]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 17. | Against Government for compensation for land acquired for public purposes. | One year. | The date of determining the amount of the compensation. |

**SYNOPSIS.**

1103. Corresponding provisions.
1104. Scope and application.
Award not a decree.
1105. Suit for compensation money.

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[29] *Secretary of State* v. *Venkataratnam,* (1923) 73 I.C. 106=46 Mad. 488=1923 Mad. 652=45 M.L.J. 12; *Yallamanchili* v. *Secretary of State,* (1925) 86 I.C. 267=21 L.W. 155=1925 Mad. 474.

[30] *Thiruvenkatacharyulu* v. *Secretary of State,* 1934 Mad. 147=57 Mad. 501.

[31] *Inguligi Venkata Sivarama Dass* v. *The Secretary of State,* (1927) 99 I.C. 1055=52 M.L.J. 132=1927 Mad. 350=38 M.L.T. 44=1927 M.W.N. 201.

[32] *Ibid.*

[33] *Ramasami Aiyar* v. *Secretary of State,* (1915) 26 I.C. 863=1915 M.W.N. 154.

[34] (1870) 2 All. H. C. 52.

## NOTES.

**1103. CORRESPONDING PROVISIONS.**—This article corresponds to Art. 19 of Act IX of 1871, and is a re-enactment of Art. 17 of the previous Act XV of 1877.

**Award not a decree.**

**1104. SCOPE AND APPLICATION.**—A **Full Bench of the Bombay High Court** has held in *Nilkanth Ganesh Naik* v. *The Collector of Thana,*[35] that the Land Acquisition Act (X of 1870) did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there is no general law which enables a Civil Court to enforce such a statutory liability, when imposed upon a Collector or other civil officer, by means of execution proceedings without a suit. The ordinary mode of enforcing such an obligation is by suit, unless the legislature when it creates the obligation prescribes such other means of enforcing it. It was querried whether an award made under the provisions of Act I of 1894 can be enforced against the Collector by execution proceedings.[36] However, it was held later, that an award under the Land Acquisition Act of 1894, is not a decree or order capable of execution under the Civil Procedure Code, and is, therefore, not within the purview of S. 10 of the Watan Act of 1874.[37] If the Collector on making an award does not pay the amount of the compensation awarded by him, or fails to deposit it in Court as required by law, the amount may be recovered by suit against the Government.[38] The decision of the Court under the Land Acquisition Act being an award, and not a decree or order of a Civil Court in its ordinary jurisdiction, it could not be changed on review.[39]

**Suit for compensation money.**

**1105.** This article does not apply to a suit for recovery of compensation money paid by Government to a person not entitled to receive the amount, *e.g.*, where the money was wrongly drawn out by another person than the proper heir of the deceased person whose land was acquired by the Government.[40]

Where *A* obtained a money decree against *B*, and attached certain land in execution, but *C* intervened successfully, and *A* then brought a suit for declaration and obtained a decree that the land was liable to be sold in execution. However, meanwhile the land was taken up by the Government under the Land Acquisition Act, and the compensation money was paid to *C*. It was held that a suit brought by the plaintiff, the auction-purchaser of the sum sold in execution of *A's* decree against *B*, was not governed by this article nor by Art. 62, but came under the general residuary Art. 120.[41] A suit to recover money paid by Government to the defendant as compensation for land taken for public purposes which the plaintiff alleged to belong to him and not to the defendant, was held to fall under this article, and the plaintiff's right of action against the defendant accrued at the time when the defendant first took the money from Government, and the ignorance of the plaintiff in regard to the accrual of his right did not prevent the time from running against his suit, unless it had been brought about by the fraud of the defendant.[42] Where the Government has acquired the land and has paid the money to one who was apparently entitled to it, a suit by a person who has also got interest in the land and claims the money paid by the Government is governed by Art. 120 and not by Art. 17 or Art. 62 of the Act.[43]

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[35] (1897) 22 Bom. 802 (F.B.).

[36] *Ibid.*

[37] *Ladha Ebrahim and Company* v. *Assistant Collector, Poona,* (1910) 12 Bom.L.R. 839=35 Bom. 146=8 I.C. 166; Followed 22 Bom. 802 (F.B.).

[38] *Nilkanth* v. *The Collector,* 22 Bom. 802 (F.B.).

[39] *Mulambath Kunhammad* v. *Acharath Parakat,* (1917) 38 I.C. 373 (378)=31 M.L.J. 827.

[40] *Nundlal Bose* v. *Meer Abbo,* (1879) 5 Cal. 597=5 C.L.R. 45.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 18. | Like suit for compensation when the acquisition is not completed. | One year. | The date of the refusal to complete. |

**SYNOPSIS.**

1106. Corresponding provisions.
1107. Scope and application.

**NOTES.**

**1106. CORRESPONDING PROVISIONS.**—This article corresponds to Art. 18 of the previous Act XV of 1877 and Art. 20 of Act IX of 1871.

**1107. SCOPE AND APPLICATION.**—The suit contemplated by this article is one for compensation for non-completion and refusal to complete the acquisition as referred to in S. 48 of the Land Acquisition Act, I of 1894. But where the Collector has taken possession and the land has vested in the Government under S. 17 of the Land Acquisition Act, a suit for compensation is not governed by this article but by Art. 120 of the schedule to Limitation Act.[44] Where the Government withdraws from an acquisition, and the Collector refuses to pay the compensation suffered by the owner in consequence of the notice or of any proceedings thereunder, a suit to recover the amount must be governed by this article.[45] This has no reference to any claim for compensation in respect of land that has been acquired.[46]

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[41] (1892) 15 Mad. 382; also see *Anant Ram Bhattacharjee* v. *Ramchandraker,* (1923) 50 Cal. 475; *Ladli Prasad* v. *Nizamuddin Khan,* (1919) 54 I.C. 535=22 O.C. 342; *Rajah Khetter Mitter* v. *Kumar Dinendra,* (1897) 3 C. W. N. 202 (Art. 120 applied or Art. 62, Limitation Act); cf. *Mahomed Wahib* v. *Mahomed Ameer,* (1905) 32 Cal. 527 (Article 62 applied).

[42] *Azroal Singh* v. *Gopeenath,* (1867) 8 W.R. 23.

[43] *Somasingh* v. *Jaigobind,* 1935 Pat. 42 (Article 120 and not Art. 17 or 62 applied).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 19. | For compensation for false imprisonment. | One year. | When the imprisonment ends. |

### SYNOPSIS.

1108. Corresponding provisions.
1109. False Imprisonment.
1110. Starting point of limitation.
1111. Suit on joint-torts.

### NOTES.

1108. **CORRESPONDING PROVISIONS.**—The corresponding article in Act IX of 1871 was Art. 21 of Sch. II of that Act. Art. 17 of Sch. II of Act XV of 1877 has been re-enacted as the present article in Act IX of 1908.

1109. **FALSE IMPRISONMENT.**—According to English law, an infringement of personal rights, ordinarily gives an immediate cause of action without proof of special damage; but, false imprisonment is deemed as giving *a continuing cause of action.*[47] This is on the basis of the principle that the continuing nature of the wrongful conduct which is accompanied by fresh damage from time to time gives a recurring cause of action.[48]

**Starting point of limitation.**

1110. The Indian law adopts this principle by treating false imprisonment as a continuing wrong, in which there is a recurring cause of action so long as the imprisonment has not ceased. **The starting point of limitation,** in the third column is, therefore, the date *"when the imprisonment ends,"* and the suit will be in time for the entire period of imprisonment, however long, provided the suit is brought within one year of the last date of such false imprisonment.[49]

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[44] *Manthara* v. *Secretary of State,* (1903) 27 Mad. 535.

[45] *Maharaja Sir Rameswar Singh* v. *Secretary of State,* 34 Cal. 470 =11 C.W.N. 356.

[46] *Manthara* v. *Secretary of State,* (1903) 27 Mad. 535 (A suit for land is governed by 12 years' limitation).

[47] *See* Dr. Pal's Limitation Act, p. 511; citing *Coventry* v. *Apsley,* (1692) 2 Saeb. 420 and *Hardy* v. *Ryle,* (1829) 9 B. C. 603; also see *Darby and Bosanquet's Statute of Limitations,* 2nd Edn., p. 45.

[48] *Whitehouse* v. *Fellowes,* (1861) 10 C.B.N.S. 765.

[49] Dr. Pal's Limitation Act, pp. 511, 512; *also see* 30 Cal. 872 (P.C.).

To support an action for false imprisonment "nothing short of **actual detention and complete loss of freedom**" is sufficient.[50] Their Lordships of the Privy Council, in holding to this effect, have followed the leading case on the subject in *Bird* v. *Jones*,[50-a] in which Coleridge, J., observed that imprisonment of the body is not to be confounded with mere loss of freedom:

> "it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power, it includes the notion of restraint within some limits defined by a will or power exterior to our own".[1]

Williams, J., speaks of imprisonment as being ***"entire restraint";*** and Pattison, J., adds

> "imprisonment is a total restraint of the liberty of the person for however short a time, **and not a partial obstruction** of his will, whatever inconvenience it may bring on him".[2]

Their Lordships were, therefore, of opinion that

> "immediately after his liberation he (the plaintiff, to whom bail had been granted), might have brought a suit for false imprisonment. . . . Having failed to bring his suit within one year from the date of his liberation, he is now barred by the law of limitation".[3]

Time began to run therefore from the **date of liberation on bail,** and not from the date on which the warrant of arrest was finally set aside.[4] In *Hasanali Bohra* v. *Sheikh Moti*,[5] it was held by the Judicial Commissioner, Nagpur, that the imprisonment ends on the day on which the Magistrate ordered the remand. If the wrongful restraint does not amount to imprisonment this article does not govern the suit for compensation.[6]

**Suit on joint-torts.**

**1111.** A **suit on joint-torts,** in which plaintiff alleges that the torts of malicious arrest and prosecution and trespass were committed by the three defendants acting in conspiracy, instead of one, is governed by the one year rule of limitation contained in Arts. 19 and 23 of the Limitation Act.[7]

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[50] *Mahammad* v. *Yusufuddin,* (1903) 30 Cal. 872 (P.C.); Followed (1845) 7 Q.B. 742.

[50-a] (1845) 7 Q.B. 742.

[1] Per Coleridge, J., in *Bird* v. *Jones,* (1845) 7 Q.B. 742.

[2] Per Pattison, J., in *Ibid.*

[3] *Mahammad Yusufuddin* v. *Secretary of State,* 30 Cal. 872 (880) (P.C.).

[4] *Ibid.,* 30 Cal. 872 (P.C.).

[5] (1904) 17 C.P.L.R. 41.

[6] *Cf.* Articles 22 and 36.

[7] *Weston, D.* v. *Peary Mohun Das,* (1914) 23 I.C. 25=18 C.W.N. 185=40 Cal. 898.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 20. | By executors, administrators or representatives, under the Legal Representatives Suits Act, 1855. | One year. | The date of the death of the person wronged. |

### SYNOPSIS.

1112. Corresponding provisions.
1113. The Legal Representatives Act XII of 1855.
1114-1116. Scope and application.
1114. (*i*) Suits by executors, etc.
1115. (*ii*) Wrongs which do not survive.
1116. (*iii*) Wrong causing pecuniary loss.
1117. (*iv*) Abatement of suits.

### NOTES.

**1112. CORRESPONDING PROVISIONS.**—The corresponding article in Act IX of 1871, was Art. 12 of Sch. II of that Act. And, Art. 20 of Act XV of 1877, has been re-enacted in the present Art. 20 of Act IX of 1908.

**1113. THE LEGAL REPRESENTATIVES ACT.**—Act XII of 1855 enables the executors, administrators, or representatives to sue for damages for certain wrongs, committed in the lifetime of person wronged causing pecuniary loss to his estate; and be sued for any wrong committed by the deceased in his lifetime, for which he would have been liable to be sued in an action for damages. This article applies to suits *by* the executors, etc. But suits *against* such executors, etc., are provided for in Arts. 33, 34 and 35 of the Sch. I to the Limitation Act.

The word "representative" in Act XII of 1855 does not mean only the executors or administrators, but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian.[8]

**(i) Suits by executors, etc.**

**1114. SCOPE AND APPLICATION.**—Articles 20 and 21, as also the Arts. 33, 34 and 35 apply only to suits brought *by*, or *against* the executors, administrators or representatives, under the provisions of the enactments therein named. But for *other* suits, by or against the executors, etc., of a deceased person, these specific provisions of the Limitation Act are not applicable.

As stated in the preamble of Act XIII of 1855 itself the relations of a person whose death was caused by the wrongful act of another were not, prior to its enactment, entitled to claim compensation on account of the death. The right to claim compensation in respect of such a death was created by the Act.[9] It is provided that every suit shall be for the benefit of certain specified near relations of the deceased

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[8] *Johnson* v. *The Madras Railway Company,* (1905) 28 Mad. 479.

> "and shall be brought by and in the name of the executor, administrator or representative of the person deceased".

But only one suit is allowed to enforce the claims of all the persons beneficially entitled, it being provided that the rights of each and every one of them shall be adjudged and adjusted by the Court in such suit.[10]

**(ii) Wrongs which do not survive.**

**1115.** Act XII of 1855 relates only to **wrongs which do not survive** to the representatives of a deceased person.[11] Where the plaintiff's right of suit does not abate by the death of the person causing the wrong, but survives against his heir, the Act, therefore, does not apply.[12]

*Illustration.*

A suit for the value of an elephant wrongly sold by a deceased person, or for recovery of money due by a deceased agent, against the representative of deceased, is not governed by Act XII of 1855.[13]

**(iii) Wrong causing pecuniary loss.**

**1116.** A suit by executors, etc., of the person wronged, under Act XII of 1855 lies only when such wrong has resulted in causing some *pecuniary loss,* for which compensation is being claimed, to the estate of deceased person. On the other hand, a suit would lie against the executors, etc., of a deceased wrong-doer, even though no pecuniary loss was caused thereby to the party, who brings the suit against the executors.[14] Pecuniary loss which a person suffers by reason of the expenses incurred for medical treatment or for defending a prosecution is not an injury to his estate, and cannot be treated as separate and distinct from the original cause of action.[15]

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[9] *Johnson* v. *The Madras Railway Company,* (1905) 28 Mad. 479 (483).

[10] *Ibid.,* (1905) 28 Mad. 479 (484) (The beneficiaries entitled to compensation under Act XIII of 1855 are not *joint*-claimants, but have *separate,* distinct and different rights enforceable by one judicial process instituted by one on behalf of all).

[11] *Sreemutty Chundermonee* v. *Santomonee Dassee,* (1864) 1 W.R. 251.

[12] *Ibid.,* (1864) 1 W.R. 251; also see *Najuf* v. *Patterson,* (1870) 2 N.-W.P. 103.

[13] *Ibid.,* 1 W.R. 251 and 2 N.-W.P. 103.

[14] *Gokul Chunder* v. *Mt. Burreck,* 2 Hay 325; Marshall, 344.

[15] *Krishna Behary Sen* v. *The Corporation,* (1904) 31 Cal. 406.

**Abatement of suit.**

**1117.** In personal actions, the rule of common law, according to the maxim *actio personalis moritur cum persona* applies,[16] *i.e.*, an action for personal injury dies with the person.[17] Act XII of 1855 deals with the cases brought by executors, etc., of a deceased person for recovery of certain moneys, and it only applies to cases where the person injured might in his lifetime have maintained, but had not instituted an action.[18] Where the suit for recovery of damages for the malicious prosecution by the defendant corporation, was instituted by the deceased, but his sons were entered upon the record in his stead, as his heirs, they were permitted to carry it on taking out administration to the estate of the original plaintiff.[19] Similarly, Act XII of 1855 does not apply to a suit brought originally against the wrong-doer himself, and only subsequently sought to be continued against his heir.[20] Accordingly, where the estate of the wrong-doer did not benefit, but actually suffered, in consequence of his wrong-doing, it was held that the suit abated on the death of the deceased wrong-doer, and no right to sue the representative survived.[21] Clause (2) of S. 1 of Act XII of 1855 does not apply to an action commenced against the wrong-doer in his lifetime, but only to actions commenced against the executors, etc., representatives of a deceased wrong-doer. Where, therefore, a suit is brought against the wrong-doer in his lifetime, such suit abates on his death.[22] As has been held by a Full Bench of the Madras High Court, "personal injuries" are wrongs to the person who do not necessarily cause damage to the estate of the person wronged.[23] Where a defendant in a suit for malicious prosecution dies before judgment is given in the suit, the right to sue does not survive to prevent the abatement of suit.[24] In actions of tort, there can be no abatement *after* judgment, which affects the *estate* of the deceased. Thus, an appeal against a decree for damage in

**Cause of action which do not survive.**

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[16] *Krishna Behary Sen* v. *The Corporation,* (1904) 31 Cal. 406 (408).

[17] *Lenden* v. *London Road Car Company,* (1888) 4 T.L.R. 448 and *Pulling* v. *The Great Eastern Railway Company,* (1883) L.R. 9 Q.B.D. 110.

[18] *Krishna Behary* v. *The Corporation,* (1904) 31 Cal. 406 (409, 410); s.c. on appeal 31 Cal. 993 (999).

[19] *Ibid.,* 31 Cal. 993 (999).

[20] *Haridas Ramdas* v. *Ramdas Mathradas,* (1889) 13 Bom. 677; Followed *Phillips* v. *Homfray,* L.R. 24 Ch. D. 439.

[21] *Ibid.,* 13 Bom. 677 (680).

[22] *Ramchode Das* v. *Rukmani Bhoy,* (1905) 28 Mad. 487; Followed 13 Bom. 677 and Relied upon 31 Cal. 406.

[23] *Rustomji Dorabji* v. *Nurse,* 1921 Mad. 1=44 Mad. 357=62 I.C. 260=40 M.L.J. 173 (F.B.).

[24] *Ibid.,* 44 Mad. 357=1921 Mad. 1 (F.B.); also see *Punjab Singh* v. *Ram Autar Singh,* (1919) 52 I.C. 348=4 P.L.J. 676.

a suit for defamation does not abate on the death of the original defendant-appellant.[25] Section 89 of the Probate and Administration Act expressly excludes from its operation all causes of action in respect of personal injuries not causing the death of party.[26] The rule of English Law *"actio personalis moritur cum persona"* is applicable to India.[27] Personal actions, so long as they remain unconverted into decrees, abate on death. If the plaintiff in a suit for libel, having failed to obtain a decree in the Trial Court, seeks to obtain a decree for damages in the Court of Appeal, and dies during the pendency of the appeal, the appeal abates.[28] The intention of S. 89, Probate and Administration Act, is to express in a statutory form the maxim *actio personalis moritur cum persona.*[29] Accordingly, the Bombay High Court has held that an action for malicious prosecution does not survive beyond the lifetime of the plaintiff, even so far as it relates to the expenses incurred by the deceased plaintiff in defending himself against a prosecution.[30] The **Calcutta High Court** however takes the view that the words *"other personal injuries not causing the death of a party"* refer to physical injuries to the person which do not cause death.[31]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 21. | By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855. | One year. | The date of the death of the person killed. |

## SYNOPSIS.

1118. Corresponding provisions.
1119. The Indian Fatal Accidents Act.
1120. Representatives of the deceased.

## NOTES.

**1118. CORRESPONDING PROVISIONS.**—The corresponding article in Act IX of 1871 was Art. 13 of Sch. II of that Act.

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[25] *Gopal* v. *Ramchandra,* (1902) 26 Bom. 597 and *Paraman* v. *Sundararaja,* (1902) 26 Mad. 499.

[26] *Punjab Singh* v. *Ram Autar Singh,* (1919) 52 I.C. 348=4 P.L.J. 676.

[27] *Gadigi Mareppa* v. *Vannajee Vajanjee,* (1917) 38 I.C. 823=31 M.L.J. 772=(1916) 2 M.W.N. 280.

[28] *Ibid.,* 38 I.C. 823=31 M.L.J. 772; Relied on 13 Bom. 677; 28 Mad. 487 and 31 I.C. 4, *supra.*

[29] *Motilal Satyanarayan* v. *Harnarayan Premsukh,* 1923 Bom. 408=47 Bom. 716.

[30] *Ibid.*

[31] *Krishna Behari* v. *Corporation,* 31 Cal. 993=8 C.W.N. 745; Followed in *Bhupendra Narain* v. *Chandramoni Gupta,* 100 I.C. 286=53 Cal. 987; Compare 44 Mad. 357 (369)=62 I.C. 260 (F.B.) and 47 Bom. 716=73 I.C. 365=1923 Bom. 408 and 52 I.C. 348=4 P.L.J. 676.

Article 21 of the Act XV of 1877 has been re-enacted in the present Art. 21 of Act IX of 1908.

**1119. THE INDIAN FATAL ACCIDENTS ACT.**—Act XIII of 1855 provides for compensation to families for loss occasioned by the death of a person caused by actionable wrong. Suits under the Indian Fatal Accidents *by* executors, etc., of a deceased party are provided by Art. 21, Sch. I to the Limitation Act.

**1120. REPRESENTATIVES OF THE DECEASED.**— The word "*representative*" in Act XIII of 1855 do not mean only executors or administrators, but includes all or any one of the persons for whose benefit a suit may be brought under the Act and it makes no difference whether the deceased was a European or Eurasian. Under Art. 21, the suit must be brought within one year from death, unless the bar is saved by S. 7 or 8 of the Limitation Act.[32] The beneficiaries have each a distinct and several right, not a joint right, in respect of the same cause of action enforceable at the instance of all or one of them suing for himself and the rest. They are, therefore, not persons "entitled to sue", within the meaning of S. 7, nor joint-claimants under S. 8 of the Act. The limitation will run against all when any one is competent to bring the suit.[33]

The maxim of Common Law, *actio personalis moritur cum persona, viz.,* that personal actions die with the person of the deceased, is so far modified by Act XIII of 1855, that action is now allowed for the benefit of the wife, husband, parent, or child of the deceased, and not for the benefit of his estate as such.[34] The preamble of this Act XIII of 1855 enacts that "it is often times right and expedient that the wrong-doer in such a case should be answerable in damages for the injury so caused by him".

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 22. | For compensation for any other injury to the person. | One year. | When the injury is committed. |

**SYNOPSIS.**

1121. Corresponding provisions.
1122. Scope and application.
1123. Proceedings under Workmen's Compensation Act.

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[32] *Johnson* v. *The Madras Railway Company,* (1905) 28 Mad. 479= 14 M.L.J. 363.

[33] *Ibid.*

[34] *Vinayek* v. *Great Indian Peninsular Railway Company,* (1890) 7 B. H.C.R. 113; also see *Lyell* v. *Ganga,* (1875) 1 All. 60 (F.B.).

## NOTES.

**1121. CORRESPONDING PROVISIONS.**—The corresponding provision in **Act XIV of 1859** was made in its S. 1, cl. 2, *viz.*, "suits for damages for injury to the person and personal property, or to the reputation.

In **Act IX of 1871,** Art. 21 provided for suits *"for false imprisonment"* and Art. 22 followed it with a provision for suits "for *any other* injury to the person". Thereafter came Arts. 23 to 25 providing for "malicious prosecution", "libel" and "slander" respectively.

In **Act XV of 1877,** the residuary provision was made in Art. 22, after dealing with "false imprisonment" and "death", in Arts. 19, 20 and 21. The provision for suits for compensation for "malicious prosecution", "libel" and "slander" was made after the residuary article.

The present Art. 22 is thus a re-enactment of Art. 22 of the previous Act XV of 1877.

**"Injury."**

**Injury to person.**

**1122. SCOPE AND APPLICATION.**—The word *"injury"* in S. 1, cl. 2 of Act XIV of 1859 was held to mean "loss or deterioration caused by a wrongful act".[35] Art. 22 of the present Act deals specially with injury to person[36]; and the words "any other injury," from the arrangement of the article, mean an immediate or consequential injury to a man's body, limbs or health,[37] other than those previously mentioned. "Injury" under Art. 22 of the present Act has a wider connotation than physical hurt. A voluntary obstruction to a person to prohibit him from entering a temple is technically an injury to the person.[38]

*Illustrations.*

(1) An injury to plaintiff caused by sulphuric acid being thrown in his face, as a result of which his injured eye-ball had to be removed by an operation, comes within the provision in this article.[39]

(2) A suit for damages or compensation for injury caused to a person's reputation and for mental pain arising out of an assault is governed by Art. 22.[40]

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[35] *Amirthammal* v. *Ranganadha,* 3 M.H.C. 65.

[36] *Abdulla* v. *Abdulla,* (1924) 84 I.C. 796=1924 Bom. 290=25 Bom. L.R. 1333.

[37] Mitra's Limitation Act, Vol. II, p. 1117; Dr. Pal's Limitation Act, p. 514.

[38] *Manickyaswami* v. *Lakamma,* (1932) 138 I.C. 84=1932 Mad. 432 =35 L.W. 392.

[39] *Abdulla* v. *Abdulla,* (1924) 84 I.C. 796.

[40] *Arhat Misir* v. *Baldeo Ahir,* (1910) 5 I.C. 124 (All.).

(3) Injuries caused by the unskilfulness of a surgeon or physician may come under this article read with S. 24, Limitation Act.[41]

**Proceedings under Workmen's Compensation Act, 1923, not a suit.**

1123. Art. 22 of the Limitation Act, 1908, applies to *suits,* and not to **proceedings under the Workmen's Compensation Act.**[42]

"Section 19 of the Act expressly ousts the jurisdiction of the Civil Court in matters required by the Act to be settled by a Commissioner. Though S. 23 empowers the Commissioner to exercise the powers of a Civil Court under the Code of Civil Procedure for certain purposes, the Act nowhere says that the proceedings under the Act should be treated as a suit, or that the ordinary law of limitation has to be applied to them, and it makes **special provisions for limitation** in **S. 10** for the original proceedings, and in **S. 30** for appeals."[43]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 23. | For compensation for a malicious prosecution. | One year. | When the plaintiff is acquitted or the prosecution is otherwise terminated. |

## SYNOPSIS.

1124. **Corresponding provisions.**
1125-1130. *"Prosecution"—Meaning of.*
1126. —Allahabad.
1127. —Calcutta.
1128. —Bombay.
1129. —Madras.
1130. —Privy Council.
1131. False report or complaint.
1132. Continuing wrong.
1133-1134. *Starting point of limitation.*
(*i*) Plaintiff's acquittal.
1134. (*ii*) Termination of proceedings.
1135. Date of acquittal; or
1136. Cause of action.
1137. Revision from order of discharge.

## NOTES.

1124. **CORRESPONDING PROVISIONS.**—In Act XIV of 1859, the corresponding provision was made by S. 1, cl. 2—"to suits for damages for injury to the person and personal property, or to the reputation . . . ."

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41. Collet on Torts, Ss. 18 and 21; Mitra's Limitation Act, Vol. II, p. 1117; Dr. Pal's Limitation Act, p. 514; cf. Art. 115, Negligence of professional man, implying *breach of contract.*

42. *J. Hogan* v. *Gafur Ramzan,* 1934 Bom. 28=58 Bom. 128=149 I.C. 247=35 Bom. L. R. 1142=1934 Cr. C. 115.

43. *Ibid.*

Art. 23, Act IX of 1871, was worded simply—"For a malicious prosecution . . . . when the plaintiff is acquitted".

In Act XV of 1877, Art. 23 ran as under present article, *i.e.*, with the words *"or the prosecution is otherwise* terminated," in the third column.

**1125. "PROSECUTION"—MEANING OF.—The Dictionary meaning** of the word "prosecution" is

> "a proceeding, either by way of indictment or information of the Criminal Court, in order to put an offender on his trial, the exhibition of a criminal charge against a person before a Court of Justice, and in general language the institution and carrying on of legal proceedings against a person".—Murray's *English Dictionary*.

**Allahabad.**

**1126. The Allahabad High Court** has observed in *Madan Mohan Singh* v. *Ram Sunder Singh,*[44] that the word

> " **'prosecution' has a very wide significance** and does not merely mean an actual trial or an enquiry which may result in a conviction, and the imposition of imprisonment or fine".

In *Mohammad Nizullah Khan* v. *Jai Ram,*[45] an action was held to lie on account of an **application for binding down to keep the peace under S. 107, Criminal Procedure Code.**

**Calcutta.**

**1127.** The view of the **Calcutta High Court** is that the term "prosecution" should not be interpreted in the restricted sense in which it is used in the Criminal Procedure Code, and that if a person maliciously and without reasonable and probable cause sets the machinery of the criminal law in motion, he is responsible for the consequences.[46] In the case of *Crowdy* v. *Reilly,*[47] it was laid down that an action for damages would lie in the case of an **application under S. 107, Criminal Procedure Code,** and that it was not essential that the original proceeding should have been of such a nature as to render the person against whom it was taken liable to be arrested, fined or imprisoned. In another case, it has been held that an **application for sanction of a criminal prosecution, actually filed in a** Civil Court, could give rise to a claim for damages for malicious prosecution.[48] The definition of "prosecution" is not confined to a prosecution before a Magistrate or a Criminal Court. If a judicial tribunal which has the power to take criminal action against the person charged is moved, the requirement of the law is satisfied, and a claim for damages for malicious prosecution will arise.[49] It is stated that

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[44] 1930 All. 326=1930 A.L.J. 885=52 All. 553=125 I.C. 464=1930 Cr. C. 449 (Per Sulaiman, J.).

[45] (1919) 41 All. 503=50 I.C. 140=17 A.L.J. 776.

[46] *Bishun Pershad Narain Singh* v. *Phulman Singh,* (1915) 19 C.W.N. 935=27 I.C. 449=20 C.L.J. 518; cf. *Nagendra Nath* v. *Basanta Das,* 1930 Cal. 392 (394)=57 Cal. 25=125 I.C. 667 (Prosecution does not commence as soon as the complaint is made to the Magistrate).

[47] (1912) 17 C.W.N. 554.

[48] *Narendra Nath De* v. *Jyotish Chandra,* (1922) 49 Cal. 1035= 1922 Cal. 145.

> "to prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question".[50]

The word "prosecution"

> "includes such civil actions as may be the subject of a suit for malicious prosecution".[1]

However, in a case under the **Bengal Disorderly Houses Act, 1906,** it was held that allegations made by the defendants in their report to the Magistrate that the plaintiff was a woman of no character was held to be libel, and not malicious prosecution, of the plaintiff.[2] Where the defendant laid **a complaint** against the plaintiff before the Magistrate, but the charge was dropped when the case was sent to police for enquiry and report, and the defendant wrote to the police stating that he did not want to proceed with the charge, there was **no *prosecution* as the Magistrate never issued any process.**[3] Similarly, where a complaint laid against the plaintiff for alleged criminal breach of trust, was dismissed by the Magistrate without summoning the accused, there was not such a prosecution by the defendant as is necessary for the maintenance of a suit for malicious prosecution.[4] **A prosecution is not commenced before a person is summoned to answer a complaint.**[5] Proceedings before police are proceedings anterior to prosecution.[6] If defendant gives correct information to police, and police, without further interference, think fit to prosecute plaintiff, defendant is not responsible in damages.[7] But, if charge is false to knowledge of the complainant, and he misleads or influences the police, he cannot escape liability for malicious prosecution, because the prosecution has not technically been conducted by him.[8] A suit for malicious prosecution is not a statutory suit. There are certain **wrongs akin to malicious prosecution,** *e.g.,* malicious abuse of the process of the Court, malicious arrest, malicious search, and malicious execution, and these kindred suits are sometimes treated as being suits for malicious prosecution, and this is the origin of the dictum

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[49] *Rabindra Nath* v. *Jogendra Chander,* (1928) 56 Cal. 432=1928 Cal. 691.

[50] Clerk and Lindsell, p. 637, cited in 1928 Cal. 691 (693)=56 Cal. 432.

[1] Bigelow on Torts, p. 204; cited in 1928 Cal. 691 (693)=56 Cal. 432.

[2] *Dhirajbala Dasi* v. *Gopal Chandra Mukherji,* (1913) 20 I.C. 768; Reld. upon *Ishri* v. *Muhammad Hadi,* 24 All. 368=1902 A.W.N. 96.

[3] *De Rozario* v. *Gulabchand Anundjee,* (1910) 37 Cal. 358=6 I.C. 877; Folld. in 57 Cal. 25=1930 Cal. 392.

[4] *Golap Jain* v. *Bhola Nath,* (1911) 38 Cal. 880=11 I.C. 311; Reld. in 1930 Cal. 392=57 Cal. 25.

[5] *Nagendra Nath Ray* v. *Basanta Das Bairagya,* 1930 Cal. 392=57 Cal. 25=125 I.C. 667; Reld. on *Yates* v. *Queen,* (1885) 14 Q.B.D. 648.

[6] *Ibid.,* 1930 Cal. 392=57 Cal. 25=125 I.C. 667; Reld. on 1926 P.C. 46 and 30 All. 525 (P.C.).

[7] *Ibid.,* 1930 Cal. 392=57 Cal. 25=125 I.C. 667.

[8] *Ibid.*

> "that the maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which that term is used in the Criminal Procedure Code".[9]

**Bombay.**

1128. The **Bombay** view that a prosecution is commenced when a complaint is made to a Magistrate, does not seem to be good law.[10]

**Madras.**

1129. **The Madras High Court,** like the Calcutta High Court, has held that a prosecution did not commence when a Magistrate issued only a notice, and not a summons to the accused on receiving a complaint of defamation and subsequently dismissed it after hearing cause for both the parties.[11]

**Privy Council.**

1130. In the decision of the Judicial Committee in the case of *Balbhadar Singh* v. *Badri Sah,*[12] there is sufficient to indicate that **proceedings before the police** are anterior to "prosecution". Their Lordships have observed that

> "In any country, where, as in India prosecution is not private, an action for malicious prosecution in the most literal sense of the word cannot be raised against any private individual. But *giving information to the authorities, which naturally leads to prosecution,* is just the same thing".[13]

In the case of *Gaya Prasad* v. *Bhagat Singh,*[14] their Lordships, in dealing with the question as to who is a prosecutor, observed:

> "The question in all cases of this kind must be, who was the prosecutor, and the answer must depend upon the whole circumstances of the case. *The mere setting of the law in motion is not the criterion*: the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the Police. That again is a question of fact."[15]

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[9] *Nagendra Nath Ray* v. *Basanta Das Bairagya,* (1930) 57 Cal. 25=1930 Cal. 392; Reld. on *Golap Jan* v. *Bholanath,* (1911) 38 Cal. 880=11 I.C. 311=15 C.W.N. 917.

[10] *Ahmedbhai* v. *Framji Edulji Bamboat,* (1903) 28 Bom. 226=5 Bom. L. R. 940; cf. 57 Cal. 25=1930 Cal. 392, *supra* and 37 Cal. 358 and 38 Cal. 880; also see *Mudvirapa* v. *Fakirapa,* 7 Bom. 427 (False complaint to Magistrate: Starting point in action for damages).

[11] *Sheik Meeran Saheb* v. *Ratnavelu Mudali,* (1912) 37 Mad. 181 =21 I.C. 703=25 M.L.J. 1.

[12] 1926 P.C. 46=29 O.C. 163=95 I.C. 329=1 Luck. 215 (P.C.).

[13] *Ibid.*

[14] (1898) 30 All. 525=35 I.A. 189=11 O.C. 371 (P.C.).

[15] *Ibid.*

In the same case, their Lordships referred to the decision of Madras High Court in the case of *Narasingha Row* v. *Muthaya Pillai*[16] and said:

> "The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified. But in the opinion of their Lordships it is not of universal application."

Their Lordships explained further that,

> "In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not technically been conducted by him."[17]

**False report or complaint.**

**1131.** According to the authorities noticed in Ss. 1125 to 1130, above, when the only act done by the defendant was the lodging before a Magistrate of a complaint, but there is no process issued by the Magistrate, Art. 23 will not be held applicable.[18] Where the report made to the police is false, but the cognizance of the offence imputed is not taken by the Magistrate, Art. 23 has no application.[19] The suit for compensation, where no prosecution had been initiated, was held to be a suit for compensation for libel or slander, for which the limitation applicable is that prescribed by Art. 24 or Art. 25.[20] If the complaint or report is false to knowledge of the complainant, and he has actively misled or influenced the police to start a prosecution, the case comes under Art. 23, as a malicious prosecution.[21] Where plaintiff was prosecuted by a Municipal Committee, and acquitted, and he then brought a suit for damages for malicious prosecution against the Municipality, Art. 23, and not Art. 2, was held applicable where the action of the defendant was not *bona fide*.[21-a]

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[16] (1902) 26 Mad. 362=12 M.L.J. 389; Refd. in (1908) 30 All. 525=35 I.A. 189=11 O.C. 371 (P.C.).

[17] *Gaya Prasad* v. *Bhagat Singh,* (1908) 30 All. 525=35 I.A. 189=11 O.C. 371 (P.C.); Folld. in 1930 All. 326=125 I.C. 464, *supra*.

[18] *De Rozario* v. *Gulab Chand,* (1910) 37 Cal. 358=6 I.C. 877; *Golap Jan* v. *Bholanath,* 38 Cal. 880=11 I.C. 311; also see *Nagendra Nath Ray* v. *Basanta Das,* 1930 Cal. 392=57 Cal. 25=125 I.C. 667; cf. *Mudvirapa* v. *Fakirapa,* (1883) 7 Bom. 427 (Date of complaint held to be date of wrong).

[19] *Ishri* v. *Muhammad Hadi,* (1902) 24 All. 368.

[20] *Ibid.;* Reld. upon in *Dhirajbala Dasi* v. *Gopal Chandra Mukherji,* (1913) 20 I.C. 768=18 C.L.J. 352.

[21] *Nagendra Nath* v. *Basanta Das,* 1930 Cal. 392=57 Cal. 25=125 I.C. 667; Folld. 1926 P.C. 46 and 30 All. 525 (P.C.).

**1132. CONTINUING WRONG.**—*See* Notes under S. 23 and Art. 19. Malicious prosecution is a sort of continuing wrong, like false imprisonment; and the Indian Legislature has obviously adopted the view, by providing in column 3 of the article, that time begins to run from the date when the wrong *ceases, i.e.*,

"when the plaintiff is acquitted, or the prosecution is otherwise terminated".

Where the plaintiff brought a suit against certain alleged joint-tortfeasors, for damages for malicious arrest, and prosecution including trespass, and these torts were said to have been committed by three men acting in conspiracy, this latter allegation made no difference in the point of limitation for the suit which remained what it was. Where in carrying into effect the conspiracy, the conspirators inflict damage on an individual, he may sue for the particular damage he has thus separately suffered. In a suit on joint-torts, the arrest, imprisonment and prosecution are governed by the one-year rule under Arts. 19 and 23 of the Limitation Act.[22]

**1133. STARTING POINT OF LIMITATION.**—Where a criminal prosecution of the plaintiff has ended is an *acquittal*, the order acquitting him does not cease to be final, if there is no appeal, but only a reference to the High Court with regard to the acquittal; and, the prosecution should be treated as one which had *"terminated"* within the meaning of Art. 23 of the Act.[23]

**(i) Plaintiff's acquittal.**

The limitation for a suit for damages for malicious prosecution commences to run from the day on which the accused were actually discharged, that is the date of the Magistrate's order showing that the trial had closed; although the Court may have expressed an opinion earlier that there was no case to put accused on trial, and that he should be discharged.[24]

Under the old law, Act XIV of 1859, also limitation was taken to commence not from the date on which the criminal charge was preferred, but from the date on which the plaintiff was discharged from custody.[25]

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[21-a] *Maung Kyaw* v. *Ma-Ubin*, 89 I.C. 861=1925 R. 311=3 R. 268.

[22] *D. Weston* v. *Peary Mohun Das*, (1914) 23 I.C. 25 (65).

[23] *Narayya* v. *Seshayya*, (1899) 23 Mad. 24; cf. 57 I.C. 635 (Mad.).

[24] *Shuppu Iyer* v. *Sivarama Pattar Kariakar*, (1912) 16 I.C. 584 (Mad.); also see 17 M.L.J. 60.

[25] *Nursing Chunder Mitter* v. *Greeja Shunker Mojoomdar*, (1867) 8 W.R. 443; also see and cf. *Bhyreb Chunder Chuckerbutty* v. *Mohendro Chuckerbutty*, (1870) 13 W.R. 118 and *Hurree Narayan* v. *Ojoodhia Ram*, (1868) 10 W.R. 308 (Commencement of limitation from date of resulting damage alleged as cause of action).

**(ii) Termination of proceedings.**

1134. The **Allahabad High Court,** in *Goberdhan Singh* v. *Ram Badan Singh,*[26] held in the words of Bowen, L.J., in the case of *Abrath* v. *North-Eastern Railway Co.,*[27] that

> "in an action for malicious prosecution the plaintiff has to prove first that he was innocent, and that his innocence was pronounced by the Tribunal before which the accusation was made".

Other High Courts have followed the same leading authority in setting forth one of the necessary ingredients to be established by the plaintiff in a suit for malicious prosecution that "the plaintiff was innocent of the charge upon which he was tried". See *Alam Khan Mahomed Khan* v. *Banemiya Rasul,*[28] *Harish Chander Neogy* v. *Nishi Kanta Banerji,*[29] *Naliappa Goundan* v. *Kailappa Goundan.*[30] The **Punjab Chief Court** held to the same effect in *Pohlu Ram* v. *Hukam Singh,*[31] that where the criminal case was dismissed on technical ground it was still more incumbent on the plaintiff to establish their innocence. But this view has been held to be erroneous by their Lordships of the Privy Council, in the case of *Balbhadar Singh* v. *Badri Sah.*[32] The Judicial Committee have held that the correct phraseology is not that plaintiff is to prove that he was "innocent of the charge upon which he was tried," but

> "that the proceedings complained of terminated in favour of the plaintiff, if from their nature they were capable of so terminating".[33]

Their Lordships added that there was controversy as to what terminated proceedings, *e.g.,* whether a *nolle prosequi* of the Attorney-General was a termination. But at any rate it was quite settled that a prosecution comes to an end when a Magistrate declines to commit.[34]

**Date of acquittal.**

1135. Limitation under this Art. 23 now clearly begins from the time when the prosecution is terminated by the plaintiff's acquittal or otherwise. In a case where the prosecution ends in an acquittal, the specific provision that limitation is to run from the date of acquittal makes it unnecessary to consider when the prosecution terminated.[35]

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[26] (1922) 67 I.C. 65=44 All. 485.

[27] (1883) 11 Q.B.D. 440.

[28] (1926) 95 I.C. 39=1926 Bom. 306=28 Bom. L. R. 459.

[29] (1901) 28 Cal. 591.

[30] (1900) 24 Mad. 59.

[31] 32 P.R. 1919.

[32] 95 I.C. 329=1926 P.C. 46=29 Oudh Cas. 163=1 Luck. 215 (P.C.); O.R. *Badri Sah* v. *Balbhadar Singh,* 79 I.C. 697=1924 Oudh 145 =10 Oudh L. J. 468.

[33] *Ibid.;* Reld. on *Basebe* v. *Mathews,* (1867) 2 C.P. 684 (688)= 36 L.J.M.C. 93=16 L.T. 417 (Per Montagu Smith, J.).

[34] *Debgal* v. *High,* (1837) 3 Bing. (N.S.) 950; *Weston* v. *Beeman,* (1857) 27 L. J. Ex. 57; *Huntley* v. *Simson,* (1857) 27 L. J. Ex. 134.

**Appeal from acquittal.**

The order of acquittal terminates the prosecution for the time being. The filing of an appeal does not *ipso facto* vacate that order; and yet while the appeal is pending it can hardly be said that the prosecution has terminated.[36]

**Close of the case.**

**1136.** In the case of a prosecution the conduct of the prosecutor is looked on as a continuous act prolonged until the close of the case, and limitation is to be computed from that point.[37] But, when the complaint made is the only act done, the date of the complaint is that of the wrong.[38] And, the Limitation Act does not prescribe or allow any deduction on account of irregular proceedings of a Magistrate not moved by the defendant in the suit.[39] Where an accused is discharged in the middle of the case before the prosecution as a whole terminates, without any formal order of acquittal or discharge, the date of the judgment afterwards pronounced and not the date of discharge, would be the starting point of limitation.[40]

**Revision from order of discharge.**

**1137.** The **Allahabad High Court** has held, taking the word "Prosecution" in its wider sense, that in the case of an order of discharge the *final termination* would be only when the proceedings in revision have come to an end in favour of the discharge.[41]

"If this view were not accepted, the result would be that the discharged person would be compelled to institute his suit for damages even though the matter is still *sub judice*, and is being considered by the Sessions Judge, or by the High Court."[42]

**Madras.**

The **Madras High Court** has held to the same effect in *Tanguturi Sriramulu* v. *Viresalingam Garu.*[43] The second part of Art. 23 of Sch. I is not

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[35] *Madan Mohan Singh* v. *Ram Sunder Singh,* 1930 All. 326=125 I.C. 464=52 All. 553=1930 A.L.J. 885; also see *Huri Mohan* v. *Naim-ud-din,* 20 Cal. 41 (Acquittal on appeal).

[36] *Ibid.,* 1930 All. 326=125 I.C. 464=52 All. 553=1930 A.L.J. 885.

[37] *Mudvirapa* v. *Fakirappa,* (1883) 7 Bom. 427 (430).

[38] *Ibid.;* Reld. on *Huree Narain Mytee* v. *Ojoodhya Ram Sein,* 10 W.R. 308.

[39] *Goma Mahad Patil* v. *Gokaldas Khemji,* 3 Bom. 74; Reld. in 7 Bom. 427 (430).

[40] *Venkataramana* v. *Swami Naik,* 17 M.L.J. 60.

[41] *Madan Mohan Singh* v. *Ram Sunder Singh,* supra.

[42] Per Sulaiman, J., in *Madan Mohan Singh* v. *Ram Sunder Singh,* 1930 All. 326=52 All. 553=125 I.C. 464=1930 A.L.J. 885.

[43] (1920) 57 I.C. 635 (Mad.).

**Bombay.**

necessarily excluded where there has been an acquittal.[44] Where a Magistrate having purported to make an order of discharge, the complainant moved the District Magistrate in revision, who directed further inquiry and the High Court set aside the District Magistrate's order, holding that the order of the trial Court amounted to an acquittal, it was held that the starting point of limitation in a suit to recover damages for malicious prosecution by the accused was the date of the High Court's order, and that the second part of Art. 23 of Sch. I applied to the case.[45] A different view was taken in an earlier case, where it was held that a suit for damages for malicious prosecution had to be brought within one year from date of plaintiff's acquittal, and not from the dismissal of a revision petition.[46] The Bombay High Court took the same view in *Purshottam Vithaldas* v. *Raoji Hari Athavale*.[47] West, J., observed that the discharge of an accused person is the termination of the prosecution,

> "because if no further proceedings are taken the accused person is free of charge made against him, and if the charge was maliciously made he would have a right of bringing an action against the person who instituted it".[48]

The **Allahabad** and latest **Madras** view is thus opposed to the early Madras and the **Bombay** High Court view: and the former appears to be the sounder view, in consonance with the wider significance of the word "prosecution," as held by numerous authorities.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 24. | For compensation for libel. | One year. | When the libel is published. |

### SYNOPSIS.

1138. **Corresponding provisions.**
1139. Libel distinguished from malicious prosecution.
1140. Starting point of limitation.

### NOTES.

**1138. CORRESPONDING PROVISIONS.**—This article is a re-enactment of Art. 24 of Sch. II to the Limitation Act XV of 1877.

Art. 24, in Act IX of 1871, was "for libel" and Act XIV of 1859 made provision for such suits by its S. 1, cl. 2.

**1139. LIBEL, DISTINGUISHED FROM MALICIOUS PROSECUTION.**—Where proceedings were taken against a respectable woman, under Bengal Disorderly Houses Act of 1906, on the allegation that she was a woman of no character, and used her house for purposes of habitual prostitution, it was held that a suit for damages should have been instituted within one year from the date of the libel, under Art. 24 of Sch. I to the Limitation Act.[49] Art. 23 had no application because it could not be contended with any show of reason that the suit was for damages for malicious prosecution.[50]

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[44] *Tanguturi Sriramulu* v. *Viresalingam Garu,* (1920) 57 I.C. 635 (Mad.).

[45] *Ibid.*

[46] *Narayya* v. *Seshayya,* (1899) 23 Mad. 24.

[47] 1922 Bom. 209=47 Bom. 28=67 I.C. 754=24 Bom. L. R. 507.

[48] *Ibid.*

**Police report.**

A prosecution does not commence until proceedings are initiated by a Magistrate taking cognizance of an offence under Code of Criminal Procedure.[1] There is a clear distinction between the giving of information to the police, and the institution of criminal proceedings.[2] Consequently, a suit for malicious prosecution does not lie unless cognizance of the offence imputed has been taken by a Magistrate. The report to Police containing an imputation of a criminal offence, which is defamatory of plaintiff's character, may be a libel or slander, according as the imputation was made in writing, or orally.[3] The investigation by the police would not alter the nature of the defendant's act which has given the plaintiff his cause of action, but would be a matter which might be taken into consideration as aggravating damages.[4]

1140. **STARTING POINT OF LIMITATION.**—Time under Art. 24 runs from the date of the *publication,* and not from the date of plaintiff's knowledge.[5] In case of a continuous publication, *e.g.,* by offered sale of the offending book or newspaper, limitation would run from last publication offered for sale.[6] The words "when the libel is published" do not mean when the libel is *first* published: but *every* publication gives a fresh cause of action.[7] Similarly, every repetition of the libel would afford basis of a damage suit.[8]

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[49] *Dhirajbala Dasi* v. *Gopal Chandra,* (1913) 20 I.C. 768.

[50] *Ibid.;* Reld. on *Ishri* v. *Muhammad Hadi,* 24 All. 368=A.W.N. (1902) 96.

[1] *Ishri* v. *Muhammad Hadi,* (1902) 24 All. 368 (370); Reld. on *Austin* v. *Dowling,* (1870) L.R. 5 C.P. 534 and *Yates* v. *The Queen,* (1885) L.R. 14 Q.B.D. 648.

[2] *Ibid.;* 24 All. 368 (370); Reld. on *Queen-Empress* v. *Bisheshar,* (1893) 16 All. 124.

[3] *Ibid.,* 24 All. 368 (371).

[4] *Ibid.*

[5] Mitra's Limitation Act, p. 1120, citing *Robert* v. *Lombard,* 1 Ind. Jur. (N.S.) 192.

[6] *Duke of Brunswick* v. *Harmer,* (1849) 14 Q.B. 185.

[7] *Ibid.*

[8] In re *Howard,* (1887) 12 Bom. 167 (169).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 25. | For compensation for slander. | One year. | When the words are spoken or if the words are not actionable in themselves when the special damage complained of results. |

## SYNOPSIS.

1141. Corresponding provisions.
1142. English law.
1143. —Not applicable in *mofussil*.
1144. Slander actionable without special damage.
1145. Starting point of limitation.
1146. Slander of title or goods.

## NOTES.

**1141. CORRESPONDING PROVISIONS.**—*See* S. 1, cl. 2, Act XIV of 1859 and compare Art. 25, Act IX of 1871. The words

> "or if the words are not actionable in themselves, when the special damage complained of results"

were not in the corresponding Art. 25 of Act IX of 1871; but were first introduced in Art. 25, Act XV of 1877.

**1142. ENGLISH LAW.**—In English law, the general rule is that slanderous words, of the nature of mere abuse, are not actionable in themselves without proof of special damage.[9] This common law rule was introduced into Calcutta by the Charter of 1726, and the latter portion of the words in the third column, which are reproduced from English law, may apply to suits on the original side of the High Courts in Presidency Towns. In *Bhooni Money Dossee* v. *Natobar Biswas*,[10] where the words used were not mere vulgar abuse, but conveyed a distinct imputation of unchastity, and alleged a specific charge of an act of immorality, but no special damage was alleged, or proved, it was held following the Full Bench decision in the case of *Girish Chunder Mitter* v. *Jatadhari*,[11] that the **mental distress** caused by the words conveying an insult was not actionable: but, by the **common law**

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[9] See and cf. Stephen's Commentaries, 18th Edn., Vol. III, Bk. III, p. 358.

[10] (1901) 28 Cal. 452=5 C.W.N. 659; also see *Hirabhai Jahangir* v. *Dinshaw Edulji*, (1926) 51 Bom. 167.

[11] (1899) 26 Cal. 653 (F.B.).

of England **introduced into Calcutta** by the charter of 1726, a person injured by slanderous words can recover damages in an action, *when actual damage has been caused.*[12]

**Not applicable in mofussil.**

1143. But, the English law is not held applicable in the *mofussil.*[13] In suits for slander and libel, Courts in India are not arbitrarily bound to follow the principles enunciated in English decisions bearing upon the point.[14] The English law of slander, as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se,* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decisions sufficient to establish such distinctions as part of the common law of British India.[15] In this country personal insult conveyed by abusive language is actionable *per se* without proof of special or actual damage.[16] The **Madras High Court** held in *Parvathi* v. *Mannar,*[17] that the rule of English law which prohibits, except in certain cases, an action for damages for oral defamation. Unless special damage is alleged, being founded on no reasonable basis, should not be adopted by Courts of British India. There is thus ample authority in the Indian case-law to show that the English Law of Torts, as to verbal abuse and slander, is not the law of British India.[18]

**Special damage not necessary.**

1144. An imputation of dishonesty to the person who is a tradesman is actionable *per se,* and malicious intent or an intent to damage the reputation of a particular person is not one of the ingredients of actionable slander.[19] The majority of the learned judges, in the Full Bench case of *Girish* v. *Jatadhari,*[20] have held, however, that where there was no *defamation,* or intent to *defame,* abusive and insulting language is not actionable, even though it causes mental pain and distress of mind to the plaintiff. Accordingly, that the mere use of abusive and insulting language, such as *Sala* (wife's brother), *haramzada* (base born or bastard), *soor* (pig), *baper beta* (ironically, a bastard), apart from defamation, is not actionable irrespective of any special damage.[21] The **Upper Burma Judicial Commissioner's Court** has likewise held that a suit to recover damages for slanderous words imputing unchastity to a woman is maintainable without proof of any special damage. The comman law rule on the subject is not consonant with the demands of justice, equity and good conscience.[22] The English law in the matter is extremely artificial.[23] A libel in a judicial proceeding may be actionable as defamation.[24]

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[12] (1901) 28 Cal. 452; Reld. on *Advocate-General of Bengal* v. *Ranee Surnomoyee Dassee,* (1863) 9 M.I.A. 387 (426) and *Ratcliffe* v. *Evans,* (1892) 2 Q.B. 524.

[13] *Sukhan* v. *Bipad,* (1906) 34 Cal. 48=4 C.L.J. 388.

[14] *Abdul Hakim* v. *Tej Chandar Mukarji,* (1881) 3 All. 815=1 A.W.N. (1881) 81.

[15] *Dawan Singh* v. *Mahip Singh,* (1888) 10 All. 425=8 A.W.N. (1888) 157.

[16] *Ibid.*

[17] (1884) 8 Mad. 175.

[18] 10 All. 425, *supra.*

[19] See and cf. *Rahim Baksh* v. *Bachalal,* (1928) 51 All. 509=1929 All. 214.

[20] (1899) 26 Cal. 653 (F.B.); also see *Gobind* v. *Garth,* 28 Cal. 63 (Defamation charge under Indian Penal Code, how established).

**1145. STARTING POINT OF LIMITATION.**—In Presidency-towns, the English Law of slander was introduced by the Charter of 1726, so far as it was applicable to local circumstances, and the doctrine of English Law that slander to give cause of action must give rise to special damage, has been acted upon in cases in Presidency-towns.[25]

The words in the last portion of column 3, are words of English Law, and should be applied only to cases where the English Law is generally held applicable.[26] But not so in cases arising in the *mofussil.*[27]

**Slander of title or goods.**

**1146.** In cases of slander of title or slander of goods the limitation is not one year under Art. 25, but two years under Art. 36, which is a general article for a suit to recover damages in tort, unless any specific article provides otherwise.[28]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 26. | For compensation for loss of service occasioned bythe seduction of the plaintiff's servant or daughter. | One year. | When the loss occurs. |

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[21] *Girish* v. *Jatadhari,* (1899) 26 Cal. 653 (F.B.); Relied on *Ibin Hossein* v. *Haider,* (1885) 12 Cal. 109; *Trailokhyanath Ghose* v. *Chundranath Dutt,* (1885) 12 Cal. 424; also see *Shoobhagee* v. *Bokhari,* 4 C.L.J. 390.

[22] *Nga Nyo* v. *Mi Te,* (1916) 33 I.C. 673 (U.B.); Relied on *Parvathi* v. *Manohar,* 8 Mad. 175.

[23] *Ibid.,* 33 I.C. 673 (674) (U.B.); cf. 28 Cal. 452.

[24] *Angada Ram* v. *Nemaichand,* (1896) 23 Cal. 867.

[25] *Bhoony Money Dossee* v. *Natobar Biswas,* (1901) 28 Cal. 452.

[26] *Ibid.*

[27] *Sukhan* v. *Biped,* 34 Cal. 48.

[28] *Albert Bonnan* v. *Imperial Tobacco Company,* (1926) 94 I.C. 444=30 C.W.N. 465=1926 Cal. 757.

### SYNOPSIS.

1147. Corresponding provisions.
1148. Scope and application.

### NOTES.

**1147. CORRESPONDING PROVISIONS.**—*See* Art. 27, Act IX of 1871, and Art. 26 of Act XV of 1877, as the corresponding articles in previous Acts.

**1148. SCOPE AND APPLICATION.**—This article recognizes a principle of parental or family authority known to English Law;

> "but the English theory on which the remedy for such a wrong as that of a seduction of a young woman is based is a theory one does not find to have any place in the law of this country".[29]

Where the plaintiff, father of a married woman, who had been deserted by her husband for some years, brought a suit to recover damages for loss of her services, the two learned Judges differed as regards the maintainability of the suit.[30] Stuart, C.J., was of opinion that the father had remedy open for loss of her services in attending to her father's household affairs and Oldfield, J., held that the suit could not be maintained consonantly with Hindu customs.[31] The view taken in this case that the decree in respect of the costs of the criminal prosecution was not open to objection has been dissented from in the case of *Fazal Imam* v. *Fazul Rasul*,[32] which decision has been approved by the Calcutta High Court in *Churamoni Dassi* v. *Baidyanath Naik*.[33]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 27. | For compensation for inducing a person to break a contract with plaintiff. | One year. | The date of the breach. |

### SYNOPSIS.

1149. Corresponding provisions.
1150. Scope and application.
1151. Trade unions.

### NOTES.

**1149. CORRESPONDING PROVISIONS.**—*See* Art. 28, Act IX of 1871 and Art. 27 of the previous Act XV of 1877, as corresponding provisions to this Art. 27 in the present Act IX of 1908. There was no corresponding provision in Act XIV of 1859, where the residuary S. 1, Cl. (16) was held applicable to such cases,[34] *e.g.*, to a suit by an indigo-planter against an instigator inducing breach of contract by a ryot was held governed by the 6 years' limitation provided by Cl. (16), S. 1 of Act XIV of 1859.[35]

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[29] Per Stuart, C.J., in *Ram Lal* v. *Tula Ram*, (1881) 4 All. 97=1 A.W.N. (1881) 143.

[30] *Ibid.*

[31] *Ibid.*

[32] (1890) 12 All. 166=10 A.W.N. (1890) 19.

[33] (1905) 32 Cal. 429 (App. 12 All. 166, *supra*).

**1150. SCOPE AND APPLICATION.**—A suit for damages for improperly enticing third parties to break their contract with the plaintiff is governed by Art. 27 of Sch. I.[36] This was so held by their Lordships of the Privy Council, where the plaintiff alleged that he was one of the two rival transport contractors to the British Government in connection with a military expedition, and the act complained of was that defendant had improperly got away from the plaintiff, a large number of camels controlled by the plaintiff for the purposes of his contract, but the real complaint was that the defendant had improperly enticed the Jamadars of the plaintiff into breaking their contracts by putting the animals which they had contracted to supply to him at the disposition of the plaintiff himself.[37]

**Trade unions.**

**1151.** This article has been considered in connection with a large number of cases arising out of action of trade unions.[38]

In every case laid in conspiracy malice is essential to the giving of a good cause of action. But mere knowledge of the existence of a contract, which it was the object of the individual or of a body of conspirators to get broken, has been held in law tantamount to malice.[39] It is not an actionable wrong merely to injure a trader by legitimate competition.[40] But a conspiracy formed not with the sole object of benefitting the conspirators by excluding hostile competition, but out of spite to a particular person to ruin him, would give an action at Civil Law.[41] Similarly a conspiracy to coerce indentured servants to break their labour contracts would certainly be indictable.[42] In all such cases there must be taken to be an existing contractual relation already entered upon, and in part performed, before it is broken at the solicitation or by the conspiracy of the defendant or defendants.[43] A mere encouragement offered to a party to a contract of marriage to break it, whereby the fulfilment of the contract is rendered impossible, is not actionable.[44] The procuring or enticement may be actionable where it is the result of a conspiracy. Before a conspiracy can be actionable it must be shown to be a conspiracy to do a lawful thing by unlawful means or to do an unlawful thing even by lawful means.[45]

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[34] *Forbes* v. *Purtab Singh,* (1867) 7 W.R. 400 [Suit for breach of contract on part of the ryot (S. 1, Cl. 10) and the tort on the part of the person prevailing upon the ryot to break the contract (S. 1, Cl. 16)].

[35] *Meer Mohamed Kazem* v. *Forbes,* 8 W.R. 257.

[36] *Haveli Shah* v. *Painda Khan,* 1926 P.C. 88=96 I.C. 887=31 C. W.N. 174 (P.C.).

[37] *Ibid.*

[38] *Allen* v. *Flood,* (1898) A.C. 1; *Quinn* v. *Leathem,* (1901) A.C. 495; *South Wales Miners' Federation* v. *Glenmorgan Coal Company,* (1905) A.C. 239; *Sorrel* v. *Smith,* (1925) A.C. 700; cited in Mitra's Limitation Act, Vol. II, p. 1122.

[39] *Khimji Vasanji* v. *Narsi Dhanji,* (1915) 28 I.C. 408=17 Bom.L.R. 225=39 Bom. 682; Relied on *Lumley* v. *Gye,* (1853) 22 L.J. Q.B. 463=118 E.R. 749=95 R.R. 501.

[40] *Ibid.,* (1915) 28 I.C. 408 (412); Relied on *Mogul Steamship Company* v. *McGregor,* (1892) A.C. 25=61 L.J.Q.B. 295.

[41] *Ibid.,* 28 I.C. 408 (412).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 28. | For compensation for an illegal, irregular or excessive distress. | One year. | The date of the distress. |

### SYNOPSIS.

1152. Corresponding provisions.
1153. Distress—meaning of.
1154. Distraint, under Bengal Tenancy Act.
1155. Scope and application.
1156. Starting point of limitation.
1157. Madras Estates Land Act.

### NOTES.

**1152. CORRESPONDING PROVISIONS.**—There was no specific provision for such suits in Act XIV of 1859.[46] The last act of taking or detention must be regarded as the date of the cause of action in a suit for damages for unlawful distraint.[47]

**1153. DISTRESS—MEANING OF.**—Distress, according to Wharton's Law Lexicon, is a **taking *without* legal process,** of a personal chattel, for the redressing of an injury, the performance of a duty, or the satisfaction of a demand. Distresses may be made on cattle, damage-feasant, and also for rents, rates, taxes, etc.[48] *Distress* is an extra-judicial remedy which may be had by the mere act of the party entitled to distrain. It is not one of those remedies which are to be obtained by *application* to the *Courts* of justice.[49]

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[42] *Khimji Vasanji* v. *Narsi Dhanji,* (1915) 28 I.C. 408.

[43] *Ibid.*

[44] *Jekisondas Harkisondas* v. *Ranchoddas Bhagwandass,* (1917) 38 I.C. 588=41 Bom. 137.

[45] *Ibid.*

[46] *Tarinee Churn Bose* v. *Shumboonath,* (1865) 3 W.R. (Act X Rulings) 139 (A suit under S. 144, Act X of 1859).

[47] *Yamuna Bai* v. *Solayya Kavundan,* (1901) 24 Mad. 339.

[48] Mitra's Limitation Act, Vol. II, p. 1123.

[49] Stephen's Commentaries, 18th Edn., Vol. III, p. 438.

**1154. DISTRAINT UNDER BENGAL TENANCY ACT VIII OF 1885.**—The Bengal Tenancy Act VIII of 1885, Ch. XII, Ss. 121 to 142, allowed a distraint but this did not fall under the above definition of "Distress", as it could not have been made by the mere act of the landlord. Under S. 124 of that Act, an officer of the Court was deputed to distrain standing or gathered crops or other produce, *by order of Court,* obtained on *application* by the landlord.[50]

**Wrongful distraint.**

A suit for compensation for wrongful distraint was not strictly speaking governed by Art. 28, but it was held by the Calcutta High Court that Art. 28 or 29 and *not* Art. 2 applied to such suits.[1] Where the defendants under fraudulent and **fictitious proceedings of distraint** between a fictitious landlord and a fictitious tenant, seized standing crops belonging to the plaintiff, it was held that a suit for damages for the crops so seized, not being specially provided for in the Act, was governed by Art. 36 of the Limitation Act.[2] To bring the case under Art. 29 the property seized must be shown to be moveable property, or that the crops were cut when the distress was effected.[3] Sections 121 to 142 of the Bengal Tenancy Act have now been repealed by the Bengal Tenancy Amendment Act IV of 1928.

**1155. SCOPE AND APPLICATION.**—

**Arts. 2 and 28.**

In a case where the municipality by a warrant of distress realised sums which were not actually due to the municipality, it was held that the statute had by an express Art. 28, specifically provided a period of limitation for suits in respect of an illegal distress, and the fact that another Art. 2 framed in general terms is wide enough to embrace the suit could not be allowed to affect the operation of the article, which was expressly framed to the case of such a suit.[4] Similarly, a suit to recover damages on account of the illegal issue of a warrant of distraint and the subsequent distraint was governed as to limitation by Art. 28 and not by Art. 2.[5]

A suit to recover back money *paid* in excess of the amount due under pressure is not a suit to recover compensation for illegal, improper or excessive distress or attachment.[6] Such a suit to recover money *paid* to redeem crops which had been distrained by the defendants for rents due from persons other than the plaintiffs, and also for damages sustained on account of the distraint is, so far as the claim relates to damages, a suit coming under Cl. (*j*), Art. 35 of the Provincial Small Cause Court's Act IX of 1887.[7]

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[50] Mitra's Limitation Act, Vol. II, p. 1123.

[1] *Jagat Jiban* v. *Sarat,* (1902) 7 C.W.N. 728.

[2] *Haricharan Fadikar* v. *Harikar,* (1905) 32 Cal. 459=9 C.W.N. 376; Relied upon in *Jadunath Dandupat* v. *Harikar,* (1913) 18 I.C. 253 (Cal.) (Art. 36 applied to wrongful distraint of standing crops).

[3] *Ibid.,* 32 Cal. 459 (462) and 18 I.C. 253 (Cal.).

[4] *Jagat Jiban* v. *Sarat,* (1902) 7 C.W.N. 728.

[5] *Municipal Board, Mussoorie* v. *Goodall,* (1904) 26 All. 482.

[6] *Karrupanan Ambalam* v. *Ramasami Chetti,* (1897) 21 Mad. 239= 8 M.L.J. 165.

1156. **STARTING POINT OF LIMITATION.**—Wrongful distress is not a continuing wrong.[8] Where the proceedings which give rise to the cause of action consist in wrongful distraint, that distraint is not a continuing wrong though no doubt the injury continues.[9] The cause of action in respect of which the suit under S. 213 of the Estates Land Act is brought arises on the date of distraint and not on the day the property attached is released on payment of the money due.[10]

By S. 78 of the (Madras) Rent Recovery Act, 1865, a suit may be brought to recover damages in respect of anything professedly done under the authority of that Act, provided that it be instituted within six months from the time at which the cause of action arose. Where the goods illegally attached were seized for longer than six months, the tenant's suit for damages for the illegal detention was not barred, the detention being a continuing wrong.[11] The cause of action arises when the wrong is complete, and unlawful distress was made.[12]

**Madras Estates Land Act.**

1157. In Madras, provision is made for distraint by landlord to recover arrears of rent, under Ch. VI of the Madras Estates Land Act I of 1908.

In case of any illegal distraint, the Act provides a remedy by a suit for damages before a Revenue Court.[13] A stranger whose property has been unlawfully distrained may file a claim before the Revenue Court under Ss. 89 and 90 of that Act, and he has a remedy by suit in a Civil Court allowed as provided for in S. 91 of the Act.[14]

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[7] *Dewan Roy* v. *Sundar Tewary,* (1896) 24 Cal. 163; Followed in 21 Mad. 239=8 M.L.J. 165.

[8] *Pamu Sanyasi* v. *Zamindar of Jayapur,* (1901) 25 Mad. 540.

[9] *Venkataramier* v. *Vithilinga,* (1914) 24 I.C. 754=38 Mad. 655 =1 L.W. 89; Relied on 25 Mad. 540.

[10] *Ibid.*

[11] *Yamunabai* v. *Solayya,* (1901) 24 Mad. 339.

[12] *Pamu Sanyasi* v. *Zamindar of Jayapur,* (1901) 25 Mad. 540; Relied in 24 I.C. 754=38 Mad. 655=1 L.W. 89, *supra.*

[13] *Narayanaswami* v. *Venkataramana,* (1915) 39 Mad. 239=29 M.L.J. 607 (F.B.).

[14] *Yamunabai* v. *Solayya,* (1901) 24 Mad. 339.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 29. | For compensation for wrongful seizure of moveable property under legal process. | One year. | The date of the seizure. |

### SYNOPSIS.

1158. Corresponding provisions.
1159-1161. Suits for compensation: conflict of views.
1159. Bombay.
1160. Calcutta.
1161. Madras.
1162-1165. Scope and application.
1162. Wrongful seizure.
1162-A. Illustrations.
1163. Moveable property.
1164. Seizure, under legal process.
1165. Starting point of limitation.
1165-A. *Illustrative cases.*

### NOTES.

**1158. CORRESPONDING PROVISIONS.**—This article corresponds to Art. 29 of Sch. II to Act XV of 1877, and to Art. 30 of Act IX of 1871.

**Conflict of views.**

**1159. SUITS FOR COMPENSATION.**—This article contemplates suits for *compensation* only. The compensation claimed must be for *wrongful seizure* (S. 1162) under *legal process* (S. 1164), by which the plaintiff's *moveable property* (S. 1163) may have been taken. The other remedies which are open to the plaintiffs whose goods or moveable property have been wrongly seized are not governed by this article.

The word "compensation" has been differently interpreted by the Bombay and Calcutta High Courts. The Madras view differs from the Bombay view, and is generally followed by the other High Courts.

**(i) The Bombay view.**

The **Bombay High Court** has held in *Jagjivan Jhaverdas* v. *Golam Jilani,*[15] that a suit to recover money wrongly taken under a decree is a "suit for compensation" within this article, to which a claim may be added to recover damages for the loss of gain or interest upon the money. This was a case where the property of the defendant was attached. West, J., observed that

> "in the case of money; . . . . the impossibility of the return of the identical coins limits the defendant's duty to the replacing them by substitutes of

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[15] (1883) 8 Bom. 17 (20); Not followed in 38 All. 676; 30 Cal. 440; Referred in 31 Mad. 431; 38 Mad. 972; 84 I.C. 6=1924 Nag. 248; 1 Oudh Cas. 272; 49 P.W.R. 1910.

exactly equal value, and the limit of the defendant's duty in such a case is the measure of the plaintiff's right. He cannot insist on a restoration of such and such rupees: he can insist only on being paid their exact value in other rupees. **This is essentially compensation.** The compensation, however, for the money wrongly seized and for the loss of gain or interest upon it may blend in a single claim for compensation".

As regards the scope of Art. 29, "in the case of an ox or a goat wrongly seized in execution, supposing the article itself is sought to be recovered . . . . . Art. 11, Limitation Act, prescribes a term of one year. Besides the recovery of the article, the owner may seek *compensation for damage to it*, and for such a suit Art. 29 prescribes a term of one year. But again, the recovery of the specific article may be impossible or undesirable, and then the owner may seek compensation *both for the thing itself* and *for the damage* he has sustained through being deprived of the use of it." To such a suit for *the thing itself*, and for the *consequential damages*, West, J., would apply Art. 29, saying

"as the double claim of compensation consists of elements of identical character, these, though capable of separate existence, blend by contract in their subject into one".

In such a blended case, he considers the whole claim practically to be based on the damage caused by the seizure.

**(ii) Calcutta.**

1160. The **Calcutta High Court,** however, in *Lakshmi Priya* v. *Ramakanta,*[16] had dissented from the Bombay view, and it was held that a suit to recover the surplus proceeds of a sale, held under Patni Regulation VIII of 1819, wrongfully taken out by the defendant in execution of a decree against a third party, does not come under Art. 29 of the Limitation Act. It was observed that

"the article contemplates wrongful seizure, the seizure of moveable property under legal process, and that by reason of such wrongful seizure a person has been damnified".[17]

Art. 29 contemplates a very different class of cases from the case where

"the plaintiffs do not say that they had sustained any injury by reason of the attachment, nor do they claim any compensation on that account. What they say is that the money taken by the defendant rightfully belongs to them, and they therefore seek to recover it as having been wrongfully taken from the Collectorate".[18]

Art. 62 was accordingly applied to the suit, and it was held not barred under Art. 29.

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[16] (1902) 30 Cal. 440=7 C.W.N. 520; Dist. 38 Mad. 972=22 I.C. 870; Relied in 31 Mad. 431 (F.B.) and 23 M.L.J. 519=16 I.C. 914 (918).

[17] (1902) 30 Cal. 440 (442).

[18] *Ibid.*

**(iii) Madras.**

**1161.** The **Madras view** in *Narasimha Rao* v. *Gangaraju,*[19] seems to be that Art. 29 is not restricted in its application to cases where the compensation claimed is for *damages consequent upon the wrongful seizure,* as held by the Calcutta High Court, but applies also to cases where it is claimed only as *the value equivalent* of the property seized. This was a case where the goods of a third person were attached before judgment. He preferred a claim petition which was dismissed, but he succeeded in a claim suit. The attachment was on 10th December, 1899. The suit was finally decided in plaintiff's favour on 7th February, 1903, and the suit for damages was instituted in 1903. Sir Arnold White, C.J., held that Art. 29 governed the suit, since this is the only article which refers specifically to wrongful seizure under legal process. This was the view taken by the same Court in *Murugesa* v. *Jattaram.*[20] He was of opinion that this article should not be construed as limited to claims for consequential damages and as not applicable where the plaintiff seeks only to recover the value of property seized, or the sale-proceeds, if the property has been sold. *Sankaran Nair, J.,* was of opinion that Art. 29 only applied when the loss complained of was due directly to the seizure. And that so long as the property remained in the custody of the Court the plaintiff could not be said to have lost it; and was, therefore, not entitled to any compensation for its loss. The loss of the property was not a necessary consequence of the attachment and thus Art. 29 did not apply.[21] With this difference of opinion the matter came before Pinhey, J., who agreed with the Chief Judge in applying Art. 29 to the case. The learned Judge observed:

> "If the seizure was not wrongful there was nothing wrongful in the payment. It is conceded that the seizure was wrongful. *This is not a continuing wrong.* Later manifestations of the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action. The cause of action, therefore, was the original seizure and time began to run from that date. The article of Sch. II of the Limitation Act that governs the case would appear to be either Art. 29 or Art 49".[22]

**1162. SCOPE AND APPLICATION.**—This article is generally taken as not limited to claims for consequential damages, and is applicable also where the plaintiff seeks only to recover the value of the property seized, or the sale-proceeds, if the property has been sold.

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[19] (1908) 31 Mad. 431=18 M.L.J. 590=4 M.L.T. 271 (F.B.) [App. in 14 I.C. 182; Followed in 36 Mad. 383; Dist. 38 Mad. 972; Relied in 23 M.L.J. 519=16 I.C. 914; also see 25 M.L.J. 447=21 I.C. 213 (F.B.); 31 M.L.J. 257=35 I.C. 98; 13 I.C. 96; 64 I.C. 513; 81 I.C. 1038; 85 I.C. 24=1924 Lah. 136].

[20] (1900) 23 Mad. 621 (624).

[21] (1908) 31 Mad. 431 (F.B.)—Per Sankaran Nair, J.

[22] (1908) 31 Mad. 431 (F.B.)—Per Pinhey, J.

The article applies when three essential conditions are present: (1) *Wrongful seizure,* for which a suit is brought for *compensation;* (2) the *seizure* must be *of moveable property;* and (3) the seizure must be under legal process.

**(i) Wrongful seizure.**

As observed by the Madras High Court in *Murugesa Mudaliar* v. *Jattaram Davy*[23]:

> "Article 29 is quite general in its terms and was intended to apply to all cases where the alleged wrongful seizure was made under legal process."

In this case certain properties in the hands of a third person were attached. The plaintiff filed a claim which was disallowed. Thereupon he filed a regular suit to establish his right which was decreed in his favour. He then filed a suit for recovering damages to which Art. 29 was applied, distinguishing the case from *Manavikraman* v. *Avisilan Koya,*[24] where the moveables of the defendant were attached before judgment, the seizure could not be regarded as wrongful, and Art. 29 was not applied in consequence.

This article includes any person who, without being an owner of property, claims to be entitled to compensation on the basis of having some interest in the property seized.[25] There is a learned discussion in *Pannaji Devi Chand & Co.* v. *Sanaji Kapur Chand,*[26] on the question of a distinction drawn by some authorities between cases where the property attached belongs to the defendant and the cases where the property attached belongs to a third party.[27] In *Manavikraman* v. *Avisilan Koya,*[28] Art. 29 was not applied since the case was not one of wrongful seizure, and Art. 36 was applied to the case of a suit for damages occasioned by the attachment before judgment by order of Court, with a view to preserve property claimed by two persons. In *Sokkalingam* v. *Krishnaswami Ayyar,*[29] Art. 29 was held restricted to cases in which the seizure is intrinsically wrongful, but did not apply to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentation to the Court. In *Arjun* v. *Abdul,*[30] the **Calcutta High Court** has held that a seizure cannot be said to be wrongful except where the writ was without jurisdiction or where the writ was executed against a person who was no party to the decree and where the goods were outside the scope of the suit. Similar view has been taken by the **Allahabad High Court** in *Manga* v. *Changamal.*[31] A writ issued by the Court is *prima facie* not a wrongful seizure. The seizure or possession of property under an order of Court is not wrongful, although the order was erroneous and is afterwards set aside.[32] In *Narayana* v. *Narayana,*[33] it was held that money taken from Court under terms of a decree, then subsisting, is not wrongful seizure, merely because the decree is afterwards set aside. Assuming that a person aggrieved by the arrest of his ship is entitled to compensation even in the absence of proof of malice, or its equivalent, the action would be for wrongful seizure under legal process, and as such Art. 29 of the Limitation Act would bar the claim if not brought within one year of the date of seizure.[34] The Madras view is that in cases of **Attachment before Judgment** where specific property is seized, the seizure is wrongful not only when the Court had no jurisdiction, but also when the attachment **was obtained on insufficient grounds.**[35] It makes no difference whether the property belongs to the defendant or to a third party.[36]

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[23] (1900) 23 Mad. 621; also see *Nagaba* v. *Madholal,* 4 N.L.R. 49 and *Damaraju* v. *Thandinada,* 4 M.L.T. 271.

[24] (1896) 6 M.L.J. 11=19 Mad. 80 (Article 36 applied).

[25] *Ramasami Aiyar* v. *Motha Venkatasanjiva Chetty,* 10 M.L.T. 381.

[26] 1930 Mad. 635=53 Mad. 621=126 I.C. 721=59 M.L.J. 859=31 M.L.W. 675=1930 M.W.N. 305.

[27] *Manavikraman* v. *Avisilan Koya,* (1896) 19 Mad. 80=6 M.L.J. 11; *Arjun* v. *Abdul,* 1921 Cal. 774=35 C.L.J. 480=64 I.C. 513; *Manga* v. *Changamal,* 1925 All. 131=22 A.L.J. 977=81 I.C. 1038 and *Sokkalingam* v. *Krishnaswami Ayyar,* (1920) 38 M.L.J. 324=11 M.L.W. 479=55 I.C. 786=1920 M.W.N. 192.

[28] (1896) 19 Mad. 80=6 M.L.J. 11 (Article 36 applied).

[29] (1920) 38 M.L.J. 324=55 I.C. 786=11 M.L.W. 479=1920 M.W.N. 192.

In this connection, it may be noticed, as pointed out by their Lordships of the **Privy Council,** in *Ramanathan* v. *Meera Saibo,*[37] that

> "a **distinction** must be drawn **between acts done without judicial sanction, and** acts done under **judicial sanction improperly obtained.** If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful, and no action will lie in respect of the seizure, unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice".

According to the **Nagpur Judicial Commissioner's Court,** the crux of the article is in the words *"wrongful seizure".* If the seizure is not wrongful, there can be no cause of action.

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[30] 1921 Cal. 774=64 I.C. 513=35 C.L.J. 480.

[31] (1925) 1925 All. 131=22 A.L.J. 977=81 I.C. 1038.

[32] *Dhakhina* v. *Saroda,* 1893 L.R. 20 I.A. 160=21 Cal. 142 (148) (P.C.).

[33] (1889) 13 Mad. 347.

[34] *Madras Steam Navigation Co.* v. *Shalimar Works, Ltd.,* (1915) 28 I.C. 463=42 Cal. 85.

[35] *Pannaji Devi Chand* v. *Sanaji Kapur Chand,* 1930 Mad. 635=53 Mad. 621=59 M.L.J. 859; also see and cf. *Ram Narain* v. *Brij Banke,* 39 All. 322 (328).

[36] *Pannaji Devi Chand* v. *Sanaji Kapur Chand,* supra.

[37] (1930) 61 M.L.J. 330=1931 A.C. 77.

"The seizure may be wrongful either because the property does not belong to the judgment-debtor, or that the Court has no jurisdiction to attach the property. It is because the process is illegal that the seizure becomes wrongful so as to give a cause of action for the suit."[38]

### 1162-A. ILLUSTRATIVE CASES.—

**Wrongful seizure.**

(1) In *Multan Chand Kanyalal* v. *Bank of Madras,*[39] in which compensation was claimed for deterioration in the quality, and diminution in the quantity of certain jaggery attached at the instance of defendants, Art. 29 was applied.

(2) In *Ram Narain* v. *Umrao Singh,*[40] it has been held that the limitation applicable to a suit for damages on account of the alleged unlawful attachment before judgment of a shop belonging to the plaintiff was that prescribed by Art. 29 of the Limitation Act.

(3) In *Ram Singh* v. *Bottro Manjee,*[41] which was a suit for compensation for the wrongful seizure of the plaintiff's bullocks in execution of a decree against a third party, Art. 30 (Act IX of 1871), corresponding to present Art. 29 was applied.

(4) In *Narasimha Rao* v. *Gangaraju,*[42] where the goods wrongfully seized were sold and a claim was made for refund of sale-proceeds, it was held that the suit was governed by Art. 29, which is the only article which refers specifically to wrongful seizure under legal process.

(5) In *Yellammal* v. *Ayyappa Naik,*[43] the attachment by a decree-holder of a debt due to his judgment-debtor did not constitute a "wrongful seizure of moveable property," within the meaning of Art. 29, and the case was held governed either by Art. 62, or Art. 120: and the starting point was not from the date of the attachment of the debt but from the date on which the attaching creditor received the money from the Court.

(6) A suit for compensation for wrongful seizure of moveables is governed by Art. 29; but, a suit for compensation for wrongful attachment of moveables, by the issue of a *prohibitory order* is governed by Art. 36, which is the general article for suits for compensation for all possible acts and omissions commonly known as torts, that is, wrongs independent of contract and which are not provided for by other articles.[44]

**1163. MOVEABLE PROPERTY.**—In *Basivi Reddi* v. *Ramayya,*[45] it has been held that where moveable property has been attached and sold, an unsuccessful claimant may bring a suit under

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[38] *Krishna* v. *Sitaram,* 1931 Nag. 47=130 I.C. 157; also see (1924) 22 A.L.J. 977 [Per Kanhayalal, J.—"Art. 29 is applicable only to those cases in which the seizure is intrinsically wrongful, or perhaps to cases, such as (1914) 42 Cal. 85, where the seizure is made without jurisdiction"].

[39] (1903) 27 Mad. 346.

[40] (1907) 29 All. 615; Reld. in *Maung Po On* v. *Maung Tin U,* 4 Bur. L. T. 46=9 I.C. 774.

[41] (1875) 24 W.R. 298.

[42] (1908) 31 Mad. 431=18 M.L.J. 590 (F.B.); Reld. on (1900) 23 Mad. 621.

[43] (1914) 22 I.C. 870=38 Mad. 972=26 M.L.J. 166=1914 M.W.N. 348 (F.B.).

[44] *Veeramma* v. *Subba Rao,* (1916) 35 I.C. 98=31 M.L.J. 257.

[45] (1916) 40 Mad. 733=31 M.L.J. 394 (F.B.).

**O. 21, R. 63,** Civil Procedure Code, to establish his right to the property attached, and he may claim a **consequential relief in addition for the recovery of its price,** without changing of the nature of the suit. Such a suit, it may be noticed, falls more appropriately under Art. 11, and not under Art. 29 of the Limitation Act.[46] Art. 29 is specific, and where it fits the case, the general Art. 36 applicable to trespass to goods, would not govern the case covered by the particular article.[47] A suit to recover the value of the article seized by the Talukdari Settlement Officer in satisfaction of rent alleged to be due, would be governed by Art. 29.

**Seizure of standing crops,** not being a seizure of *moveable property,* a suit for compensation in a case of wrongful seizure of such property, would not be governed by this Art. 29, but by Art. 36.[48] Where there are other acts, Art. 36 may be excluded by Art. 39.[49] A suit for damages representing the value of crops belonging to plaintiff which were wrongfully attached, cut and removed by the defendant is governed by Art. 48 or 49, and not by Art. 29 or Art. 36.[50] Where the plaintiff's claim is for the recovery of the amount of money he has voluntarily paid to save his property which had been wrongfully attached by the latter, and for damages, Art. 62 and not Art. 29 applied.[1]

**1164. SEIZURE BY LEGAL PROCESS.**—To apply Art. 29, there must be an actual seizure under legal process.[2] The word "seizure" as used in this article is intentionally a wide one; but one thing seems clear, namely, that "seizure" implies the taking of something out of the possession of its owner.[3] In *Rupa Bai* v. *Audimulam,*[4] in which money paid into Court by a *Zamindar* for the benefit of a lessee of the estate was paid out to a creditor of the lessee, it was held that there was no seizure by a legal process, as the fund was in Court and was subject to the order of the Court. Art. 29 did not apply and Art. 120 was held to apply.[5] In *Lakshmi Priya* v. *Ramakanta,*[6] where the attachment was of the surplus proceeds of a sale in the hands of the Collector, it was held that the article contemplates wrongful seizure, the seizure of moveable property under legal process, and that by reason of such wrongful seizure a person has been damnified. There can be wrongful seizure only where the property is in the possession of the person. No doubt constructive possession also will do, but **when there is no right to possession,** there can be no wrongful seizure and **Art. 29 has no application.**[7] Thus the payment of debt into Court by the garnishee by order of Court is no seizure for the word seizure implies taking hostile possession.[8]

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[46] *Basivi Reddi* v. *Ramayya,* (1916) 40 Mad. 733=31 M.L.J. 394 (F.B.) and also see *Venkateswara* v. *Somasundaram,* (1917) 44 I.C. 551=7 L.W. 280; but compare *Kristnam* v. *Pathma,* (1905) 29 Mad. 151 and *Yellamaraju* v. *Goteti,* (1928) 56 M.L.J. 52=1928 Mad. 840=110 I.C. 554.

[47] *Madras Steam Navigation Co.* v. *Shalimar Works, Ltd.,* (1915) 28 I.C. 463=42 Cal. 85; also see *Ram Narain* v. *Umrao Singh,* (1907) 29 All. 615=1907 A. W. N. 194 and *Narasimha Rao* v. *Gangaraju,* (1908) 31 Mad. 431.

[48] *Narasimham* v. *Venkiah,* (1915) 18 M.L.T. 532; *Venkata Ramanujam* v. *Basavayya,* (1913) 25 M.L.J. 447=21 I.C. 213; also see *Murlidhar* v. *Mulu,* (1917) 27 I.C. 935; *Jadunath* v. *Harikar,* (1913) 17 C.W.N. 308=18 I.C. 253 and *Suraj Mal* v. *Prahlad,* (1921) 65 I.C. 665 =18 N.L.R. 96.

[49] *Hari Charan* v. *Hari Kar,* (1905) 32 Cal. 459 (462); cf. *Venkata Ramanujam* v. *Basavayya,* (1913) 25 M.L.J. 447=21 I.C. 213; cf. S. 2 (13), C. P. Code (Not applicable in cases under Limitation Act).

[50] *Maharaj Bahadur* v. *Achala Bala Devi,* (1927) 105 I.C. 763= 1928 Cal. 106.

[1] *Official Liquidator* v. *Ram Charan Lal,* 1934 Oudh 158 (2)=148 I.C. 448=11 O.W.N. 398.

[2] *Multanchand Kanhyalal* v. *Bank of Madras,* (1904) 27 Mad. 346; also see *Madras S. N. Co.* v. *Shalimar Works,* (1914) 42 Cal. 85 (Arrest of ship).

In *Suraj Mal* v. *Manek Chand,*[9] the attachment was made not by actual seizure but by the **issue of a prohibitory order,** and it was held on this ground that Art. 36 and not Art. 29 applied. Where the attachment of a debt, not secured by a negotiable instrument was made by the usual prohibitory order, there was held to be no *seizure* by legal process within the meaning of Art. 29 and Art. 62 was applied to the case.[10] In the case of a prohibitory order preventing a person from passing over the money to the judgment-debtor, Art. 29 can have no application.[11] In a Mysore case, Art. 29 was held inapplicable where a suit was brought for damages for illegal search and seizure *by the police,* as there was no legal process within that article.[12] Where the judgment-debtor *voluntarily* pays money into the execution Court under the mistaken belief that he is liable to pay it on account of the decree, and the decree-holder withdraws the money from Court by order of the Court, there is no "seizure by legal process" to justify the application of Art. 29.[13] Where the suit is not for compensation for wrongful seizure of moveable property, but for **injury caused by an injunction** wrongly obtained, that is, for the loss of part of attached property, and the deterioration of the rest while under the defendant's attachment, Art. 42 and not Art. 29 was held applicable to such a suit.[14]

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[3] *Ram Narain* v. *Brij Bankey Lal,* (1917) 39 I.C. 532=39 All. 322 =15 A.L.J. 295.

[4] 11 Mad. 345=4 Ind. Dec. (N.S.) 240.

[5] 11 Mad. 345; Reld. in *Raja Ram* v. *Mul Chand,* (1924) 84 I.C. 6=1924 Nag. 248=20 N.L.R. 189=7 N.L.J. 140.

[6] 30 Cal. 440; Reld. in 84 I.C. 6, *supra.*

[7] *Subbanna* v. *Narayanayya,* 1930 Mad. 349 (1)=123 I.C. 362 (1); Reld. on *Niader Singh* v. *Ganga Dei,* 38 All. 676=35 I.C. 86=14 A.L.J. 728; cf. *Narasimha Row* v. *Ganga Ram,* (1908) 4 M.L.T. 271 (A case of possession).

[8] *Raja Ram* v. *Mul Chand,* (1924) 84 I.C. 6=20 N.L.R. 189= 1924 Nag. 248.

[9] 6 Bom. L. R. 704; cf. *Ram Narain* v. *Umrao Singh,* 29 All. 615.

[10] *Yellammal* v. *Ayyappa Naik,* (1914) 22 I.C. 870=38 Mad. 972 =26 M.L.J. 166=1 L.W. 162=1914 M.W.N. 348 (F.B.).

[11] *Veeramma* v. *Subba Rao,* (1915) 35 I.C. 98=31 M.L.J. 257.

[12] Rustomji's Limitation Act, p. 364, citing (1910) 15 Mysore C. C. R. 47.

**1165. STARTING POINT OF LIMITATION.**—*"The date of the seizure"* is expressly given in column 3, as the starting point of limitation under Art. 29.

It is the seizure, if wrongful, under some legal process, in respect of moveable property, that gives the cause of action, and the plaintiff cannot treat the suit as one for trespass upon goods (Art. 49) apart from the seizure for the purpose of evading Art. 29.[15]

**The date of actual seizure.**

Two points are of importance to be noticed in this connection. Art. 29 is specific in its nature, and must exclude general articles like 36 or 49 which might also cover the case.[16]

> "The difficulty of applying either of the Art. 36 or 49 is that before these articles can be attracted it has to be shown that the specific Art. 29 which applies to suits for compensation for wrongful seizure of moveable property under legal process is not applicable."[17]

Secondly, there is no justification for adding to the words *"the date of the seizure,"* the words that the seizure is wrongful when so declared or adjudicated upon by the Court on an objection taken by the person whose property is attached. As observed by the Madras High Court in *Pannaji Devi Chand* v. *Sanaji Kapur Chand*,[18]

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[13] *Fazluddin* v. *Mt. Zainab,* 49 P.W.R. 1910; Dist. and Doubted 8 Bom. 17; Reld. on 30 Cal. 440.

[14] *Idu Mian* v. *Rahmat-ullah,* (1901) 24 All. 146.

[15] *Madras S. N. Co.* v. *Shalimar Works,* (1915) 28 I.C. 463=42 Cal. 85.

[16] *Pannaji Devi Chand* v. *Sanaji Kapur Chand,* (1930) 126 I.C. 721=1930 Mad. 635=53 Mad. 621=59 M.L.J. 859.

[17] *Ibid.*; also see *Krishna* v. *Sitaram,* 1931 Nag. 47=130 I.C. 157=13 N.L.J. 209 (*Held,* that "it is an established rule of construction that a general article does not govern when there is a particular article to cover the case") and *Madras S. N. Co.* v. *Shalimar Works,* (1915) 42 Cal. 85=28 I.C. 463.

[18] (1930) 126 I.C. 721=1930 Mad. 635 (637)=53 Mad. 621=59 M.L.J. 859.

"the wrongful nature of the attachment does not depend upon the adjudication of the Court on an objection. It is not rightful when the Court makes an order on allegations which are subsequently found to be unproved and becomes wrongful only when the Court on investigation of the facts holds that the plaintiff had no jurisdiction in attaching the properties. It is wrongful *ab initio*".[19]

**Wrongful seizure not a continuing wrong.**

(2) Wrongful seizure of moveable property is **not a continuing wrong,** within the meaning of S. 23, although the party is deprived of the possession and use of the property during the period it is taken out of his possession. Under Art. 29 time begins to run from the date of the actual seizure, and not from the date the seizure is declared wrongful by a competent Court.[20] If there is actual seizure there is no continuing wrong, and the time spent in the previous litigation cannot be excluded in computing the period of limitation.[21]

### 1165-A. ILLUSTRATIONS.—

(1) In *Murugesa Mudaliar* v. *Jattaram*,[22] where certain properties were attached in the hands of third parties in June 1895, and the plaintiff filed a suit in 1899, for recovering damages after having obtained a declaration establishing his right, it was held that the plaintiff was not entitled to have the time spent in prosecuting the previous suit deducted from the period of limitation.

(2) Similarly, in *Narasimha Rao* v. *Gangaraju*,[23] it was held by the majority that Art. 29 applied to suits for damages for wrongful attachment. In this case the goods of a third person were attached, who preferred a claim which was dismissed, but he succeeded in a claim suit. It was held that there was no ground for holding that the time does not run so long as the property remains in *custodia legis*. "The damage to the plaintiff is the seizure of his property." "This is not a continuing wrong." "Later manifestations of the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action."

(3) In a suit for the recovery of damages on account of a daily fine imposed by the Municipality, and the detention of an omnibus, which fine had been set aside by the High Court, and the detention pronounced illegal; it was held that if the plaintiff had any cause of action it accrued upon the seizure of the omnibus, and not upon the order of the High Court, which allowed the conviction to stand as to one rupee, and that he could not treat the continued detention of the omnibus as fresh cause of action from day to day.[24]

(4) The cause of action in respect of which the suit under S. 213 of the Madras Estates Land Act is brought arises on the date of distraint, and

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[19] *Pannaji Devi Chand* v. *Sanaji Kapur Chand*, (1930) 126 I.C. 721=1930 Mad. 635 (637)=53 Mad. 621=59 M.L.J. 859.

[20] *Ibid.*

[21] *Ibid.*

[22] (1900) 23 Mad. 621.

[23] (1908) 31 Mad. 431=18 M.L.J. 590.

[24] *D. Hughes* v. *The Chairman*, (1873) 19 W.R. 339.

not on the day the property attached is released on payment of the money due.[25]

(5) The starting point of limitation under Art. 29 is the *date of seizure* of plaintiff's moveable property in execution of a decree against a third party, and not the date of its release from attachment.[26] Attachment if wrongful, is not a continuing wrong and the only material date is the date of the seizure.[27]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 30. | Against a carrier for compensation for losing or injuring goods. | One year. | When the loss or injury occurs. |
| 31. | Against a carrier for compensation for non-delivery of, or delay in delivering, goods. | One year. | When the goods ought to be delivered. |

## SYNOPSIS.

1166. Corresponding provisions.
1167. Notice of claim.
1168. Period of notice—deduction of.
1169. **Scope and applicability**—Suits for compensation.
1170. Old law.
1171. Suits against carriers—Definition.
1172. Compensation for **non-delivery.**
1173. Suits by consignor or consignee.
1174. **Loss or injury to goods.**
1175. **Misdelivery of goods.**
1176. Burden of proof as to loss.
1177. Starting point of limitation.

## NOTES.

**1166. CORRESPONDING PROVISIONS.**—Arts. 30 and 31, in Act XV of 1877 as originally enacted, were included in Part V, with a period of two years. These articles corresponded to Arts. 36 and 37 of Sch. II, Act IX of 1871, having a period of two years prescribed therefor.

The Amending Act X of 1899, reduced the period of limitation under Arts. 30 and 31 in Act XV of 1877, from *two years* to *one year.* Further, in Art. 31, the words "non-delivery of, or" were added by this Amending Act, X of 1899.

**1167. NOTICE OF CLAIM.**—Act X of 1899, which amends the period of limitation for instituting the suits falling under Arts. 30 and 31, provides for a **notice in writing** by the plaintiff of the loss of or injury to goods entrusted to a common carrier for carriage, and **S. 2 of Act X of 1899,** requires that such notice should be given within six months of the time when the loss or injury first came to the plaintiff's knowledge. Similarly, under **S. 77 of the Railways Act** notice must be given to the Railway Company where the suit relates to loss of goods. The expression "loss of goods" in the Railways Act is not co-extensive with non-delivery, and it has been held in some Patna cases that in a suit for non-delivery no notice is required to be given under S. 77 of the Act,[28] though there is a conflict of view on this point.[28-a]

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[25] *Venkataramier* v. *Vithilinga Thambiran,* (1914) 24 I.C. 754=38 Mad. 655=1 L.W. 89.

[26] *Ram Singh* v. *Bhottro,* (1875) 24 W.R. 298.

[27] *Ram Narain* v. *Umrao Singh,* (1907) 29 All. 615; also see *M. S. Chettyar Firm* v. *S. E. Bholat,* 1934 Rang. 329.

**Period of notice—deduction of.**

**1168.** In a suit against several Railways including a State Railway, the plaintiff is entitled, under S. 15 (2) of the Limitation Act, to deduct from the period of limitation for the suit the period of two months prescribed by S. 80 of the Civil Procedure Code, or the period of notice given to the Railway Companies under S. 77 of the Railways Act, whichever is beneficial in saving the bar of limitation.[29] This view is open to question inasmuch as S. 15 (2), Limitation Act, allows a deduction for a notice of *suit*, and not of a *claim* which is contemplated by S. 77 of the Railways Act.[30] However, under S. 15 (2) of the Limitation Act, the period of the notice sent to the Local Government under S. 80 of the Civil Procedure Code, *i.e.*, two months, must be excluded in computing the period of limitation prescribed for the suit against the Secretary of State for India.[31] Notice of claim against a State Railway under S. 77 of the Railways Act is effective if served on the Government.[32] A notice of claim given to the Claims Superintendent is not a notice to the Agent, unless that officer was authorised by the Agent to receive such notices.[33]

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[28] *Jaisram Ramrakha* v. *Great Indian Peninsular Railway Co.,* 1929 Pat. 109=115 I.C. 893; *East Indian Railway* v. *Kalicharn Ram Prasad,* 1922 Pat. 106=69 I.C. 103=3 Pat.L.T. 215; *Great Indian Peninsular Railway Co.* v. *Gopi Ram Gourí Shanker,* 1928 Pat. 270=7 Pat. 192.

[28-a] Compare *B. N. Ry. Co.* v. *Hamir Mull Chagan Mull,* 1925 Pat. 727=5 Pat. 106 (Non-delivery constitutes loss within meaning of S. 77) and *Assam Bengal Railway Company* v. *Radhika Mohan Nath,* 1923 Cal. 397.

[29] *Bengal & North-West Railway Company* v. *Ramsaruplal,* (1922) 70 I.C. 109=1922 Pat. 549=3 P.L.T. 643.

[30] *See* Rustomji, p. 370.

[31] *North-West Railway Company through Secretary of State* v. *Ramdhan Shivlal,* 52 P.R. 1917.

[32] *Radha Sham Basak* v. *Secretary of State,* (1916) 34 I.C. 130=44 Cal. 16=23 C.L.J. 547=20 C.W.N. 790.

[33] *The East Indian Railway Company* v. *Ram Autar,* (1917) 38 I.C. 502=20 C.W.N. 696; also see and cf. *South Indian Railway Company* v. *Narayana Aiyar,* (1923) 77 I.C. 511=1924 Mad. 567=46 M.L.J. 302=34 M.L.T. 303.

**1169. SCOPE AND APPLICABILITY.**—Both Arts. 30 and 31 are concerned with *suits* for *compensation,* against a carrier—the one "for losing or injuring goods," and the other "for non-delivery of, or delay in delivering, goods".

**Suits for compensation.**

**1170. OLD LAW.**—The Limitation Act of 1877 as it originally stood gave the position to Arts. 30 and 31 among a number of other articles dealing with suits for damages for torts and this led to an expression of opinion that in order to come under these articles the claim must be founded only on tort. A claim for short-delivery based on a breach of contract to deliver, was held governed by cl. 115, and not cl. 30, Sch. II of the Limitation Act.[34] An action against a Railway Company for loss of goods, when there was no contract, was held governed by Sch. II, cl. 30 of the Limitation Act.[35] The mere non-delivery of goods was held no proof of their *"loss,"* within Art. 30 of Sch. II of Act XV of 1877[36]; and, where plaintiff brought a suit for breach of contract for non-delivery of goods, under a bill of lading, the loss of the goods denied as received could not be assumed without evidence, in order to bring the case within Art. 30, Sch. II, Act XV of 1877.[37] Accordingly, where a suit was brought against a Railway Company by the consignee of goods for compensation for non-delivery, the period of limitation was not two years (Art. 30), but three years (Art. 115), Sch. II, Limitation Act, 1877.[38] In *G. I. P. Ry. Co.* v. *Raisett,*[39] Farran, J., took the view, differing from Calcutta and Madras cases that the position of the Arts. 30 and 31 was a fallacious test, and he was inclined to the opinion that the intention of the Legislature would have been better fulfilled by liberally interpreting the language of Art. 30 to embrace claims for compensation for loss of goods arising otherwise than out of contract. Acting no doubt on this suggestion, the Legislature in 1899 amended Art. 31 by inserting the words *"non-delivery of or,"* so as to make the article run thus:—"Against a carrier for compensation for non-delivery of, or delay in delivering, goods".[40]

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[34] *The British India Steam Navigation Company, Limited* v. *Hajee Mahomed Esack and Company,* (1881) 3 Mad. 107; Followed in 3 Mad. 240.

[35] *Kaluram Maigraj* v. *The Madras Railway Company,* (1881) 3 Mad. 240.

[36] *Mohan Singh Chawan* v. *Great Indian Peninsular Railway Company,* (1883) 7 Bom. 478.

[37] *Danmul* v. *B. I. S. N. Coy.,* (1886) 12 Cal. 477.

[38] (1882) 5 Mad. 388.

[39] (1895) 19 Bom. 165 (188).

[40] *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Company,* (1915) 30 I.C. 840=39 Mad. 1 (12)=29 M.L.J. 342=2 L.W. 805=18 M.L.T. 236=1915 M.W.N. 644 (F.B.); Relied in *Mylappa Chettiar* v. *The B. I. S. N. Coy.,* (1918) 45 I.C. 485=34 M.L.J. 553=8 L.W. 46=24 M.L.T. 175.

"By this amendment the Legislature clearly indicated its intention **that** Art. 31 should apply to a claim against a carrier for **compensation for** non-delivery of goods, **irrespective of the question whether the suit was** laid in contract or in tort."[41]

**1171. SUITS AGAINST CARRIERS.**—**The Sind Judicial Commissioner's Court** has noticed that

**Definition.**

"in the Imperial Dictionary a carrier is said to be one who is employed to carry goods for others for reward. In Wharton's Law Lexicon a carrier is defined as one who undertakes to transport the goods of other persons from one place to another for hire".[42]

The same definition has been adopted by the **Madras High Court.**

"The carrier in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire."[43]

Applying this test, the Board of Port Trust, Karachi, is not acting as a carrier when taking goods to the Import Yard for delivery to the consignee, and Art. 30 of the Limitation Act does not apply to a suit for compensation for damage done to the goods.[44] Sea-going merchant ships are "carriers" within the meaning of Arts. 30 and 31, though they are not "common carriers" as defined in the Carriers Act, III of 1865.[45]

**Art. 31** is **not restricted** in its application **to common carriers.**[46] It applies to common carriers who come within the above definition.[47] A common carrier by entering into a special contract limiting his liability does not cease to fill that character.[48]

**1172. NON-DELIVERY.**—Since the amendment, it has been held by almost all High Courts that **Art. 31** and not **Art. 115 applies** to a suit against a carrier for compensation for non-delivery

**Suit for compensation *ex contractu* or *ex delicto*.**

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41. *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co.,* (1915) 39 Mad. 1 (12) (F.B.).

42. *Prag Narain Baragoa* v. *The Karachi Port Trust,* (1911) 10 I.C. 972=4 S.L.R. 236.

43. *Mylappa Chettiar* v. *B. I. S. N. Company,* (1918) 45 I.C. 485 =34 M.L.J. 553=8 L.W. 46=24 M.L.T. 175.

44. (1911) 10 I.C. 972=4 S.L.R. 236, *supra*; also see *The Sind Typewriting Company* v. *The Karachi Port Trust,* (1925) 89 I.C. 376 (Sind).

45. *B. I. S. N. Coy.* v. *Haji Mahomed,* 3 Mad. 107 (110).

46. *Mylappa Chettiar* v. *B. I. S. N. Coy.,* supra.

47. *Ibid.,* (1918) 45 I.C. 485=34 M.L.J. 553; also see *Alamgir Footwear and Company* v. *Secretary of State,* (1933) 144 I.C. 703=1933 All. 466 (468)=1933 A.L.J. 796 (Secretary of State can take advantage of Art. 31, Limitation Act, as a "carrier" though Government is "common carrier", within Act III of 1865).

48. *Ali Mohamad* v. *G. I. P. Ry. Co.,* (1915) 31 I.C. 474=11 N.L.R. 174; cf. *G. I. P. Ry. Co.* v. *Jitan Ram,* (1923) 2 Pat. 442=72 I.C. 440.

**Allahabad.**

**Bombay.**

**Punjab.**

**Calcutta.**

of goods. The **Allahabad High Court** took this view in the case of *G. I. P. Ry. Co.* v. *Ganpat Rai.*[49] The decision by the **Bombay High Court** in *Haji Ajam* v. *B. & P. S. N. Co.*,[50] was followed by a **Full Bench of the Punjab Chief Court** in *Moti Ram* v. *E. I. Ry. Co.*[1] A similar view was taken by the **Calcutta High Court,** in *Indian General Navigation & Ry. Co.* v. *Nandolal Basik*,[2] which has been followed in some later cases, by the same High Court.[3] The case-law was fully reviewed by Page, J., in *Chiranjilal Ramlal* v. *B. N. Ry. Co.*,[4] where it was held that after the enactment of Act X of 1899, the old cases could no longer be regarded as authorities for the proposition that Art. 115, and not Art. 31, is applicable to claims against a carrier for compensation for the non-delivery of goods which he has undertaken to carry. The case of *Radha Sham Basak* v. *Secretary of State*,[5] though decided after the amendment has followed the old cases in applying Art. 115, instead of Art. 31 to a suit for compensation for non-delivery of goods by a carrier. This ruling has been distinguished and not followed in later cases by the Calcutta High Court. It has been dissented from by the **Patna High Court** in the case of *E. I. Ry. Co.* v. *Sagar Mull*,[6] where it was held that a suit for damages for non-delivery of goods entrusted to a railway company for carriage is governed by Art. 31, and limitation begins to run from the date on which the goods ought to have been delivered. Such a claim, whether laid in tort or contract, is

**Patna.**

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[49] 10 I.C. 122=33 All. 544=8 A.L.J. 543; also see and cf. *Mutsaddi Lal* v. *B. B. & C. I. Ry.*, 58 I.C. 547=18 A.L.J. 377=42 All. 390 (Goods lying for delivery in Lost Property Office) and *Jugal Kishore* v. *G. I. P. Ry. Co.*, (1922) 68 I.C. 981=45 All. 43=1923 All. 22=20 A.L.J. 792 (Art. 30 refers to losing or injuring goods by the carrier, and not by the consignee).

[50] 26 Bom. 562=4 Bom. L. R. 447.

[1] 108 P.R. 1906=2 P.L.R. 1907=30 P.W.R. 1907 (F.B.).

[2] 3 I.C. 469=13 C.W.N. 851.

[3] *Lal Mohan Hazra* v. *E. I. Ry. Co.*, (1922) 70 I.C. 857=1922 Cal. 330; *Chiranjilal Ramlal* v. *B. N. Ry. Co.*, (1925) 86 I.C. 127=1925 Cal. 559=52 Cal. 372; also see *Vally Mahomed Haji Gunny* v. *Nederland*, (1924) 80 I.C. 612=1924 Cal. 173=27 C.W.N. 806.

[4] (1925) 86 I.C. 127=1925 Cal. 559=52 Cal. 372.

[5] 34 I.C. 130=44 Cal. 16=23 C.L.J. 547=20 C.W.N. 790; cf. *Lal Mohan Hazra* v. *E. I. Ry.*, (1922) 70 I.C. 857=1922 Cal. 330 and *Chiranjilal Ramlal* v. *B. N. Ry. Co.*, (1925) 86 I.C. 127=1925 Cal. 559=52 Cal. 372.

[6] (1925) 89 I.C. 672=4 Pat. 482=1925 Pat. 611=6 P.L.T. 559; Folld. *Rameshwardas Mali Ram* v. *E. I. Ry. Co.*, 71 I.C. 565=4 P.L.T. 331=1923 Pat. 298.

governed by Art. 31.[7] A suit for *non-delivery* of goods is governed by Art. 31, but in the case of *short-delivery* of goods the article applicable is Art. 30 and the period of limitation runs from the date when the consignment is short-delivered.[8]

**Madras.**

The **Madras High Court** has held that a **suit to recover compensation for loss of goods consigned** to a Railway Company for carriage is governed by Art. 31, and limitation for the suit begins to run from the date on which the defendant company finally says the goods cannot be delivered.[9] However a **suit** against a Railway Company **to recover the surplus proceeds of a sale** held by it under S. 56 of the Railways Act is not governed by Art. 31, but by Art. 62, the proceeds held by it being received for the plaintiff's use.[10] The **Madras Full Bench** decision in *Venkatasubba Rao* v. *Asiatic Steam Navigation Company*[11] has been relied on by the **Lahore High Court,** for holding that a **suit** against a Railway Company **to recover compensation for wrongful conversion** of the plaintiff's goods, where non-delivery is also alleged, is governed by Art. 31 and not by Art. 48 of Sch. I to the Limitation Act, and limitation begins to run from the date on which the goods ought to have been delivered.[12] The **Nagpur Judicial Commissioner's Court**[13] has followed the Allahabad,[14] Bombay,[15] Calcutta,[16] and Madras,[17] High Courts, and the Punjab Chief Court,[18] for holding that a suit against a carrier for

**Lahore.**

**Nagpur.**

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[7] *Agent, B. N. Ry. Co.* v. *Hamir Mull Chhaganmal,* (1925) 90 I.C. 374=5 Pat. 106=1925 Pat. 727=6 P.L.T. 565.

[8] *Gopi Ram Gouri Shanker* v. *G. I. P. Ry. Co.,* (1927) 103 I.C. 383=1927 Pat. 335=8 P.L.T. 767.

[9] *South Indian Ry. Co.* v. *Narayana Ayyar,* (1923) 77 I.C. 511=1924 Mad. 567=40 M.L.J. 302=34 M.L.T. 303.

[10] *Tarab Chand* v. *Madras & S. M. Ry. Co.,* (1921) 62 I.C. 742=44 Mad. 823=1921 Mad. 362.

[11] 30 I.C. 840=39 Mad. 1=29 M.L.J. 342=2 L.W. 805=18 M.L.T. 236=1915 M.W.N. 644 (F.B.); Folld. in *British India Steam Navigation Co., Ltd.* v. *Hussain Kasim Shett,* (1917) 42 I.C. 536.

[12] *Secretary of State* v. *The Dunlop Rubber Co.,* (1925) 88 I.C. 979=26 P.L.R. 490=6 Lah. 301=1925 Lah. 478.

[13] *Agent, G. I. P. Ry. Co.* v. *Jasrup Shrinath,* (1925) 90 I.C. 135=1926 Nag. 57; cf. *Nawab Boot House* v. *Secretary of State,* 1935 All. 156.

[14] Reld. on 58 I.C. 547=42 All. 390=18 A.L.J. 377; also see 10 I.C. 122=33 All. 514=8 A.L.J. 543.

[15] 19 Bom. 165 and 26 Bom. 562=4 Bom. L. R. 447.

[16] 70 I.C. 857=1922 Cal. 330 and 3 I.C. 469=13 C.W.N. 851.

[17] 30 I.C. 840=39 Mad. 1 (F.B.).

[18] 108 P.R. 1906 (F.B.).

compensation for non-delivery of goods, irrespective of whether failure to deliver is due to a tort, or to a breach of contract is governed by Art. 31. The same view was taken by the Nagpur Court in *Ali Mohamed* v. *G. I. P. Ry. Co.,*[19]

> "There is thus a consensus of opinion among all the High Courts as to the applicability of Art. 31 to all cases of non-delivery whether founded on tort or contract. The only case to the contrary is that in *Radha Sham Basak* v. *Secretary of State for India*,[19-a] where defendants denied the delivery of goods."[20]

**Sind.**

To this long list of cases may be added the decision of **Sind Judicial Commissioner's Court** in the case of *Ludhomal-Purtomal* v. *Secretary of State,*[21] where Fawcett, A.J.C., has followed the Bombay case of *Haji Ajam Goolam Hossein,* in applying Art. 31 to a suit framed to recover compensation for non-delivery of goods, making it a case of non-feasance and not misfeasance, by non-performance of contract.

**Suits by consignor and consignee.**

**1173.** The view taken in *Radha Sham* v. *Secretary of State*,[22] that Art. 31 seems to contemplate a suit by the party entitled to the delivery, namely, the consignee is not sustainable. The **Allahabad High Court,** in *Mutsaddi Lal* v. *B. B. & C. I. Ry. Co.,*[23] has applied Art. 31 to a suit by a consignor of goods against a Railway Administration for damages for non-delivery. Similarly, Art. 31 was applied to a suit against a Railway Company for compensation for non-delivery of goods consigned by the plaintiff's agents in Bombay to him at Ghazipur.[24] The Allahabad view has been relied upon by Page, J., in the Calcutta case of *Chiranjilal Ramlal* v. *B. N. Ry. Co.,*[25] that

> "the Legislature in enacting Art. 31 was not minded to discriminate between a suit brought by a consignee or a consignor".

The learned Judge took the same view in *Vally Mahomed* v. *Nederland S. N. Co.,*[26] that Art. 31 of Sch. I to the Limitation Act applies equally to a suit by a consignor as well as by a consignee. This view is further supported by a decision of the **Lahore**

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[19] 31 I.C. 474=11 N.L.R. 174.

[19-a] (1916) 34 I.C. 130=44 Cal. 16.

[20] *Agent, G. I. P. Ry. Co.* v. *Jasrup Shrinath,* 90 I.C. 135=1926 Nag. 57.

[21] (1919) 51 I.C. 570=13 S.L.R. 1.

[22] (1916) 34 I.C. 130=44 Cal. 16=20 C.W.N. 790=23 C.L.J. 547.

[23] (1920) 58 I.C. 547=42 All. 390=18 A.L.J. 377.

[24] *G. I. P. Ry.* v. *Ganpat Rai,* (1911) 33 All. 544=10 I.C. 122.

[25] (1925) 86 I.C. 127=1925 Cal. 559=52 Cal. 372.

[26] (1924) 80 I.C. 612=1924 Cal. 173=27 C.W.N. 806; Folld. 3 I.C. 469=13 C.W.N. 851 and 26 Bom. 562=4 Bom. L. R. 447.

**High Court** in *Secretary of State* v. *Dunlop Rubber Co.*[27] and of the **Patna High Court** in *B. N. Ry. Co.* v. *Hamir.*[28] Also see *E. I. Ry.* v. *Ram Autar.*[29]

1174. **LOSS OR INJURY TO GOODS.**—It is now settled law that all suits against carriers in respect of goods delivered to them for carriage fall under Art. 30 or Art. 31, according as the claim is regarded as one based upon loss of, or injury to the goods, or of non-delivery thereof.[30] However, the interpretation of the word *"loss"* has been the subject of discussion in several cases both in England and in this country and divergent opinions have been expressed by the learned Judges.

Baron Parke, in the leading English case of *Hearn* v. *L. & S. W. Ry. Co.*,[31] has interpreted *"loss"* to mean loss of the article itself, or injury to it, and not the loss of monies of the carrier.

> "In ordinary parlance, this appears to mean the loss by the carrier of the articles committed to him, or injury to them, whilst in his care, not the loss sustained by the owner by non-delivery of the article in due time or altogether, or the loss of the use of the article by him. By the term 'the injury' is clearly meant the injury to the article itself."[32]

Page, J., accepts this interpretation as correct in the case of *East Indian Railway Co.* v. *Jagput Singh.*[33] He says:

> "In my opinion, the term loss as used in the risk-note, and in Ch. VII of the Railways Act, does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use or enjoyment thereof, but means loss of the goods by the Railway Company while in transit, and such "loss" occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily, or through inadvertence, loses possession of the goods, and for the time being is unable to trace them. The term 'loss' denotes a fact, not a cause of action."[34]

This view as to the meaning of the term loss is supported by several decisions of the **Allahabad High Court,**[35] also by the

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[27] (1925) 6 Lah. 301=1925 Lah. 478.

[28] (1925) 5 Pat. 106=1925 Pat. 727.

[29] (1917) 38 I.C. 502=20 C.W.N. 696 (A suit by a consignor for compensation for loss caused by negligence or theft of railway servants).

[30] *Rivers Steam Navigation Co., Ltd.* v. *Bisweswar Kandu,* (1929) 116 I.C. 148=1928 Cal. 371; also see *Louis Dreyfus & Co.* v. *Secretary of State,* (1918) 45 I.C. 173=11 S.L.R. 103 and *E. I. Ry. Co.* v. *Ram Autar,* (1917) 38 I.C. 502=20 C.W.N. 696.

[31] (1855) 10 Ex. 793 (799)=159 E.R. 660=102 R.R. 833.

[32] *Ibid.*

[33] (1924) 79 I.C. 126=51 Cal. 615=1924 Cal. 725=28 C.W.N. 1001.

[34] *Ibid.*

[35] *Jugal Kishore* v. *G. I. P. Ry. Co.,* (1923) 20 A.L.J. 792=45 All. 43=1923 All. 22 (2)=68 I.C. 981; *Secretary of State* v. *Jiwan,* (1923) 71 I.C. 609=45 All. 380=1923 All. 426=21 A.L.J. 220; *E. I. Ry.* v. *Kishan Lal,* (1924) 73 I.C. 986=45 All. 530=1924 All. 7=21 A.L.J. 438 and *E. I. Ry.* v. *Makhan Lal,* 74 I.C. 814=45 All. 575=1923 All. 605=21 A.L.J. 515.

**Bombay**[36] and **Patna**[37] High Courts. The **Punjab Chief Court** took this view in *Changa Mal* v. *The Bengal N. W. Ry.*,[38] which was followed in *Fakir Chand* v. *The Secretary of State for India.*[39] But, a different view was taken by the Lahore High Court in a Full Bench case, which overruled the decision of the Punjab Chief Court.[40] Also see *G. I. P. Ry. Co.* v. *Jitan Ram Nirmal Ram.*[41] Art. 30 is not applicable to cases of *short-delivery*, which does not amount to *loss of or injury to the goods,* but is rather a loss or injury to the *consignee.*[42] Similarly, where the goods which were not *lost,* but delivery being unclaimed, the goods were kept lying in the Lost Property Office, a suit for compensation was held to be governed by Art. 31, as a case of "non-delivery", and not by Art. 30, which was inapplicable.[43] This view was not accepted in the recent case of *Secretary of State* v. *Simla Footwear Co.*,[44] where Art. 48 is applied to such a suit. This article does not apply where no loss is pleaded or proved, but there is a plea of denial of receipt of the consignment.[45] Where goods were consigned to Railway Company for carriage, and two bags were found missing by the consignee who offered to take the remaining bags, but the Station-master refused delivery, held that the suit was governed by Art. 31 and not Art. 30.[46] Non-delivery does not constitute loss within the meaning of S. 77 of the Railways Act.[47] A Full Bench of the Patna High Court has held that loss of goods means that they cannot be traced: but Jwala Prasad, J., held per *contra,* that Risk-note B does not include loss to the owner on account of the non-delivery of the article by the Railway Company.[48]

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[36] *G. I. P. Ry.* v. *Ram Chunder Jagannath,* 49 I.C. 396=43 Bom. 386 =21 Bom. L. R. 6 (Per Kajiji).

[37] *E. I. Ry.* v. *Kali Charn Ram,* 69 I.C. 103=1922 Pat. 106=3 P.L.T. 215.

[38] 6 P.R. 1897.

[39] (1913) 19 I.C. 477=170 P.L.R. 1913=122 P.W.R. 1913.

[40] 2 Lah. 133 (F.B.) (S. 1175).

[41] 72 I.C. 440=2 Pat. 442=4 P.L.T. 173=1923 Pat. 285; cf. *Puran Das* v. *E. I. Ry. Co.*, 102 I.C. 673 (F.B.).

[42] *B. & N.-W. Ry. Co.* v. *Kameshwar,* (1933) 12 Pat. 67=141 I.C. 813=1933 Pat. 45 (48) (Art. 31 applied).

[43] *Mutsaddi Lal* v. *B. B. & C. I. Ry. Co.*, 42 All. 390 (392)=18 A.L. J. 377=58 I.C. 547.

[44] 1935 All. 601 (Art. 48 applied).

[45] *Radha Shyam* v. *Secretary of State,* 44 Cal. 16 (26).

[46] *G. I. P. Ry. Co.* v. *Radhalal-Mannilal,* (1925) 87 I.C. 579=1925 All. 656=47 All. 549=23 A.L.J. 398.

[47] *G. I. P. Ry. Co.* v. *Gopi Ram-Gauri Shanker,* (1928) 107 I.C. 540=7 Pat. 192=1928 Pat. 270=9 P.L.T. 163.

[48] *Purandas* v. *E. I. Ry. Co.*, 102 I.C. 673=1927 Pat. 234=8 P.L.T. 415 (F.B.).

**1175. MISDELIVERY OF GOODS.**—A **Full Bench of the Lahore High Court** has held in *Hill Sawyer Co.* v. *Secretary of State,*[49] that misdelivery of goods is "loss" within the meaning of the Railways Act, S. 80; but this view was not shared by Abdul Rauf, J., who has held that "loss" signifies a loss to the Railway Company.

The **majority of the Full Bench** have proceeded on the ground that the Indian Railways Act is not in *pari materia* with the English Carriers Act, 1830, and the word "loss" in Ch. VII of the Railways Act, cannot bear the restricted meaning of loss *by the carrier,* and not simply loss *to the owner.* The word "loss" in the Railways Act, accordingly, includes loss to the owner of the goods made over to a Railway Administration which have been misdelivered, and so have been lost to the person entitled thereto. The Full Bench view has been followed in *Gobind Ram-Bughimal* v. *Secretary of State.*[50] "Loss" includes loss *by the carrier,* as well as loss *to the owner,* and a suit, whether it be for the misdelivery of the goods or for their non-delivery is a suit for the loss of goods to the owner.[1] The contrary view had been taken in an earlier decision of Rattigan, J., in *Fakir Chand* v. *Secretary of State,*[2] following a decision of Chatterji, J., in *Changa Mal* v. *B. & N.-W. Ry. Co.*[3]

It is to be observed that, whereas Jwala Prasad, J., in *E. I. Ry.* v. *Kali Charan*[3-a] held that when goods are not delivered they are "lost"; the contrary view is taken by a Division Bench in *G. I. P. Ry. Co.* v. *Jitan Ram.*[4] But, the middle view has been adopted by Page, J., in the *East India Ry. Co.* v. *Jagpat Singh,*[5] by holding that

> "the true view would seem to be that in either case the goods may or may not be lost, and that proof of non-delivery, or misdelivery is by no means conclusive as to whether or not a loss has occurred".

**1176. BURDEN OF PROOF AS TO LOSS.**—The **Calcutta High Court** held in the case of *Rivers S. N. Co., Ltd.* v. *Bisweswar Kandu,*[6] that the burden of proving that the loss took place more than a year before suit and that for that reason the suit is time-barred under Art. 30 of Limitation Act, is on the defendant. The **Madras High Court** has likewise held in *The M. & S. M. Ry. Co.* v. *Bhimappa,*[7] that in a suit for compensation for the loss of goods against a Railway Company, the burden of proving when the goods were lost is on the defendant company. Where it is not proved that the goods were lost more than one year before the institution of the suit, neither Art. 30 nor Art. 31 bars such a suit if it is brought within one year from the date of refusal to deliver.[8] Under the Carriers Act, the loss or damage of goods delivered for carriage to a common carrier is *prima facie* evidence of negligence and the burden to disprove negligence lies on the carrier. Loss from an unknown cause is presumptive proof of negligence.[9] The words "against a carrier for losing or injuring goods" obviously suggest not a loss of the goods to the owner but an actual losing of the goods by the *carrier* himself; and the words "when the loss or injury occurs" in the third column mean that the period of limitation begins to run from the time when the *carrier* lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. Therefore, the burden of proving when the goods were lost is decidedly on the defendant.[10] If the loss contemplated by the article means loss of the goods themselves and not loss to the owner only, the time would begin to run from the loss of goods by the carrier, and the burden of proving when the goods were lost would be on the defendant.[11] If the carrier claims the benefit of Art. 30, he ought to prove the date of the loss, supposing the plaintiff has given *prima facie* evidence that his suit is not barred by limitation.[12] The date of actual loss has to be proved by the carrier, and it cannot be inferred from the mere fact of non-delivery of goods on a certain date.[13] The case is different if the liability of the company is limited by agreement.[14]

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[49] 2 Lah. 133=61 I.C. 926=3 L.L.J. 297 (F.B.).

[50] (1926) 98 I.C. 946=1926 Lah. 596.

[1] *Ibid.*

[2] (1913) 19 I.C. 477=170 P.L.R. 1913.

[3] 6 P.R. 1897.

[3-a] 69 I.C. 103=1922 Pat. 106=3 P.L.T. 215.

[4] 72 I.C. 440=4 P.L.T. 173=1 P.L.R. 169=1923 Pat. 285=2 Pat. 442; cf. *Puran Das* v. *E. I. Ry. Co.,* 102 I.C. 673 (F.B.).

[5] 79 I.C. 126=51 Cal. 615=1924 Cal. 725=28 C.W.N. 1001.

[6] (1929) 116 I.C. 148=1928 Cal. 371.

**1177. STARTING POINT OF LIMITATION.**—The starting point under Art. 30 is expressly stated in column 3 to be *"when the loss or injury occurs"*: and under Art. 31, in cases of non-delivery, or delayed delivery, the commencement of the period is from the time *"when the goods ought to be delivered"*.

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[7] (1912) 17 I.C. 419=23 M.L.J. 511.

[8] *Ibid.*

[9] *Rivers S. N. Co., Ltd.* v. *Bisweswar Kandu,* (1929) 116 I.C. 148=1928 Cal. 371.

[10] *Jugal Kishore* v. *G. I. P. Ry. Co.,* (1923) 68 I.C. 981=1923 All. 22=45 All. 43 (45)=20 A.L.J. 792.

[11] *Fakir Chand* v. *Secretary of State,* (1913) 19 I.C. 477; Followed 6 P.R. 1897; but cf. *Hill Sawyers Co.* v. *Secretary of State,* 2 Lah. 133 (F.B.), which overrules 6 P.R. 1897.

[12] *Mohun Singh* v. *G. I. P. Ry. Co.,* (1883) 7 Bom. 478.

[13] *G. I. P. Ry. Co.* v. *Radhemal,* (1925) 47 All. 549.

[14] *Narayana Aiyar* v. *S. I. Ry. Co.,* (1923) 75 I.C. 260=18 L.W. 322; *E. I. Ry. Co.* v. *Netram,* (1923) 75 I.C. 26=1924 Pat. 812.

The **Allahabad High Court** has held in *Jugal Kishore* v. *G. I. P. Ry. Co.*,[15] that the words "when the loss or injury occurs" in the third column mean that the limitation begins to run from the time when the *carrier* lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. Where the Railway Company did not prove or admit that the goods were lost, the claim of the plaintiff brought more than a year after the despatch of goods was held not barred by Art. 30.[16] Art. 30 is not applicable where no loss is pleaded or proved, but there is only a plea of denial of receipt of the consignment.[17] Under Art. 30, time begins to run from a definite date that is when the loss or injury occurs. Hence where loss had occurred prior to a given date, the plaintiff could not claim that limitation runs only from date of open delivery to him by the company.[18]

Where the suit is one against the carrier for compensation for non-delivery of goods, limitation begins to run from the date on which open delivery was permitted.[19]

In a suit for compensation for non-delivery of goods falling under Art. 31, limitation commences from the date when the goods ought to have been delivered, but delivery was refused.[20] A suit against a Railway Company to recover compensation for wrongful conversion of the plaintiff's goods where non-delivery is also alleged is governed by Art. 31, and not Art. 48, and limitation begins to run from the date on which the goods ought to have been delivered.[21]

**Short-delivery.**

In the case of **short-delivery** of goods, one view is that short-delivery amounts to non-delivery of the thing short-delivered and therefore falls under Art. 31.[22] It has been held in such cases that the period of actual delivery of the portion is the date when all the goods should have been delivered.[23] Another view is that non-delivery of a consignment means non-delivery of the consignment as a whole as contrasted with short-delivery.[24]

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[15] (1923) 45 All. 43 (45)=1923 All. 22=68 I.C. 981=20 A.L.J. 792.

[16] *Ibid.*

[17] *Radha Sham* v. *Secretary of State*, 44 Cal. 16 (26).

[18] *Secretary of State* v. *Meaz Ali Hamed Ali*, 1935 All. 407.

[19] *Bala Prasad* v. *B. N.-W. Ry. Co.*, (1927) 106 I.C. 311=1927 Oudh 478=3 Luck. 102.

[20] *G. I. P. Ry. Co.* v. *Radheylal-Manilal*, (1925) 87 I.C. 579=1925 All. 656=47 All. 549=23 A.L.J. 398.

[21] *Secretary of State* v. *Dunlop Rubber Co.*, (1925) 88 I.C. 979=6 Lah. 301=1925 Lah. 478; cf. 1927 Lah. 471 and 1935 All. 156.

[22] *Haji Ajam* v. *Bombay and Persia S. N. Co.*, 26 Bom. 562; *Venkatasubba Row* v. *A. S. N. Co.*, 39 Mad. 1 (F. B.) and *B. & N.-W. Ry. Co.* v. *Kameshwar*, (1933) 12 Pat. 67=141 I.C. 813=1933 Pat. 45.

[23] *Secretary of State* v. *Dunlop Rubber Company*, (1925) 6 Lah. 301; *Rameshwar* v. *E. I. Ry. Co.*, (1923) 71 I.C. 565=4 P.L.T. 331; *Gopi Ram* v. *G. I. P. Ry. Co.*, (1927) 103 I.C. 383=1927 Pat. 335.

### *Part V.—Two years.*

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 32. | Against one who, having a right to use property for specific purposes, perverts it to other purposes. | Two years. | When the perversion first becomes known to the person injured thereby. |

### SYNOPSIS.

1178. Corresponding provisions.
**1179-1185. Scope of the article.**
1179. Article not restricted to suits *ex contractu.*
1180. Article is independent of nature of remedy.
1181. Article not confined to particular relief.
1182. The position of the article in Schedule immaterial.
1183. Suit against person *"having a right"*.
1184. Suits for title between co-owners or co-tenants.
1185. Perversion of user.
**1186. Starting point of limitation.**

### NOTES.

**1178. CORRESPONDING PROVISIONS.**—There was no such specific provision in Act XIV of 1859. The corresponding article in Sch. II of Act IX of 1871, was Art. 38, where limitation ran "from the time of the perversion". In Act XV of 1877, the corresponding provision was made in Art. 32, which has been re-enacted in the present article.

**(*i*) Article not restricted to suits *ex contractu.***

**1179. SCOPE OF THE ARTICLE.**—This article is **not restricted to suits *ex contractu,*** but applies irrespective of the question whether the suit is based on tort or contract.

In early Calcutta cases, of *Kedarnath Nag* v. *Khettur Paul,*[25] and *Gunesh Das* v. *Gundour,*[26] this article was not applied to cases by a landlord against his tenant who had, in breach of the conditions of his lease, dug up a tank on the land without the plaintiff's permission,[27] or removed trees from the lands leased to him for agricultural purposes.[28] But, in the **Full Bench** case of *Sharoop*

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[24] *Great Western Ry. Co.* v. *Wills,* (1917) A.C. 148.
[25] (1880) 6 Cal. 34=6 C.L.R. 569.
[26] (1882) 9 Cal. 147=12 C.L.R. 418.
[27] *Kedarnath Nag* v. *Khettur Paul,* (1880) 6 Cal. 34.
[28] *Gunesh Das* v. *Gondour,* (1882) 9 Cal. 147.

*Dass Mondal* v. *Joggessur Roy,*[29] where the suit was framed in tort, and the primary relief sought was in effect a mandatory injunction directing the defendant to fill up the tank in question, and to pay the plaintiff compensation for his alleged wrongful act; the secondary relief being for ejectment, it was held that the case was within Art. 32. This conclusion is consistent with the decision of the **Calcutta High Court** in the case of *Soman Gope* v. *Raghubir Ojha,*[30] and with the principles of the **Allahabad** case of *Gangadhar* v. *Zahurriya,*[31] although in the latter case the plaintiff did not seek to eject. The **Lahore High Court** has taken the same view in *Bhagwana* v. *Bhagwana,*[32] where it was held by Johnstone, J., that

> "the notion that Art. 32 applies only to cases *ex contractu* cannot be regarded as correct".

**(ii) Article is independent of nature of remedy.**

**1180.** The **Calcutta High Court** has held that "there is nothing in the article to limit it to a suit for compensation. The article is independent of the nature of the remedy, and apparently applies equally to all classes of suits brought upon the cause of action referred to in the article."[33]

*Illustrations.*

**Suits for ejectment.**

(1) Accordingly, where the **suit** was brought, **under S. 25, Cl. (2) and S. 155, Bengal Tenancy Act,** to evict a tenant on the ground of his having used the land in a manner which rendered it unfit for the agricultural purposes of the tenancy, by the tenant having turned it into an orchard, Art. 32 was held applicable.[34] A suit for possession of land brought on the ground that the tenant has misused the land or used it in contravention of the terms of the kabuliat is governed by Art. 32 and not by Art. 143.[35]

**Suits for ejectment and injunction.**

(2) In a suit brought by a Zamindar against certain occupancy tenants, seeking to restrain them from converting it into a grove the arable land held by them, the prayer in the plaint was not for mere ejectment of the tenant but virtually sought also for an injunction, and Art. 32 was held rightly applied.[36]

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[29] (1899) 26 Cal. 564 (F.B.); Followed in *Taher Mondal* v. *Tarafdi Gharami,* (1916) 33 I.C. 923=20 C.W.N. 661.

[30] (1896) 24 Cal. 160.

[31] (1886) 8 All. 446 (N. F. 6 Cal. 34).

[32] (1930) 121 I.C. 186=31 P.L.R. 14=1930 Lah. 283.

[33] *Soman Gope* v. *Raghubir,* (1896) 24 Cal. 160 (162).

[34] *Ibid.*

[35] *Taher Mondal* v. *Tarafdi Gharami,* (1916) 33 I.C. 923=20 C.W.N. 661.

[36] *Gangadhar* v. *Zahurriya,* (1886) 8 All. 446=6 A.W.N. (1886) 210; Followed in 10 All. 634.

**Ejectment and compensation.**

(3) Similarly, where in a suit for ejectment and compensation for a breach of covenant on which land was held, the suit for ejectment is barred by limitation, the suit for compensation is maintainable if it is within the period of limitation prescribed by Art. 32, as the claim for compensation is independent of the claim for ejectment.[37]

**Suits for injunction, etc.**

(4) A suit by a *Zamindar* for removal of a structure made by mortgagee of occupancy holding without the consent of the plaintiff, was held governed by Art. 32.[38]

(5) In the Full Bench case of *Sharoopdas Mondal* v. *Joggessur Roy*,[39] (*Vide* S. 1179), Art. 32 was applied to a suit for a mandatory injunction and damages as primary relief, with a prayer for ejectment as secondary relief.

(6) Where a public graveyard was converted into a grove by the defendant, and the plaintiff, as the proprietor of the plot of land in question, sued for possession of the land and for removal of the trees, *held*, that the plot being a public graveyard plaintiff could not sue for its possession, and that the claim for removal of trees was governed by Art. 32.[40]

(7) Where the defendant while perverting joint property from its specified user, admits the plaintiff's right to share the user in its perverted form, the plaintiff, if he wishes to get rid of the perversion, shall have to do so within two years from the date on which he obtained knowledge of the perversion.[41]

**(*iii*) Article not confined to particular relief.**

1181. The **Allahabad High Court** has held in *Musharf Ali* v. *Iftikhar Husain*,[42] that where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted *for any relief* in respect of any injurious consequences arising from such perversion, such a suit will be governed by Art. 32.

*Illustrations.*

(1) Article 32 applies to a suit brought under S. 25, Cl. (*a*) and S. 155 of the Bengal Tenancy Act, 1885, for the ejectment of a tenant and removal of trees planted by him on land leased out for agricultural purposes.[43]

(2) A suit by Zamindars for the removal of trees planted by a tenant on his cultivatory holding is governed by the limitation prescribed in Art. 32.[44]

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[37] *Krishna Das Ray* v. *Mohendro Chandra*, (1921) 62 I.C. 779=1921 Cal. 62=25 C.W.N. 930.

[38] *Lach Ram Rao* v. *Jangi Rai*, (1911) 8 A.L.J. 914=12 I.C. 108; Followed 8 All. 446 and 20 All. 519.

[39] 26 Cal. 564=3 C.W.N. 464 (F.B.); Relied in 62 I.C. 779=25 C.W.N. 930.

[40] *Ismail* v. *Thakur Lal*, (1926) 93 I.C. 89=1926 Oudh 341.

[41] *Mastan Singh* v. *Santa Singh*, 1933 Lah. 705 (709)=14 Lah. 267 =34 P.L.R. 618=145 I.C. 553 (F.B.); Diss. *Ghulam Muhammad* v. *Abdul Satar*, (1925) 89 I.C. 405=1925 Lah. 653.

[42] (1888) 10 All. 634=8 A.W.N. (1888) 257.

[43] *Soman Gope* v. *Raghubir Ojha*, (1896) 24 Cal. 160.

[44] *Jai Kishen* v. *Ramlal*, (1898) 20 All. 519; Relied on 8 All. 446 and 10 All. 634.

**(iv) The position of the article in the schedule immaterial.**

1182. In construing this article, the argument based upon its position has no substantial force. In determining the meaning of a legislative enactment, you cannot let the scheme of the Code outweigh the expressed will of the Legislature, as held in *Heera* v. *Pestonji.*[45]

**(v) Suit against a person having a right.**

1183. This article contemplates, *firstly,* **a suit against a person having some right** to use the property for a specific purpose; *secondly,* **a perverted user** by that person, to which the plaintiff has a right to object. Whatever be the nature of the relief sought, a suit based on such perversion of the right purpose by the defendant will fall under this article. It follows that this article **will not apply to suits against a mere trespasser,** or other person who has no right whatsoever to the user of the property in question in any manner, or to any extent. Art. 120 would have to be applied in such cases.

**Lahore Full Bench.**

In *Dewa Singh* v. *Qarun,*[46] Addison, J., has observed that it is only in cases where the defendant had a right to use the property encroached upon for any specific purpose, that Art. 32 would apply, and Art. 120 would certainly apply if the defendant had no right to use the property for a specific purpose. But this has been reversed on Letters Patent appeal in *Qarun* v. *Dewa Singh.*[47] In the **Full Bench** case of *Mastan Singh* v. *Santa Singh,*[48] Tekchand, J., has observed that

> "it is no doubt true that the phraseology of the article is somewhat obscure. It does not describe explicitly the type of suit to which it applies".

But he concludes from the words used in the third column,

> "that the article is applicable to those cases only in which the injury complained of is the perverted user of the property by the defendant, who had the right to use it for a specific purpose, and the plaintiff seeks assistance of the Court *merely to get rid of the perversion*".[49]

He adds that

> "In my opinion, it has no application where the defendant's act, though it might also have resulted in the perversion of the user from the original specified purpose, really amounted to an ouster of the plaintiff from the

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[45] (1898) 22 Bom. 693 (F.B.).

[46] (1929) 118 I.C. 447=30 P.L.R. 399=1929 Lah. 535; cf. *Achar Singh* v. *Badhawa Singh,* 15 I.C. 285=124 P.R. 1912=132 P.W.R. 1912 =2 P.L.R. 1913.

[47] *See* per contra, 1933 Lah. 705 (F.B.), in so far as it applied Art. 32 to suits between co-owners or co-tenants *inter se*; *also see* 1934 Lah. 701= 156 I.C. 358=35 P.L.R. 472 (Art. 120 applied).

[48] 1933 Lah. 705 (709)=14 Lah. 267=34 P.L.R. 618=145 I.C. 533 (F.B.).

[49] *Ibid.*

property in question and the **object of the suit** is not to get rid of the perversion simplicitor, but to **have** the dispute as to title settled".[50]

**(vi) Suits for title between co-owners or co-tenants.**

1184. Accordingly, the principle was laid down that

> "**to suits between co-owners or co-tenants** ***inter se,*** where the title of one is denied by the other, **Art. 144 or Art. 120** would apply according as the relief claimed is one for possession or injunction".[1]

This is on the ground

> "that it was not the **intention of the legislature** to reduce the period of limitation for such suits to two years simply because the attack by the defendant on the plaintiff's title was accompanied by a perversion of the user of the property from its original specified purpose".[2]

The learned Judge wished to make it clear, however, that it should not be understood as laying down that in no case can Art. 32 apply to disputes between co-owners or co-tenants *inter se.*[3]

> "A case might arise, for instance, where the defendant while perverting joint property from its specified user, admits the plaintiff's right to share the user in its perverted form. In such circumstances, if the plaintiff wishes to get rid of the perversion, he shall have to do so within 2 years from the date on which he obtained knowledge of the perversion."[4]

This principle derives support from the observations of Coldstream, J., in *Mian Pirthi* v. *Hans Raj,*[5] that

> "Art. 32 was not intended to apply to a case in respect of land in which the person proceeded against had no other right than a right in common with the general public, to pass over it". . . . . "There can be no doubt that Art. 32 can properly be applied only where the person proceeded against had, before the perversion in respect of which he is being sued took place, **a right to 'use the property for specific purposes'.**"[6]

The same learned Judge held in another case decided on the same day that where certain persons build on common burning ground, a suit to eject them is governed by Art. 32, as the defendants have **a real right in the land itself,** parts of which any of them can from time to time temporarily appropriate and use as a support on which to cremate a dead body.[7]

The **Full Bench** decision, in *Mastan Singh* v. *Santa Singh,*[8] must be taken to have overruled the cases of *Ghulam Muhd.* v. *Abdul*

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[50] *Mastan Singh* v. *Santa Singh,* 1933 Lah. 705 (709)=14 Lah. 267=34 P.L.R. 618=145 I.C. 533 (F.B.).

[1] *Ibid.*

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] 1928 Lah. 794=112 I.C. 381; Relied on 124 P.R. 1912 and 1928 Lah. 792 (1); Diss. 1922 All. 320; cf. 1924 All. 250.

[6] *Ibid.*

[7] *Nand Ram* v. *Jaichand,* (1928) 1929 Lah. 186=112 I.C. 844.

[8] 1933 Lah. 705=145 I.C. 553=14 Lah. 267 (F.B.).

*Sattar,*[9] *Bhagwana* v. *Bhagwana,*[10] *Bhagwan* v. *Ramanand,*[11] *Dewa Singh* v. *Qarun,*[12] etc., where Art. 32 has been applied to suits by plaintiff against co-owners of plots of land set apart for the common use of plaintiff and defendant for a specific purpose, from which plaintiff has been excluded.

*Illustrations.*

(1) In *Gangadhar* v. *Zahurriya,*[13] there was an undoubted right in the defendants, who were occupancy tenants of the plaintiff's land, to use that land for certain specific purposes, and what the plaintiff complained of was that instead of using it as arable land, for which it had been let to them, they had converted it into a *bagh* or grove; consequently Art. 32 was held to be applicable.

(2) But, in *Musharraf Ali* v. *Iftikhar Hussain,*[14] where the suit was brought by a *Zemindar* for removal of trees planted in certain waste land of his village by persons who had no right to plant them, it was held that Art. 120 and not Art. 32 governed the suit.

(3) Where the defendant planted trees on the plaintiff's land without having any right to do so, and the plaintiff sued for the removal of trees and for possession of the land it was held that the period of limitation applicable to the suit was 12 years.[15]

(4) The planting of trees on another person's land is active trespass, and the owner is entitled to treat it as such. The period of limitation for a suit for possession of the land is twelve years from the trespass.[16]

(5) However, *Bhide, J.,* has held in the case of *Gurdit Singh* v. *Hari Singh,*[17] that a **suit for a mandatory injunction** directing the defendants to remove an encroachment alleged to have been made by them on a public road is governed for purposes of limitation by Art. 120 and not Art. 32.

(6) In *Achar Singh* v. *Badhawa Singh,*[18] Reid, C.J., held that a suit to oust the defendant from a specific portion of the *shamilat deb* occupied by him adversely to the rest of the proprietors or to remove an obstruction to the enjoyment of the *shamilat* is governed by Art. 120, which is a resi-

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[9] 1925 Lah. 653=89 I.C. 405.

[10] 1930 Lah. 283=31 P.L.R. 14=121 I.C. 186.

[11] (1929) 115 I.C. 73.

[12] 1929 Lah. 535=118 I.C. 447.

[13] (1886) 8 All. 446=6 A.W.N. (1886) 210.

[14] (1888) 10 All. 634=8 A.W.N. (1888) 257; Followed in *Badal* v. *Nageshwar,* (1919) 52 I.C. 858=6 Oudh L. J. 329; cf. *Ghafur Khan* v. *Prag Narain,* (1922) 66 I.C. 799=9 Oudh L.J. 17 (The prayer for removal of trees was merely ancillary to claim for possession).

[15] *Muhammad Shafi* v. *Bindeshi Saran,* (1923) 75 I.C. 266=46 All. 52=1924 All. 443.

[16] *Mohammad Shafi* v. *Bindeshri Singh,* (1922) 70 I.C. 483=1922 All. 50; Dist. and not app. 10 All. 634=8 A.W.N. (1888) 257.

[17] (1928) 110 I.C. 517=29 P.L.R. 308=1928 Lah. 792; Folld. 15 I.C. 285=124 P.R. 1912 and 60 I.C. 20=3 L.L.J. 128 and 56 I.C. 1003=2 L.L.J. 463.

[18] (1912) 15 I.C. 285=124 P.R. 1912=2 P.L.R. 1913.

duary article prescribing the period of limitation for a suit for injunction not covered by Art. 32 or Art. 142 or Art. 144.[19]

(7) Similarly, in *Ganda Singh* v. *Nathu Ram,*[20] Rattigan, J., applied Art. 120 to a suit for perpetual injunction directing defendant to restore to its original condition certain land encroached upon by the latter which was originally reserved for the common use of the proprietors.

(8) Compare *Bhagwana* v. *Bhagwana,*[21] where a suit by the village proprietors against others for an injunction to compel the latter to remove constructions built on a part of the village common land was held governed by Art. 32 instead of by Art. 120. This was also the view taken in *Dewa Singh* v. *Qarun,*[22] following the decision in *Ghulam Muhammad* v. *Abdul Satar,*[23] where Jailal, J., applied Art. 32 in a suit by plaintiffs against a defendant who admittedly had a right to use the pond in dispute along with other proprietors of the village for a specific purpose, *i.e.*, of taking water therefrom, and had perverted it to purposes other than for which it was intended by filling up the pond and cultivating the entire area. But, see *per contra,* the Full Bench decision in *Mastan Singh* v. *Santa Singh,*[24] followed in Letters Patent appeal case *Qarum* v. *Dewa Singh.*[25]

(9) A suit for the removal of trees on a plot reserved for a public graveyard falls under Art. 32.[26] Similarly, where certain persons built on a common burning ground, a suit to eject them was held governed by Art. 32, as the defendants had a real right in the land itself.[27]

**1185.** **Perverted user.** As noticed in the preceding paragraph the claim must be based on some **perversion of the use of property** in question, for the proper application of Art. 32. When the user continues to be the same in nature and only **increase of burden** is complained against the change in quantity of user may not amount to a perversion of user within the contemplation of Art. 32. It is a **question of substantive law** whether any particular perversion will be actionable, and if so what particular relief would be available to the party injured by the perversion. But, where perversion supplies a good cause of action, Art. 32 will be held to govern the suit. **The principle applicable** to such cases is laid down very clearly in the Full Bench judgment of the **Lahore High Court** in the case of *Mastan Singh* v. *Santa Singh,*[28] where all the relevant case-law has been fully discussed (*see* **Ss. 1183 and 1184** *ante*).

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[19] *Nur Mohammad* v. *Gauri Shankar,* (1920) 56 I.C. 1003=2 L.L.J. 463 and *Lal Singh* v. *Hira Singh,* (1921) 60 I.C. 20=3 L.L.J. 128.

[20] (1912) 13 I.C. 661=77 P.W.R. 1912=151 P.L.R. 1912.

[21] (1930) 121 I.C. 186=31 P.L.R. 14=1930 Lah. 283; O.R. in 1933 Lah. 705=14 Lah. 267=145 I.C. 553 (F.B.).

[22] (1929) 118 I.C. 447=30 P.L.R. 399=1929 Lah. 535.

[23] (1925) 89 I.C. 405=1925 Lah. 603.

[24] 1933 Lah. 705=145 I.C. 553=14 Lah. 267 (F.B.).

[25] 1934 Lah. 701=156 I.C. 358=35 P.L.R. 472.

[26] *Ismail* v. *Thakar Lal,* (1926) 93 I.C. 89=1926 Oudh 241.

[27] *Nand Ram* v. *Jai Chand,* 1929 Lah. 186=112 I.C. 844.

[28] 1933 Lah. 705=145 I.C. 553=14 Lah. 267 (F.B.).

*Illustrations.*

(1) Where defendant who was entitled to place beams on the plaintiff's wall placed heavier and more numerous beams on the wall than had existed before, and plaintiff brought a suit for the removal of the beams, it was held that Art. 32 had no application to the case.[29]

(2) A common instance of the application of Art. 32 is that of a tenant who having a right to cultivate land digs a tank in it or builds a house on it.[30]

(3) Where the defendant raised his wall from 11 ft. to 19 ft. by erecting a second storey of his house and put a *dopolia* or double-sided thatch thereby placing an additional burden on the plaintiff's wall, it was held that this was an alteration which constituted an extension or encroachment upon the original easement, and also an actionable wrong, but that Art. 32 was inapplicable to the case, as defendant's right of support or easement could only be acquired after twenty years' uninterrupted enjoyment.[31]

1186. **STARTING POINT OF LIMITATION.**—The third column of Art. 32 provides expressly that the *terminus a quo* is the date on which "the perversion becomes *known* to the person injured thereby". The law prior to 1877 was that limitation commenced to run from the *"date of the perversion"*. This article supplies an important instance where the period prescribed commences to run not from the date of the cause of action, but when the facts entitling the plaintiff to sue became known to the person injured. The words "first becomes known" occur also in Art. 114: and "first learns" in Art. 48: and the words "becomes known" are to be found in Arts. 48-A, 48-B, 90, 91, 92, 95, 96, 118, 127, 134 and 134-A.

In view of the express language of this article, it is not enough for the purpose of the article that the suit has been instituted more than two years after the date of the alleged perversion which gives the cause of action. It must be found that the plaintiff became aware of the injury more than two years antecedent to the institution of the suit.[32] The plaintiffs are bound to sue within two years of the time when the perversion first became known to them or to their predecessors in title.[33]

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[29] *Mohan* v. *Bishambar Sahai,* (1924) 78 I.C. 193=46 All. 68=1924 All. 450; O.R. *Bishambar Sahai* v. *Janki Dad,* (1922) 69 I.C. 819=1922 All. 320.

[30] *Ibid.,* 78 I.C. 193=46 All. 68=1924 All. 450; also see and cf. *Krishna Das* v. *Mohendra,* (1921) 62 I.C. 779 (Cal.) and *Piyare Lal* v. *Bed Ram,* 1924 All. 814=78 I.C. 849.

[31] *Jaddu Ram* v. *Kanhai Ram,* (1916) 33 I.C. 90 (All.).

[32] *Gobinda Chandra Basu* v. *Kamijuddi Soyal,* (1906) 17 I.C. 115 =16 C.L.J. 127.

[33] *Lach Ram Rao* v. *Jangi Bai,* (1911) 8 A.L.J. 914=12 I.C. 108; Folld. in *Piyare Lal* v. *Bed Ram,* 78 I.C. 849=1924 All. 814.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 33. | Under the Legal Representatives Suits Act, 1855, against an executor. | Two years. | When the wrong complained of is done. |
| 34. | Under the same Act against an administrator. | Do. | Do. |
| 35. | Under the same Act against any other representative. | Do. | Do. |

## NOTES.

**1187. CORRESPONDING PROVISIONS.**—These three articles correspond to Art. 33 of Act XV of 1877 and Art. 39 of Act IX of 1871.

Articles 20 and 21 provide for suits by such executors and administrators under Act XII of 1855 (Legal Representatives Suits Act, 1855).

It may be noticed that S. 17 of the Limitation Act may modify the period prescribed for such suits, in certain cases.

As Arts. 34 and 35 of Act XV of 1877 had to be omitted, the Legislature found it convenient to split up Art. 33 of Act XV of 1877 into three parts.

**1188. THE OMISSION OF OLD ARTS. 34 AND 35.**—The reasons for the omission of old Arts. 34 and 35 may be briefly noticed:—

Article 34 related to actions for recovery of a wife. An amendment of O. 21, R. 23, Civil Procedure Code, whereby a decree for restitution of conjugal rights could not be enforced by detention in civil prison, made a decree for *recovery of a wife* meaningless. Article 35 related to suits for restitution of conjugal rights, which had a very limited scope. It did not apply to cases arising under the Indian Divorce Act; and as regards Hindus and Muhammadans, the statement of objects and reasons explained the situation as follows:—

"The Allahabad High Court held that it did not apply to Hindus or Mahomedans as their personal law did not require an antecedent demand to sustain a suit for restitution of conjugal rights, nor make restitution unenforceable against a minor, and it had further held that the withholding of conjugal rights by either party is a continuing wrong and that a claim for restitution could not be barred by limitation.[33-a] The same view was taken in *Bai Sari* v. *Sankla*.[33-b] These views have been so far modified by the rulings of the Calcutta and Madras High Courts and by the later rulings of the Bombay High Court as to make the article applicable to Hindus and Mahomedans in cases of suits preceded by demand and refusal as mentioned in the third column.[33-c] The operation of the article may be easily avoided by a party if he simply refrains from making a demand which, it may be noted, is not under the Hindu or Mahomedan Law necessary to give rise to a cause of action. It is a very usual thing in Hindu and Mahomedan families for a wife to go and stay with her parents or brothers, and the effect of this article is, that, if owing to any domestic quarrel, the wife should in a fit of temper refuse to return, the husband would be compelled to take the matter into Court within two years."

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 36. | For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for. | Two years. | When the malfeasance, misfeasance or non-feasance takes place. |

### SYNOPSIS.

1189. Corresponding provisions.
1190. **Scope of the article:** Torts independent of contract.
1191. ,, ,, Suits for compensation.
1192. Applications under Companies Act.
1193-1196. **Article explained—**
1193. Tort, defined.
1194. Malfeasance, misfeasance and non-feasance explained.
1195. Wrongs independent of contract.
1196. Not otherwise provided for.
1197. Article applied.
1198. Article not applied.
1199. Starting point of limitation.
1200. Continuing wrongs.

### NOTES.

**1189. CORRESPONDING PROVISIONS.**—There was no such specific provision in **Act XIV of 1859.** In **Act IX of 1871,** the corresponding provision was made in its Art. 40, which ran as follows:—

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[33-a] *Binda* v. *Kaunsilia,* (1890) 13 All. 126 (146).

[33-b] (1892) 16 Bom. 714.

[33-c] *Dhanjibhoy* v. *Hirabai,* (1901) 25 Bom. 644 (F.B.); *Asir-un-nissa* v. *Buzloo,* (1906) 34 Cal. 79; *Saravana* v. *Poovayi,* (1906) 28 Mad. 436.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| — | "For compensation for any wrong malfeasance, non-feasance or misfeasance independent of contract and not herein specially provided for." | Two years. | When the wrong is done or the default happens. |

The article was modified by Art. 36 of **Act XV of 1877,** by omitting the word "wrong" in first column, and changing the phraseology of the third column. This article has been re-enacted as the present article in Act IX of 1908.

**Torts independent of contract.**

**1190. SCOPE OF THE ARTICLE.**—Article 36 is a general article. It is applicable to suits for compensation for any malfeasance, misfeasance, or non-feasance independent of contract. In other words, it refers to action which may be on account of the commission of some act which is in itself unlawful (malfeasance), or being the improper performance of some lawful act (misfeasance), or the omission of some act which a person by law is bound to do (non-feasance). It is a general article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere.[34]

**Suits for compensation.**

**1191.** This article is applicable only to *suits,* not applications or appeals; and it applies to suits *for compensation,* not for any other relief. And, these suits for compensation must be based on torts, or *wrongful acts actionable per se,* independent of contract, express or implied.

**Applications under S. 235, Companies Act.**

**1192.** An *application* under S. 214 of the old Companies Act was not held to fall within the definition of a *suit,* and therefore, this article or any other article in the first division of this schedule could not apply to it.[35] But an application under S. 235 of the Companies Act (VII of 1913) has to be treated as a *suit* for purposes of this article, as Cl. (3) of S. 235 aforesaid enacts that "the Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit.

**Lahore.**

Article 36 has therefore been applied to such an application by the **Lahore High Court.**[36]

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[34] *Kripa Ram* v. *Kunwar Bahadur,* 1932 All. 256=54 All. 467=136 I.C. 809=1932 A.L.J. 241.

[35] *Ramasami* v. *Sriramulu,* 19 Mad. 149.

[36] *Bank of Multan* v. *Hukum Chand,* 71 I.C. 890=1923 Lah. 58; also see *Bhim Singh* v. *Basheshar,* 8 Lah. 167=100 I.C. 907=1927 Lah. 433 and *Daulat Ram* v. *Bharat National Bank,* 5 Lah. 27 (30)=1924 Lah. 435=79 I.C. 740.

**Allahabad.**

The **Allahabad High Court** has taken the view that the wrong is not a matter *independent of contract*; and Art. 36 would be misapplied to cases arising out of articles of association, which contain the contract between the company and the directors.[37] A claim by the liquidators of a company against the directors under S. 235 of the Companies Act was, therefore, held to be governed not by Art. 36, but by Art. 120 and "the right to sue" within the meaning of the latter article would accrue only after the appointment of the liquidator, if not after he discovers the misapplication of the money.[38] Articles 115 or 116 were also not held applicable as they are meant to apply to particular and specific contracts that are broken.[39]

**Bombay.**

Similarly, the **Bombay High Court** has applied Art. 120 to an application under S. 235 (3) and held that right to sue accrues on the day on which the loss is first ascertained.[40] It has observed upon the desirability of some amendment of the Act so as to nullify the existing differences of opinion in various High Courts as to affect the procedural S. 235.[41]

**Madras.**

**Sindh.**

In *Narasimha Iyengar* v. *Official Assignee of Madras,*[42] the Madras High Court has noticed the conflict between the **Allahabad** decision in In the matter of *The Union Bank, Allahabad,*[43] and the Lahore decision in *Bhim Singh* v. *Basheshar Nath,*[44] which follows an earlier decision of the Punjab High Court and the Madras High Court preferred to follow the Punjab decisions. It was held that the liquidator does not acquire a new right from the winding-up order to enforce against the directors a claim which had already become time-barred whether under Art. 36 or Art. 120.[45] The **Sindh Judicial Commissioner's Court** has held in *Karachi Bank* v. *Shewa Ram,*[46] that misfeasance coming under proceedings under S. 235 is not independent of contract within the meaning of Art. 36, as the relation between the directors and the company is a contractual one; and hence limitation for a suit under the section is not governed by Art. 26. It relies on the

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[37] In re *Union Bank,* 47 All. 669=23 A.L.J. 473=88 I.C. 785=1925 All. 579.

[38] *Ibid.;* Not Folld. *Bank of Multan* v. *Hukum Chand,* 71 I.C. 899 =1923 Lah. 58.

[39] *Ibid.,* 47 All. 669=88 I.C. 785 (799).

[40] *Govind Narayan* v. *Rangnath Gopal,* 1930 Bom. 572=54 Bom. 226=127 I.C. 305=32 Bom. L. R. 232.

[41] *Ibid.*

[42] 1931 Mad. 58=1930 M.W.N. 966=32 L.W. 555=128 I.C. 477=54 Mad. 153=60 M.L.J. 280.

[43] 1925 All. 519=88 I.C. 785=47 All. 669.

[44] 1927 Lah. 433=100 I.C. 907=8 Lah. 167.

[45] 1931 Mad. 58 (61)=128 I.C. 477=54 Mad. 153.

[46] 1933 Sind 103=143 I.C. 713; Reld. on 1925 All. 519 and 1930 Bom. 572, *supra.*

Allahabad and Bombay view, as against the Lahore and Madras view.

**1193. ARTICLE EXPLAINED.**—As noticed in Ss. 1190 and 1181, *ante* this article applies only to *suits,* for *compensation,* based upon tortious acts, *independent of contract,* and it is applicable only *as a residuary article* to such class of cases, when no other more specific article is to be found in the Act. The exceptions are dealt with in Arts. 19 to 27, with a period of one year, and Arts. 37 to 42, 48 and 49, with a period of 3 years. Suits for the abatement of a nuisance or for an injunction, not being suits for compensation would not be governed by Art. 36. The expressions **malfeasance, misfeasance or non-feasance** have been explained in S. 1194. Collectively these three terms mean torts in general.[47]

**(*i*) Tort.**

"**Tort** is a term which is used to describe a wrong or a breach of duty committed by some person which is legally wrongful as regards some other person. An Act which constitutes such a breach of duty is called a tortious act and the person committing such act is called a tort-feasor."[48]

Pollock defines tort as follows:—

"Every tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related in one of the following way to harm (including interference with an absolute right, whether there be measurable actual damage or not), suffered by a determinate person.

(*a*) "It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of."

(*b*) "It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting."

(*c*) "It may be an act violating an absolute right (especially rights of possession or property), and treated as wrongful without regard to the actor's intention or knowledge."

(*d*) "It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented."

(*e*) "It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits to avoid or prevent."[49]

Torts may be (1) wrongs affecting property; (2) wrongs affecting a person in respect of his property; and (3) wrongs affecting a person in respect of his person or his personal rights.[50]

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[47] Also see S. 1190, above.

[48] Halsbury's Laws of England, Vol. 27, p. 463.

[49] Pollock on Torts, p. 18; Dr. Pal's Limitation Act, p. 541.

[50] Halsbury's Laws of England, Vol. 27, pp. 472 to 476.

**(ii) Malfeasance, misfeasance or non-feasance.**

**1194.** In *Mangun Jha* v. *Dolhin Golab Koer,*[1] the **Calcutta High Court** held that these terms "malfeasance, misfeasance or non-feasance" are generally, though not entirely, applied to some wrongful acts committed by persons standing in a fiduciary or *quasi*-fiduciary character, such as executors, trustees and directors of companies. A suit brought by the son of a deceased *shebait* of a debutter estate against the defendant *personally* for the recovery of money advanced by the deceased on account of debutter estate when he had been wrongfully kept out of office by the defendant was held to be governed by Art. 36.[2] However, it was pointed out by Farran, J., in the Bombay case of *Essoo Bhayaji* v. *"The Savitri"*,[3] that the words "malfeasance, misfeasance or non-feasance, independant of contract" used in Art. 36, are of the widest import, and embrace all possible acts or omissions commonly known as torts by English Lawyers; that is to say, wrongs independent of contract. For "torts", using the expression briefly for the three expressions employed in Art. 36, a two years' period is provided as the general rule subject to special exceptions contained in other articles of the schedule.[4] In *Hari Charn Fadika* v. *Hari Kar,*[5] Maclean, C.J., uses the Art. 36, taking the expressions in their widest meanings to cover a suit for damages to standing crops belonging to the plaintiff, wrongfully seized by the defendants under fraudulent and fictitious proceedings of distraint.

**(iii) Wrongs independent of contract.**

**1195.** "There are four classes of wrongs which stand outside the sphere of tort, *viz.,* (1) wrongs exclusively criminal; (2) civil wrongs which create no right of action for damages, but give rise to some other form of civil remedy exclusively; (3) civil wrongs which are exclusively breaches of contract; and (4) civil wrongs which are exclusively breaches of trust or of some other merely equitable obligation."[6]

The present article has no application to a suit based on such civil injury, unless the same wrong is both a breach of contract, and a tort. As Salmond observes,

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[1] (1898) 25 Cal. 692 (699) (F.B.) (Per Maclean, C.J.).

[2] *Peary Mohan* v. *Narendra,* 5 C.W.N. 273.

[3] 11 Bom. 133 (136); also see Rampini, J., in *Mangun Jha* v. *Dolhin Golab Koer;* following *Surat Lal* v. *Umar Hazi,* 22 Cal. 877; cf. *Hari Charn* v. *Hari Kar,* 32 Cal. 459; also see *Chithambaram Chetty* v. *U Kha Gyi,* 17 I.C. 906=6 L.B.R. 75.

[4] *Ibid.,* 11 Bom. 133.

[5] (1905) 32 Cal. 459=9 C.W.N. 376; also see *Venkataramanujam* v. *Basavayya,* (1913) 21 I.C. 213=25 M.L.J. 447 and *Narbada Prasad* v. *Akbar Khan,* (1924) 80 I.C. 769=20 N.L.R. 80=1924 Nag. 125.

[6] Salmond on Torts, pp. 2 to 7 cited in Dr. Pal's Limitation Act, p. 542.

"In the first place, there are many instances in which a person voluntarily finds himself by a contract to perform some duty which already lies upon him independently of any contract. The breach of such a contract is also a tort, inasmuch as liability would equally have existed in such a case had there been no contract at all."[7]

All the cases in which, by a wilful or negligent act of misfeasance, harm is done to the person or property of another in the course of performing a contract made with him which involves the use of care and skill, would come under this head.[8]

"The second mode of concurrence of tort and breach of contract is where the defendant takes upon himself by contract a duty which did not *precedently and independently* exist, yet the breach of which is at the same time a tort."[9]

In such cases the defendant enters into a contract to do something which he was not otherwise bound to do, and does, by this contract, put himself in such a position that he cannot now break that contract without at the same time causing damage to the person or property of another and thus committing a tort by violating a right which existed independently of contract.[10] Now, sometimes the plaintiff has the option in such cases of concurrence of suing either in contract or in tort. The action founded on tort has to be distinguished from an action based on breach of a contract. As Halsbury puts it:

"**An action of tort** is an action based on facts which constitute a tort, that is, which constitute and are regarded as a breach of duty on the part of the tort-feasor whether the relationship out of which the duty arises results from a contract or not; if, however, the relationship does not give rise to the duty which is broken, but it is necessary to refer to the contract in order to establish such duty, then the action is said to be founded on contract."[11]

"If the claim of the plaintiff is for a breach of some particular stipulation of a contract, as distinguished from a breach of duty arising out of a relationship established by contract, the **action is founded on contract.**"[12]

"The words *'independent of contract'* do not exclude the above cases of concurrence. All that the article requires is that the suit must not be founded on contract."[13]

**(*iv*) Not herein specially provided for.**

**1196.** Art. 36 is a general residuary article, applicable to this class of cases, *viz.*, suits for compensation based on wrongs, independent of contract, which are not specially provided for in some

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7. Salmond's Law of Torts, p. 3; Dr. Pal's Limitation Act, p. 542.
8. Dr. Pal's Limitation Act, p. 542.
9. *Ibid.*
10. Dr. Pal's Limitation Act, p. 542; Salmond on Torts, p. 3.
11. *Ibid.*, p. 543; Halsbury's Laws of England, Vol. 27, p. 466.
12. Dr. Pal's Limitation Act, p. 543.
13. *Ibid.*, p. 543; see and cf. *Jagannath* v. *Kalidas*, 1929 Pat. 245 =8 Pat. 776; also see *Govind Narayan* v. *Rangnath*, (1930) 54 Bom. 226; In the matter of *Union Bank, Allahabad*, 47 All. 669 and *Ramaswamy Chetty* v. *Palaniappa*, 1930 Mad. 364 (371); cf. *Bhim Singh* v. *Liquidator*, 1927 Lah. 483=8 Lah. 167 and *Bank of Multan* v. *Hukum Chand*, 1923 Lah. 58.

other specific article. Cases falling under Arts. 19 to 27 and 37 to 49 would be excluded from the application of Art. 36.[14] Torts to property immoveable and moveable including in the latter expression exclusive privileges such as copyrights and patent rights, etc., are dealt with by the 36th article.[15] When a suit for damages for malfeasance or misfeasance or for negligence is not covered by any special article, it must fall under Art. 36 or Art. 115, according as the liability is *ex delicto* or *ex contractu.*[16]

### 1197. ARTICLE APPLIED.—

**Actions on tort.**

(1) A suit by the plaintiff to recover **damages for the loss of his ship,** caused by collision with the defendant's steamer is an action on tort founded upon the negligence of the defendant or his servants in the management of his steamer, and is governed by Art. 36.[17]

(2) Where a chairman of a Municipal Council was sued on account of his **liability for embezzlements by the manager,** the relation of principal and agent not being established between the plaintiff Municipal Council, and the defendant, Arts. 89 and 90 were held inapplicable and Art. 36 was applied to the case.[18]

(3) A person who unlawfully interferes with the exercise of the property rights of another commits an act in the nature of **trespass to property** and is liable for damages in an action for trespass. It is not necessary for the plaintiff in such a case to prove any malice or the want of any reasonable or probable cause.[19]

(4) A suit for **slander of title or slander of goods** is governed by Art. 36: where a party maliciously obtains an order for the detention of goods of a person under S. 19-A, Sea Customs Act, the latter is entitled to bring a suit for damages and limitation for such a suit is 2 years as prescribed by this article.[20]

(5) Article 36 might apply to a **claim for perquisites** of an *archaka,* or temple servant if framed as a suit for compensation, against defendants other than trustees, in tort.[21]

(6) A suit against an officer of a company for misfeasance is governed by Art. 36[22]; and a right to sue for **misfeasance of directors of companies.**

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[14] *Kirpa Ram* v. *Kunwar Bahadur,* 54 All. 467=1932 All. 256=136 I.C. 809=1932 A.L.J. 241.

[15] *Essoo Bhayaji* v. *"The Savitri",* 11 Bom. 133.

[16] *Jagannath* v. *Kali Das,* 1929 Pat. 245=8 Pat. 776.

[17] *Essoo Bhayaji* v. *"The Savitri",* 11 Bom. 133.

[18] *Srinivasa Ayyangar* v. *Municipal Council of Karur,* (1899) 22 Mad. 342.

[19] *Bhut Nath* v. *Chandra Benode,* 16 I.C. 443=16 C.L.J. 34; Referred in *Norendra Nath* v. *Bhushan Chandra,* (1920) 31 C.L.J. 495=57 I.C. 375 (F.B.).

[20] *Albert Bounan* v. *Imperial Tobacco Company,* (1926) 94 I.C. 444=1926 Cal. 757=30 C.W.N. 465; s.c. on appeal 106 I.C. 277=1928 Cal. 1=46 C.L.J. 455; *see* Pearson, J., in 30 C.W.N. 469=1926 Cal. 767.

[21] *Bhardwaja Mudaliar* v. *Arunachalla Gurukkal,* (1918) 45 I.C. 414=41 Mad. 528=7 L.W. 524=23 M.L.T. 288.

[22] *Bank of Multan* v. *Hukumchand,* (1923) 71 I.C. 899=1923 Lah. 58.

arises from the date of misfeasance, being governed by Art. 36 or by Art. 120.[23]

(7) An application for compensation under S. 235, Companies Act, against directors for malfeasance or misfeasance is governed by Art. 36.[24]

(8) A case of damage to houses by bursting of municipal fittings by its negligence is governed by Art. 36 and not by Art. 2.[25]

(9) Similarly, where a canal was cut by authorities to avert danger to an adjacent railway and plaintiff's property suffered damage thereby, Art. 2 was held inapplicable.[26]

(10) Where each act of depositing silt on plaintiff's grounds afforded the plaintiffs a separate cause of action, their relief in respect of silt deposited more than two years before suit was held statute barred under Art. 36.[27]

(11) A suit for compensation for wrongful attachment of moveables is governed by Art. 36, and not any of the Arts. 42, 46, 62 or 120, Sch. I, Limitation Act.[28]

(12) A suit by a Malabar mortgagor for damage caused to property subsequent to redemption decree, is governed by Art. 36.[29]

(13) A suit for damages for deterioration of perishables by detention is governed by Art. 36 and not by Art. 49.[30]

(14) To a suit for compensation for the cutting and carrying off of standing crops by means of a fictitious distress, by a fictitious landlord against a fictitious tenant, it was held (per Rampini, C.J., and Geidt, J.) that Art. 36 is applicable. But Doss, J., held per *contra*, that partly Art. 39 and partly Art. 49 were applicable which gave a period of three years.[31] This case was distinguished in *Jadunath* v. *Harikar*,[32] and in *Maharaj Bahadur* v. *Achala Bala*.[33] In *Mangun Jha* v. *Dolhin Golab Koer*,[34] the majority of the Full

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[23] *Narasimha* v. *Official Assignee*, 54 Mad. 153=128 I.C. 477=1931 Mad. 58=60 M.L.J. 280.

[24] *Bhim Sen* v. *Basheshar*, 1927 Lah. 433=8 Lah. 167=100 I.C. 907; also see *Hukumchand* v. *The Bank of Multan*, 69 I.C. 255=1924 Lah. 285.

[25] *Maya Ram* v. *Municipal Committee, Lahore*, 1929 Lah. 730=121 I.C. 500; cf. *Baiza Khan* v. *Municipal Committee, Amritsar*, 12 L.L.J. 31=122 I.C. 111 (Art. 2 applied).

[26] *Punjab Cotton Press Co., Ltd.* v. *Secretary of State*, 103 I.C. 1 =10 Lah. 161=1927 P.C. 72 (P.C.).

[27] *Karachi Bank, Ltd.* v. *Shewa Ram*, (1933) 143 I.C. 713=1933 Sind 103.

[28] *Pandiri Veeramma* v. *Mandavili Subba Rao*, 35 I.C. 98=31 M.L.J. 257.

[29] *Puthiyapandikasalayil* v. *Kallumpurath*, (1917) 43 I.C. 6=33 M.L.J. 463=6 L.W. 696=1917 M.W.N. 822.

[30] *Ananda Chandra* v. *Barodakanta*, 90 I.C. 509=1926 Cal. 177=42 C.L.J. 203.

[31] *Jadunath* v. *Harikar*, (1909) 1 I.C. 788=36 Cal. 141=9 C.L.J. 109 =12 C.W.N. 1092; Followed *Mohesh Chandra* v. *Harikar*, 32 Cal. 459=9 C.W.N. 376; s.c. on appeal 17 C.W.N. 308.

[32] 17 C.L.J. 206.

[33] 1928 Cal. 106=105 I.C. 763.

[34] (1898) 25 Cal. 692 (F.B.).

Bench held that in a suit for damages for cutting and carrying away crops, Art. 36 cannot apply. The case was held governed by Art. 49, as the crops though immoveable in the first place, become specific moveable property when severed, though by a wrongful act.

(15) A suit to recover damages resulting from a conspiracy falls within Art. 36 or Art. 130, and not within Art. 23.[35]

(16) A suit for compensation for damages caused to plaintiff's building by reason of the defendant closing up certain drains is under Art. 36, as it is an act of malfeasance. The offence is a continuing one and the date of damage is the date of the malfeasance.[36]

(17) Where plants growing on mortgaged property were cut and removed by third parties, and the mortgagee sued to enforce his mortgage security, it was held that the only cause of action which the plaintiff had was for damages for the depreciation of the security, and the proper article applicable to the case would be either Art. 36 or 49.[37]

(18) A suit for compensation for exclusion of the plaintiffs from their civil rights, if occasion arises for their exercise, in the administration of the caste funds, and the benefits, of being able to scrutinize the caste accounts is mainly intended to vindicate rights of plaintiffs as members of caste and is governed by Art. 36 and not Art. 24.[38]

## 1198. ARTICLE NOT APPLIED.—

(1) A suit for relief on the ground of fraud is governed by Art. 95 and not by Art. 36.[39]

(2) Article 36, as noticed above, applies only to suits for compensation for tortious acts independent of contract,[40] and it cannot apply to a suit to set aside sale in execution of a decree, where the land described by boundaries in the proclamation of sale, really comprised two separate lots, and the auction-purchaser prayed that he might be put into the possession of the land as described in the certificate of sale, or the amount of his purchase-money be ordered to be paid with interest.[41]

**Art. 115 applied.**

(3) A suit for compensation against a person for untruly representing himself as agent for another, is breach of an "implied contract", and as such is governed by Art. 115 and not by Art. 36 or Art. 120.[42]

(4) Where a pledgee sells pledged property without pledgor's authority, the pledgee is guilty of unauthorised conversion, and the pledgor is entitled to recover damages, but the suit to recover such damage is either governed by Art. 145 or Art. 115 and Art. 36 has no application.[43]

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[35] *Peary Mohandas* v. *Weston,* 13 I.C. 721=16 C.W.N. 145.

[36] *Chiranjilal* v. *Shiblal,* 92 I.C. 994=1926 Lah. 242 (Art. 36 read with S. 23, applied).

[37] *Surapudi Muniappa* v. *Nookala Seshayya,* (1916) 32 I.C. 901=3 L.W. 341.

[38] *Devchand Totaram Kirange* v. *Ghanashyam Sakharam,* 1935 Bom. 361=37 Bom.L.R. 417.

[39] *Dehra Dun Mussoorie Electric Tramway Co.* v. *Hansraj,* 1935 All. 995.

[40] *Mahomed Sayed Phaki* v. *Navroji Balabhai,* (1885) 10 Bom. 214.

[41] *Ibid.*

[42] *Vairavan Chettiar* v. *Avicha Chettiar,* (1913) 21 I.C. 65=38 Mad. 275=25 M.L.J. 256.

[43] *Ramaswamy Chetty* v. *Palaniappa Chettiar,* 1930 Mad. 364=122 I.C. 37=30 M.L.W. 898.

(5) Where the owner of a sub-soil causes injury to the surface, the wrong cannot be said to be independent of a contract so as to be governed by Art. 36; for there is an implied covenant running with the land that the surface owner will have an inherent right of support from the owner of the sub-soil.[44]

(6) Where a bailment arises out of contract, a suit against the bailee for compensation for damages caused to the goods is governed by Art. 115 and not by Art. 36.[45]

(7) A suit for compensation for breach of a term in a compromise is governed by Art. 115 and not by Art. 36 or Art. 120; and the fact that such compromise is merged in a decree nonetheless makes it a contract within the meaning of Art. 115.[46]

**Art. 29 applied.**

(8) Article 36 is to be differentiated from Art. 29. Article 36 is the general article governing suits for compensation for torts to which no special article applies. Art. 29 provides for suits for compensation for wrongful *seizure* of *moveable property* under *legal process,* and a suit falling under this description cannot be governed by Art. 36.[47] Thus, a suit for compensation, for the wrongful seizure of a ship under order of a Court falls under the specific Art. 29, and cannot be governed by Art. 36.[48]

(9) The limitation applicable to a suit for damages on account of the alleged unlawful attachment before judgment of a shop belonging to the plaintiff was held to be that prescribed by Art. 29 commencing to run from the date of the attachment.[49] Article 29 applies to all cases of attachment before judgment where specific property is seized and the seizure is wrongful.[50] A suit for damages on account of the sale of goods attached before judgment, at a low price, and injury to trade and reputation consequent on the attachment itself would be governed by Art. 29.[1]

**Art. 49 applied.**

**Art. 120 applied.**

(10) Where the moveable property is wrongly taken or detained by the defendant and not by the Court in execution of a legal process, Art. 49 would apply.[2] Where the attachment was made not by actual seizure, but by the issue of a prohibitory order, Art. 36 was applied.[3] But where there is neither wrongful seizure of moveable property, nor any non-feasance, misfeasance or malfeasance, in respect of it, and the suit is to recover money wrongly

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[44] *Jagannath* v. *Kalidas,* 1929 Pat. 245=8 Pat. 776=120 I.C. 626.

[45] *Halloway* v. *Holland,* (1933) 145 I.C. 1001=1933 Oudh 518=9 Luck. 189=10 O.W.N. 1105.

[46] *Gopal Saran Narain Singh* v. *Chhakauri Lall,* 1934 Pat. 7.

[47] *Ram Narain* v. *Umrao Singh,* (1907) 29 All. 615.

[48] *Madras S. N. Co.* v. *Shalimar Works,* 42 Cal. 85 (108).

[49] *Ram Narain* v. *Umrao Singh,* (1907) 29 All. 615; Reld. on *Murugesa* v. *Jatta Ram,* (1900) 23 Mad. 621 and *Multan Chand Kanyalal* v. *Bank of Madras,* (1903) 27 Mad. 346.

[50] *Pannaji Devi Chand* v. *Sanaji Kapur Chand,* (1930) 53 Mad. 621=126 I.C. 721=1930 Mad. 635=59 M.L.J. 859.

[1] *Sokkalinga Chetty* v. *Krishnaswami,* (1920) 55 I.C. 786=38 M.L. J. 324.

[2] *Ram Narain* v. *Umrao Singh,* (1907) 29 All. 615; also see *Passanha* v. *Madras D. & B. Society,* 11 Mad. 333.

[3] *Surajmal* v. *Manak Chand,* 6 Bom. L. R. 704.

distributed on sale of attached property subject to lien, Art. 120 of the Limitation Act would govern the suit.[4]

(11) A suit for compensation by some of the joint tenants against other co-owners in exclusive occupation of the joint lands, does not fall within the purview of Art. 36 nor of Art. 115, and the only article applicable to the case is Art. 120.[5]

**Art. 39 applied.**

(12) Where plaintiff sued for compensation for loss of crops caused by the defendant's taking possession of his well, it was held that the plaintiff's suit for compensation for *trespass on land,* was within time under Art. 39, if instituted within three years from the date on which the defendant's possession ceased.[6]

(13) A suit for compensation for illegal attachment of standing crops is governed by Art. 39, which specially provides for suits for compensation for such trespass, and not by Art. 36, which provides for suits for compensation for torts not provided for elsewhere.[7]

(14) A suit for damages sustained by the plaintiff on account of the defendant cutting plaintiff's valuable trees and removing the same is primarily a suit for compensation for "trespass upon immoveable property" and is governed by the three years' rule laid down in Arts. 39 and 49 of the Limitation Act.[8]

(15) A suit for damages for injury caused to crops by the closing of the main sluice of a tank is governed by Art. 39 and not Art. 36.[9]

(16) A suit for damages for unlawfully setting fire to and destroying pepper vines on one's land is governed by Art. 39. Trespass includes the mischief which the trespasser commits after entering on the land. Art. 36 can apply only to cases of malfeasance, misfeasance or non-feasance not provided for by other articles.[10]

**Art. 48 or 49 applied.**

(17) *In a suit by landlord against a tenant for compensation for removal of trees* after they have been cut down, the period of limitation is three years under Art. 48 or 49 and Art. 36 does not apply.[11]

(18) A suit by a mortgagee to recover compensation from a third person for injury to specific moveable property mortgaged to the former is governed by Art. 49.[12]

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4. *Ram Narain* v. *Brij Bankey Lal,* (1917) 39 All. 322=39 I.C. 532.

5. *Aghore Nath* v. *Ram Churn,* (1896) 23 Cal. 805.

6. *Narasimhacharya* v. *Raghupathyacharya,* (1882) 6 Mad. 176.

7. *Surajmal Ganesh Das* v. *Prahlad,* (1922) 65 I.C. 665; Reld. on *Hari Charn* v. *Hari Kar,* 32 Cal. 459=9 C.W.N. 376; *Venkataramanujam* v. *Basavayya,* (1913) 21 I.C. 213=25 M.L.J. 447.

8. *Narbada Prasad* v. *Akbar Khan,* (1924) 80 I.C. 769=20 N.L.R. 80=1924 Nag. 125.

9. *Sona Patil* v. *Laxman,* (1924) 82 I.C. 482=1925 Nag. 189.

10. *Kayakool Natuvlapurayil* v. *Pottarkular Koman,* 17 I.C. 605=23 M.L.J. 618=1912 M.W.N. 1229.

11. *Mohamed Hamidar Rahman* v. *Ali Fakir,* (1909) 10 C.L.J. 25; also see *Jadunath* v. *Hari Kar,* (1913) 17 C.W.N. 308=17 C.L.J. 206=18 I.C. 253 and *Maharaj Bahadur Singh* v. *Achala Bala,* 1928 Cal. 106 =105 I.C. 763.

12. *Chidambaram Chetty* v. *U Kha Gyi,* 17 I.C. 906=6 L.B.R. 75.

(19) A suit for compensation for the Court having unlawfully detained the plaintiff's specific moveable property, to wit, a deposit of a certain sum of money, owing to the wrongful act of the defendant is governed by Art. 49 and not by Art. 36.[13]

**Art. 120 applied.**

(20) A suit by some co-sharers in a ferry is governed by Art. 120, and neither Art. 36 nor Art. 115 applied.[14]

(21) Plaintiff's predecessor obtained a lease of certain premises from the Collector for the purpose of carrying on a grog-shop and died shortly after. By way of security for the rent of these premises he had deposited an amount in the Collectorate. Defendant got a transfer of the lease and the amount of security deposit was applied in satisfaction and discharge of the defendant's liability under the lease. In a suit by plaintiff to recover the sum of money which had been applied by the defendant for his own use, benefit and enjoyment, it was held that Art. 36 was not applicable, and Art. 62, or Art. 120, applied.[15]

(22) A suit by a hereditary servant in a temple against the trustees for recovery of emoluments wrongfully withheld is governed by Art. 120, and not by Art. 36.[16]

(23) To a suit for money received and misappropriated by a servant, Art. 89, and not Art. 36, is applicable.[17]

**1199. STARTING POINT OF LIMITATION.**—The date from which the period of limitation, under this article, commences to run is "when the malfeasance, misfeasance or nonfeasance takes place," and the knowledge of the plaintiff has nothing to do with the question.[18] In torts time commences to run from date of the misfeasance, not from the time when the damage is occasioned.[19] Therefore, limitation begins to run from the time and as soon as the injurious act is effected and perpetrated, although the actual injury and damage and subsequent and could not immediately operate or become known.[20] Where the defendant had been depositing silt on the plaintiff's land for the past fifteen years, and each act of depositing silt affords a separate cause of action, the plaintiff can claim compensation for damage sustained by him in consequence of silt deposited during two years prior to suit.[21]

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[13] *Tula Ram* v. *Mohri Lal,* 7 I.C. 7; also see *Ram Narain* v. *Brij Bankey,* 39 All. 322=15 A.L.J. 295.

[14] *Kishun Dayal Singh* v. *Kishan Deo Jha,* 35 I.C. 430=1 Pat. L. J. 69.

[15] *Raja Kumar* v. *Fateh Bahadur,* (1917) 38 I.C. 525 (Pat.).

[16] *Subbier* v. *Ranga Aiyangar,* 9 M.L.J. 163.

[17] *Sheosarn Lal* v. *Harihar Prasad,* 28 I.C. 452 (Cal.).

[18] *Shivachidambara* v. *Kamakshi Ammal,* (1909) 3 I.C. 433=33 Mad. 71 (74)=19 M.L.J. 498=6 M.L.T. 239.

[19] Banning, Limitation Act, 2nd Edn., p. 31; Rustomji's Limitation Act, p. 379.

[20] *Ibid.*

[21] *Morumal* v. *Gobindram,* 27 S.L.R. 41=144 I.C. 452=1933 Sind 176.

**Continuing wrongs.**

1200. In cases of continuing wrongs coming under this article, S. 23 will affect the starting point, and time will begin to run when the wrong ceases.[22] In cases of continuing wrongs the date of the damage is the date of the malfeasance within the meaning of Art. 36: and a suit to recover compensation for damage caused by defendant's action lies within two years from the date of the damage.[23]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 37. | For compensation for obstructing a way or a water-course. | Three years. | The date of the obstruction. |
| 38. | For compensation for diverting a water-course. | Three years. | The date of the diversion. |

### SYNOPSIS.

1201. Corresponding provisions.
1202. Suits for compensation.
1203. Continuing wrongs.
1204. Starting point of limitation.
1205. Scope and application.

### NOTES.

1201. **CORRESPONDING PROVISIONS.**—These articles are a re-enactment of Arts. 37 and 38 of Act XV of 1877.

In Act IX of 1871, the corresponding provisions were contained in Arts. 31 and 32 of that Act. The period of limitation prescribed was two years, and suits were described as "for obstructing a way or water-course" and "for diverting a water-course" respectively.

1202. **SUITS FOR COMPENSATION.**—Since 1877, the provisions in Arts. 37 and 38 are limited to suits for compensation only. Accordingly, suits for injunction for removal of obstructions or for declaration are not governed by Arts. 37 and 38.[24]

In *Nerode Kanta* v. *Bharat Chandra,*[25] where the suit was brought to establish a right of way and for an injunction not to obstruct the right against a joint owner of the property on land commonly set apart for the purpose, it was held that the article which applied was Art. 144; and Art. 37 did not apply, because the suit was not for compensation. In the case of co-owners, if the plaintiff's rights of way over common property are invaded, a suit to establish his right over the land and to obtain the removal of certain alleged obstructions to that way, would be governed by Art. 144, as there is no special provision in the schedule to the Limitation Act for such suits.[26]

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[22] *Suraj Mal* v. *Maneksha,* 6 Bom. L. R. 704; also see *Manga* v. *Changa,* 22 A.L.J. 977=1925 All. 131 and *Rajrup Koer* v. *Abul Hossein,* (1880) 6 Cal. 394 (P.C.).

[23] *Chiranji Lal* v. *Shib Lal,* 92 I.C. 994=1926 Lah. 242.

[24] *Nerode Kanta* v. *Bharat Chandra,* (1909) 2 I.C. 410; also see *Dwarka Nath* v. *Tara Prasanno,* (1923) 76 I.C. 328=1923 Cal. 356.

[25] (1900) 2 I.C. 410 (Cal.).

**1203. CONTINUING WRONGS.**—In *Rajrup Koer* v. *Abul Hossein,*[27] their Lordships of the Privy Council observed that

> "the obstructions which interfered with the flow of water to the plaintiff's *mahal* were in the nature of continuing nuisances, as to which the cause of action was renewed, *de die in diem,* so long as the obstructions causing such interference were allowed to continue. Indeed S. 24 of the statute contains express provision to that effect."

This ruling has been followed in the case of *Nerode Kanta* v. *Bharat Chandra,*[28] as authority for the proposition that if S. 37 does apply, the obstruction being in the nature of a continuing nuisance, the provisions of S. 23 become applicable, and give a fresh starting point for limitation *de die in diem.* The principle was also followed in *Dwarka Nath* v. *Tara Prasanno.*[29] The principle of a continuing breach of contract, or nuisance was first embodied in a Limitation Act by Act IX of 1871. The illustration of a continuing nuisance was the diversion by *A* of *B's* water-course. By S. 23, a fresh period of limitation began to run at every moment of the time during which the diversion continued.[30] This section would apply both to suits for damages for obstructing a way or a water-course, and to suits for removal of continuing obstructions as there is no distinction between the two suits under present Act.[31]

**1204. STARTING POINT OF LIMITATION.**—In view of the application of S. 23 to suits for compensation of continuing obstructions or diversions of water-course, a suit brought within three years of last day to which the wrong continued would be within time.[32] Limitation may be pleaded to save much of the damage as took place before the three years, from the time of action brought, which are allowed by Arts. 37 and 38.[33]

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[26] *Dwarka Nath* v. *Tara Prasanno,* (1923) 76 I.C. 328=1923 Cal. 356.

[27] (1880) 6 Cal. 394=7 C.L.R. 529=7 I.A. 240 (P.C.) (Case under S. 24 old, now S. 23, Limitation Act).

[28] (1900) 2 I.C. 410 (Cal.).

[29] (1922) 76 I.C. 328=1923 Cal. 356.

[30] *Dhanjibhoy* v. *Hirabhoy,* (1901) 25 Bom. 644 (655).

[31] *Ponnusami* v. *Collector of Madura,* (1869) 5 M.H.C.R. 6 (24) and *Sri Viswambara* v. *Sri Sri Saradhi,* (1866) 3 M.H.C.R. 111 (113).

[32] *Sona Patil* v. *Laxman,* 82 I.C. 482=1925 Nag. 189.

[33] *Dwarkanath* v. *The Corporation of Calcutta,* (1890) 18 Cal. 91 (98).

**1205. SCOPE AND APPLICATION.**—Art. 37 does not deal with obstructions and disturbances of other easements, *e.g.*, of the right to light or air. Art. 36 will apply to suits for compensation in such cases.[34]

An obstruction to the migration of fish to and fro in plaintiff's *julkur* is not an obstruction to water-course.[35]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 39. | For compensation for trespass upon immoveable property. | Three years. | The date of the trespass. |

### SYNOPSIS.

1206. Corresponding provisions.
1207-1209. **Article explained.**
1207. Trespass of immoveable property.
1208. English law.
1209. Immoveable property.
1210. Continuing injury or wrong.
1211. **Starting point of limitation.**
1212. **Scope and application.**
1213. Article applied—Illustrative cases.
1214. Article not applied—Illustrative cases.

### NOTES.

**1206. CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, the corresponding provision was made in S. 1, cl. 16.

Art. 43 of Act IX of 1871 containing the corresponding provision was worded thus:—"*For trespass upon immoveable property*": and it was not confined to suits for damages on account of trespass, but might cover suits for recovery of immoveable property from a trespasser.[36]

This article is a re-enactment of Art. 39 of Act XV of 1877.

**1207. ARTICLE EXPLAINED.**—

**Trespass of immoveable property.**

The meaning of trespass as defined by Halsbury is

"a wrongful act of commission, done in disturbance of the possession of property of another, or against the person of another against his will".[37]

According to Salmond, "trespass of immoveable property" will mean any direct and forcible injury to such property, and not only the unlawful entry on another's immoveable property.[38] The

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[34] Mitra's Limitation Act, Vol. II, p. 1144.

[35] *Ibid.*, citing *Maharanee Surnomoyee* v. *Degumbary,* 2 Shome 93.

[36] *Jahorman* v. *The Municipality of Ahmednagar,* (1878) 6 Bom. 580.

[37] Halsbury's Laws of England, Vol. 27, p. 844.

[38] Dr. Pal's Limitation Act, p. 552.

**Madras High Court** has, likewise, held that trespass includes the mischief which the trespasser commits after entering on the land.[39]

**English Law.**

**1208.** In English Law, the wrong of trespass to land—trespass *quare clausum fregit*—consists in an act of entering upon land in the possession of another, or remaining upon such land, or placing any material object upon it in each case without lawful justification.[40] There are five kinds of lawful entry:

"One can enter on land either (*i*) under a lawful title to possess it, or (*ii*) in some public right (as in the case of a highway), or (*iii*) in the exercise of a right of easement which is consistent with the rightful possession, or (*iv*) under the authority or license, express or implied, of the person entitled to possess, or (*v*) by authority of law. There is no other kind of lawful entry and whoever enters otherwise is a trespasser."[41]

**Halsbury** gives Illustrations of Trespass from English law:—

"A person unlawfully enters on land if he wrongfully sets foot on or rides or drives over it[42]; or takes possession of it or expels the person in possession[43]; or pulls down or destroys anything permanently fixed to it, or places or fixes anything on or in it[44] or erects or suffers to continue on his own land anything which permanently overhangs the land of another[45]; or discharges or causes water to flow upon such land or suffers filth or any injurious substance which has been collected on his own land to pass to another's land."[46] "It is trespass for a landlord to distrain wrongfully or for a sheriff to levy wrongful execution or for a landlord or sheriff who has rightly entered on land for the purpose of distress or execution, to remain there when the distress or execution has become wrongful."[47] "If a tenant remains in possession against the will of the rightful owner even after the determination of the tenancy by efflux of time or otherwise he becomes a trespasser from the date of the determination of the tenancy. If land is subject to a right in another, that other person will be a trespasser if he unlawfully uses such land for any purpose other than that of exercising the right to which it is subject."[48]

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[39] *Moideen Kutti* v. *Koman Nair,* (1912) 23 M.L.J. 618=17 I.C. 605.

[40] Salmond on Torts, p. 222.

[41] Pollock on Possession, p. 45; Mitra's Limitation Act, Vol. 2, pp. 1144-1145.

[42] *Blundell* v. *Catterall,* (1821) 5 B. & Ald. 268; *Kenyon* v. *Hart,* (1865) 6 B. & S. 249.

[43] *Murray* v. *Hall,* (1849) 7 C.B. 441.

[44] *Mace* v. *Philcox,* (1864) 15 C.B. 600; *Whithwam* v. *Westminster B. C. & C. Co.,* (1896) 2 Ch. 538; *Kynoch, Ltd.* v. *Rowlands,* (1912) 1 Ch. 527; *Leader* v. *Moody,* (1875) L.R. 20 Eq. 145; *Schweder* v. *Worthing G. L. & C. Co.,* (1912) 1 Ch. 83; also 1 Ch. 118.

[45] *Pickering* v. *Rudd,* (1815) 4 Camp. 219; *Corbett* v. *Hill,* (1870) L.R. 9 Eq. 671; *Smith* v. *Giddy,* (1904) 2 K.B. 448; *Lemmon* v. *Webb,* 1895 A.C. 1.

[46] *Tenant* v. *Goldwin,* (1704) 2 Ld. Raym. 1089; *Foster* v. *Warblington,* (1906) 1 K.B. 648; *Jones* v. *Llanrwst,* (1911) 1 Ch. 393.

[47] Halsbury's Laws of England, Vol. 27, p. 850.

[48] *Harrison* v. *Rukland,* (1893) 1 Q.B. 142; *Hickman* v. *Maisey,* (1900) 1 Q.B. 752; *Fitzhardinge* v. *Purcell,* (1908) 2 Ch. 139; Dr. Pal's Limitation Act, p. 553.

**"Immoveable property."**

**Standing crops.**

1209. For the purposes of the Limitation Act, the word "immoveable property" will have the same meaning as is given to the expression by its definition in the General Clauses Act. Standing crops are thus to be treated as immoveable property, and the definition of moveable property, in the Civil Procedure Code, which includes standing crops, will not govern the Limitation Act.[49] When crops are cut and carried away they become moveable property. *See* Notes under S. 36, *ante.*[50]

1210. **CONTINUING INJURY OR WRONG.**—A trespass may be a continuing injury, lasting as long as the personal presence of the wrong-doer, or the other act of trespass (such as, placing things upon another's land) continues. The continuance of a trespass is a fresh trespass and is actionable in the same way as the original act of trespass and although damages have been recovered for the original act.[1] A continuation of every trespass being in law a new trespass, this will give rise to actions *de die in diem* so long as it lasts.[2] But, where the trespass itself is not a continuing wrong, the mere fact that it produces continuing consequences will not give rise to fresh causes of action *de die in diem.*[3]

1211. **STARTING POINT OF LIMITATION.**—S. 23 of the Limitation Act will control the third column in Art. 39, as a trespass upon immoveable property is a continuing wrong or injury, giving rise to a fresh cause of action *de die in diem* so long as the trespass continues.[4] The starting point of limitation in a suit for compensation under this article, therefore, will be the last act of trespass, and damages accrued within three years of the date of suit could be recovered.[5] Ordinarily, a trespass being an infringement of the right of property, there is an immediate cause of action from the date of trespass itself.[6] In the case of a fraudulent trespass, the statute will not run until the fraud is discovered.[7]

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[49] *Pandah Gazi* v. *Jennuddi,* (1878) 4 Cal. 665.

[50] *Jadunath* v. *Harikar,* (1909) 1 I.C. 788=36 Cal. 141; *Mohesh Chandra* v. *Hari Kar,* 32 Cal. 459; *Maharaj Bahadur* v. *Achala,* 1928 Cal. 106=105 I.C. 763; also see *Mangun Jha* v. *Dolhin Golab Koer,* 25 Cal. 692 (F.B.).

[1] Halsbury's Laws of England, Vol. 27, p. 847; *Holmes* v. *Wilson,* (1839) 10 Ad. & El. 503; *Bowyer* v. *Cook,* (1847) 4 C.B. 236; also see Pollock on Torts, p. 404 (13th Edn.).

[2] *Winterborn* v. *Morgan,* (1809) 11 East 405; also see and cf. S. 1203, *ante.*

[3] Dr. Pal's Limitation Act, p. 553.

[4] *See* S. 1210, above.

[5] *Narasimmacharya* v. *Ragupathyacharya,* 6 Mad. 176 (178); also see *Ramphul* v. *Misree,* (1874) 24 W.R. 97.

[6] *Clegg* v. *Dearden,* (1848) 12 Q.B. 576.

[7] *Bulli Coal Mining Co.* v. *Osborne,* 1899 A.C. 351; Mitra's Limitation Act, Vol. 2, p. 1145.

**1212. SCOPE AND APPLICATION.**—This article applies only to *suits for compensation* for trespass upon immoveable property. It does not apply to cases of trespass to goods, which may fall under Arts. 28, 29 or 36, *ante,* or Arts. 48 or 49, *post.* Suits to recover immoveable property from a trespasser, are governed by Art. 142, Limitation Act.[8]

**(*i*) Trespass to goods.**

A forcible entry by the owner or person having lawful authority to enter is not actionable.[9] However, a trespass may be committed not only by a person himself, but his cattle when let loose on another's property without any legal justification.[10]

**(*ii*) Trespass against legal possession.**

"*Trespass* and other violations of *possessory* rights can be committed not only against the person who is lawfully in possession, but against any person who has legal possession, whether rightful in its origin or not, so long as the trespasser or other intruder cannot justify his act under a better title."[11] "A person who is in *possession* of land, although wrongfully, has a title to the land which is good against all except those who can show a *better title,* that is, except those who can prove that they or their predecessors had earlier possession of which they were wrongfully deprived."[12]

**(*iii*) Trespass and nuisance.**

*Trespass* is to be distinguished from a *"nuisance"*. An act committed *beyond* the bounds of property affected by it may be a nuisance, but is not a trespass.[13]

"An action of trespass is brought when a person's property has been invaded. An action of nuisance is brought when there is no invasion of another person's property, but when the wrong consists in so using your own land as to injure your neighbour."[14]

**(*iv*) Trespass and detinue.**

Trespass is also to be distinguished from detinue. "In trespass, the gist of action is the wrongful entry. In detinue, the gist is the wrongful *detention,* and not the original taking or obtaining of the goods."[15]

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[8] *Joharmal* v. *Municipality of Ahmednagar,* 6 Bom. 580 (582).

[9] See Mitra's Limitation Act, Vol. II, p. 1145, citing *Newton* v. *Harland,* (1840) 1 Man. & G. 644; *Harvey* v. *Bydges,* (1845) 14 M. & W. 437 and *Sree Hurry Roy* v. *Hills,* (1866) 6 W.R. Civ. Ref. 21 (23); also *Lows* v. *Telford,* (1876) 1 A.C. 414 (426).

[10] Stephen's Commentaries, 18th Edn., Vol. III, p. 375.

[11] Pollock on Torts, 13th Edn., p. 384.

[12] Williamson Real Property, 23rd Edn., p. 637.

[13] Mitra's Limitation Act, Vol. II, p. 1145.

[14] *Ibid.,* citing *Kine* v. *Jolly,* (1905) 1 Ch. 480 (487).

[15] *Ibid.,* p. 1145; also see *Nundo* v. *Banamali,* (1902) 29 Cal. 871 (883) (Plaintiff's cause of action in ejectment suits is the wrongful detention of the land which is his, not the taking of it).

### 1213. ARTICLE APPLIED—ILLUSTRATIVE CASES.—

(1) A suit for damages for unlawfully setting fire to and destroying pepper vines on one's land was held governed by Art. 39.[16]

(2) Fishing in the owner's tank without his permission was held to be trespass where the plaintiff himself was not prevented from fishing there.[17] But the continuous acts of defendant in taking fish from the plaintiff's *julkur,* under a claim of right, must be considered as a dispossession by the defendant of the plaintiff's rights *pro tanto.*[18]

(3) Entry of the defendant's cattle on plaintiff's land and the causing of damage thereby was regarded as trespass.[19]

(4) In *Mangun Jha* v. *Dolhan Golab Koer,*[20] and *Surat Lal Mondal* v. *Umar Haji,*[21] suits for cutting crops on the owner's land were held governed by Art. 39.

(5) But, in *Jadunath* v. *Hari Kar,*[22] it was held per Rampini, A.C.J., that a suit for compensation for illegal distress, and cutting and carrying off standing crops is governed by Art. 36. Doss, J., held per *contra* "that wrongfully cutting and carting away crops amounts to trespass upon immoveable property," and to "wrongfully taking specific moveable property" within the meaning of Arts. 39 and 49, Sch. I, Limitation Act, and a suit for compensation for such acts is governed partly by Art. 39 and partly by Art. 49 of the Act.[23] On Letters Patent Appeal the view of Doss, J., was upheld.[24]

(6) In *Venkataramanujam* v. *Basavayya,*[25] a Bench of three Judges held that Art. 39 would apply to a suit for unlawful attachment of the lands with the standing crops, and for loss of the crops.

(7) A right in the trees standing on a land as well as a right to the future crops of trees is a right in immoveable property, and any infringement of such a right is an infringement of a right to or a wrong done to immoveable property.[26] A suit for damage sustained by the plaintiff on account of the defendant cutting plaintiff's valuable lac producing trees and removing the same is primarily a suit for compensation for "trespass upon immoveable property", and is governed by the three years' rule in Arts. 39 and 49, Sch. I, Limitation Act.[27]

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[16] *Moideen Kutti* v. *Koman Nair,* (1912) 23 M.L.J. 618=17 I.C. 605.

[17] *Lukhimoni* v. *Karuna,* (1878) 3 C.L.R 509.

[18] *Parbutty* v. *Mudho,* (1878) 3 Cal. 276.

[19] *Boyle* v. *Tamlyn,* 6 B. & C. 329=30 R.R. 343; cited in *Moideen Kutti* v. *Koman Nair,* (1912) 23 M.L.J. 618=17 I.C. 605.

[20] 25 Cal. 692=2 C.W.N. 265.

[21] 22 Cal. 877.

[22] 36 Cal. 141=9 C.L.J. 109=1 I.C. 788=12 C.W.N. 1090 (L.P.).

[23] Per Doss, J., in 36 Cal. 141; Relied on 25 Cal. 692 (F.B.).

[24] (1913) 18 I.C. 253=17 C.W.N. 308.

[25] (1913) 25 M.L.J. 447=21 I.C. 213=14 M.L.T. 225=1913 M.W.N. 869.

[26] *Narbada Prasad* v. *Akbar Khan,* (1924) 80 I.C. 769 (771)=20 N.L.R. 80=1924 Nag. 125; Relied on *Ruttonji Edulji* v. *The Collector,* 11 M.I.A. 295 (313)=10 W.R.P.C. 13 (Trees are part of the land) and *Raja Bije* v. *Ganoolal,* 5 C.P.L.R. 6; *Sakharam* v. *Gopal,* 9 C.P.L.R. 53 (Right to enjoy lac crop is a right to enjoy immoveable property).

[27] *Narbada Prasad* v. *Akbarkhan,* (1924) 80 I.C. 769 (771)=20 N.L.R. 80=1924 Nag. 125.

(8) A suit for compensation for injury caused to crops by the closing of the main sluice of a tank is governed by Art. 39, and not by Art. 36.[28]

(9) Where plaintiff who obtained an ejectment decree against defendant, sued him for mesne profits, Art. 39 was applied to the case, the claim being in the nature of an action for damages for trespass upon immoveable property.[29]

### 1214. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

(10) Where the plaintiff and defendant were lessees of adjacent collieries, and the defendants had inadvertently, by trespass upon the coal mines of the plaintiff carried away some coal, it was held by the High Court that Art. 39 or 49 applied, but their Lordships of the Privy Council applied Art. 48, to the suit for damages for the coal taken by the defendants.[30] The **Patna High Court** has held that a suit for compensation for underground trespass upon plaintiff's colliery, is governed by Art. 39; but, a suit to recover the price of coal extracted and removed by the defendant from the plaintiff's colliery and converted to his use would fall under Art. 48.[31] This view has been approved by the Privy Council.[32]

(11) A suit for declaration of the exclusive right of entry and worship in the sanctuary of a temple, and for an injunction restraining the defendant from interfering with it, by entering the sanctuary and performing worship therein, was not barred by limitation under this or any other article, merely because the first act specified may fall beyond the term of limitation.[33]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 40. | For compensation for infringing copyright or any other exclusive privilege. | Three years. | The date of the infringement. |

### SYNOPSIS.

1215. Corresponding provisions.
1216. Scope and application.
1217. Article applied—Illustrations.

### NOTES.

**Act XIV of 1859.**

**1215. CORRESPONDING PROVISIONS.**—The corresponding provision in Act XIV of 1859 was made in S. 1, Cl. (2). Act XX of 1847 (The Indian Copyright Act) by its S. 16 enacted that

> "all actions, suits, bills, indictments, informations, and other criminal proceedings for any offence which shall be committed against the Act, shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void, and of no effect".

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[28] *Sona Patil* v. *Laxman,* (1924) 82 I.C. 482=1925 Nag. 189.

[29] *Ramasami Reddi* v. *Authi Lakshmi,* (1910) 8 I.C. 162=34 Mad. 502=1910 M.W.N. 614=9 M.L.T. 35.

[30] *Pannalal Ghose* v. *The Adjai Coal Co.,* (1927) 101 I.C. 62=31 C.W.N. 82=1927 Cal. 117: s.c. on appeal, *Adjai Coal Co.* v. *Pannalal,* (1930) 58 M.L.J. 536=1930 P.C. 113=123 I.C. 726=57 I.A. 144 (P.C.).

[31] *Lodna Colliery Co., Ltd.* v. *Bepin Behari,* 1 P.L.T. 84=55 I.C. 113 (133, 134).

[32] *Pugh* v. *Ashutosh,* 8 Pat. 516.

[33] *Anandrav Bhikaji* v. *Shankar,* (1883) 7 Bom. 323.

**Act IX of 1871.**

The Limitation Act IX of 1871, S. 2, had repealed S. 16 of Act XX of 1847 to the extent of the words "actions, suits and bills". And, by Art. 11, it was enacted that in suits

> "for damages for infringing copyright or any other exclusive privilege, the period of limitation is to be one year".

As held by *Garth, C.J.*, in *Kinmond* v. *Jackson,*[34]

> "there can be little doubt that the intention of the framers of Art. 11 was to supply the place of the repealed provisions in S. 16 of Act XX of 1847 relating to civil suits; and I think we ought to read the words of Art. 11 as not confined to what is technically known at common law as an action for damages, but as meaning generally every civil suit seeking a remedy for infringement, etc., etc."

He then referred to S. 22 of the Patent Act XV of 1859, which enacts that an action may be maintained by an inventor against any person who, during the continuance of any exclusive privilege granted by this Act, shall, without license, make use of, or sell, the said invention, etc. . . . . . adding that

> "in my opinion Art. 11 of Sch. II embraces any suit or action brought under S. 22 of Act XV, and there was no intention of drawing any distinction between a suit framed as an action for damages, and one framed as a suit for an account. The taking of an account of profits is only a mode of compensating an inventor for the infringement of his privilege, other than by an assessment of damages; and it seems unreasonable that, if the period of limitation is one year in the one case, it should be six years in the other. We think, therefore, that the plaintiff is entitled to an account of the profits for one year only from the date of the filing of the plaint."[35]

In Act XV of 1877, Sch. II, Art. 40 was the same as the present Art. 40 in Act IX of 1908.

**1216. SCOPE AND APPLICATION.**—As held by Garth, C.J., in *Kinmond* v. *Jackson,*[35-a] with reference to Art. 11 of Act IX of 1871, the present Art. 40 of Act IX of 1908, would not be confined to actions for damages, but would apply to "every civil suit seeking a remedy for infringement" of copyright or any other exclusive privilege including a suit for an account of profits.[36] A "patent right", in respect of a new manufacture is an exclusive privilege like "copyright".[37] Act II of 1911, as amended by Act VII of 1930, the Inventions and Designs Act, deals with the subject.[38] The Indian Copyright Act is Act III of 1914. Section 2 of the Act defines "copyright".

**1217. ARTICLE APPLIED—ILLUSTRATIONS.—**

(1) A suit for an account of profits obtained by infringing a copyright or patent right has been held to be governed by this article.[39]

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[34] 1 C.L.R. 66=3 Cal. 17.

[35] *Ibid.*

[35-a] *Ibid.*

[36] Dr. Pal's Limitation Act, p. 555.

[37] Mitra's Limitation Act, p. 1147.

[38] *Ibid.*

[39] *Kinmond* v. *Jackson,* (1877) 3 Cal. 17.

(2) In *MacMillan* v. *Suresh Chander Deb*,[40] a suit for infringement of copyright, praying for an *injunction* to restrain a piracy of copyright by sale of a book published more than a year before suit, was held to be not barred by Art. 40, Sch. II, Act XV of 1877, nor by S. 26 of Statute 5 and 6 Vict., C. 45, assuming that a rule of limitation in the Act would be applicable to this country.[41]

(3) A suit for an *injunction* restraining the infringement of a **trade mark** which is an "exclusive privilege", is governed by Art. 120, read with S. 23 of the Limitation Act.[42]

(4) In *Varcados* v. *Macleod*,[43] the **Punjab Chief Court** has held that the right to a **trade-name or a trade-mark** is an exclusive privilege, and a suit for damages for infringing the privilege clearly falls under Art. 40, Limitation Act.

(5) Under the Copyright Act an infringement takes place not only when a book is re-printed but also when a book in respect of which a copyright exists is sold. There is a fresh cause of action on the sale of every book.[44]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 41. | To restrain waste. | Three years. | When the waste begins. |

## SYNOPSIS.

1218. Corresponding provisions.
1219. Starting point of limitation.
1220. **Scope and application.**

## NOTES.

**1218. CORRESPONDING PROVISION.**—This article corresponds to Art. 41 of the previous Act XV of 1877.

**1219. STARTING POINT OF LIMITATION.**—This article expressly provides that suits to restrain waste may be instituted within three years of the time "when the waste *begins*"; not when it ceases. The provisions of S. 23, Limitation Act, **do not** therefore apply to this article. In *Dhanjibhoy Bomanji* v. *Hirabai*,[45] this is mentioned as an apt illustration of a bar on a suit for a particular remedy, even though the cause of action be continuing.

**1220. SCOPE AND APPLICATION.**—This article does not deal with suits for *compensation* for waste, which would be governed by the general provisions of Art. 36. The type of cases falling under this article are suits for *injunction* to restrain waste by Hindu widows, and undivided co-parceners.[46]

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[40] (1890) 17 Cal. 951.

[41] *Ibid.*

[42] *Kanakasabai* v. *Muthu*, (1890) 13 Mad. 445; *Aga Mahomed* v. *Edward Peltzer*, (1903) 2 L.B.R. 113.

[43] 45 P.R. 1919=51 I.C. 434=83 P.L.R. 1919.

[44] *Marshall* v. *Ram Narain*, (1934) 3 A.W.R. 255=1934 All. 922=154 I.C. 207.

[45] (1901) 25 Bom. 644 (649) (F.B.).

> "The most ordinary instance in which an injunction is granted is to restrain the committing of waste by a tenant for life or for years, upon the application of the owner of the inheritance."[47]

*Suits "to restrain waste"* would not embrace **"meliorating waste"**, *i.e.*, that which betters. Such a waste is not restrainable unless substantial damage is proved.[48] The expression "waste", as used in this article, means

**Waste.**

> "any considerable spoil, or destruction in houses, woods, gardens, trees, lands, etc., by a lessee, life-tenant, or other limited owner, a mortgagor, or mortgagee in possession, a co-sharer, etc".[49]

According to English Law, waste is an injury to real property. But, in *Hurrydoss Dutt* v. *Sreemutty Uppoornath Dossee*,[50] their Lordships of the Privy Council have explained the principles applicable to suits by reversioners in respect of alleged waste of personal property, by tenants for life, including daughters, who stand in the same situation as regards disposition of property, held by them, with a right of enjoyment, for their lives. A reversioner's right to sue to restrain waste of *moveables* by a Hindu widow is governed by Art. 120.[1] In *Tanikachala Mudaliar* v. *Alamelu Ammal*,[2] the suit was to restrain waste by a Hindu widow, and it was contended successfully that actual waste was not necessary, apprehension of waste being enough especially if the property is immoveable.[3]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 42. | For compensation for injury caused by an injunction wrongly obtained. | Three years. | When the injunction ceases. |

**SYNOPSIS.**

1221. Corresponding provisions.
1222-1223. **Scope and application.**
  (*i*) Suit for compensation.
  (*ii*) Injunction wrongfully obtained.
1224. **Starting point of limitation.**
1225. **Illustrative cases.**

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[46] Mitra's Limitation Act, Vol. II, p. 1149.

[47] Wharton, cited in *ibid.*, p. 1149.

[48] Mitra's Limitation Act, Vol. II, p. 1149; citing *Doherty* v. *Allman*, (1878) 3 A.C. 709.

[49] Stephen's Commentaries, Vol. III and Wharton's Lexicon; Mitra's Limitation Act, Vol. II, p. 1149.

[50] 6 M.I.A. 433 (Cal.).

[1] *Venkamma* v. *Narasimha*, (1921) 44 Mad. 984=41 M.L.J. 279=66 I.C. 10=1921 M.W.N. 590=14 M.L.W. 193.

[2] (1914) 25 I.C. 153=16 M.L.T. 26.

[3] *Durganath* v. *Chintamoni*, 31 Cal. 214=8 C.W.N. 11.

## NOTES.

**1221. CORRESPONDING PROVISIONS.**—This article re-enacts Art. 42 of Act XV of 1877, and corresponds to Art. 86 of Act IX of 1871.

**1222. SCOPE AND APPLICATION.**—The reason for the insertion of Art. 86 in Act IX of 1871 was obviously the decision in *Nand Kumar* v. *Gour Shanker,*[4] where a suit for compensation for an injunction wrongfully obtained in a suit which had been dismissed without any award of compensation under Civil Procedure Code, was held maintainable. In *Bhutnath* v. *Chandra Benode,*[5] a suit for injunction restraining plaintiff from erecting a house was dismissed in appeal, and plaintiff's application for damages was treated as a suit from date of application, on payment of requisite Court-fee. But, this view has been questioned in *Mohini Mohan* v. *Surendra Narain,*[6] in view of the provision in S. 95 of the Civil Procedure Code, which limits the damages awardable to plaintiff against whom a temporary injunction has been applied for on insufficient grounds, or there was no reasonable or probable ground for instituting the same. The section also enacts that "an order determining any such application shall bar any suit for compensation in respect of such arrest, attachment, or injunction". It has been observed in *Mohini Mohan* v. *Surendra Narain,*[7] and agreed to in *Albert Bonnan* v. *Imperial Tobacco Company,*[8] that

**(i) Suit for compresentation.**

> "nothing in the Limitation Act can give a party a right of suit unless such a right exists independent of the Limitation Act".[9]

The former case has held that there is no authority for the suggestion that if a party maliciously and without a probable cause brings a suit for a perpetual injunction and succeeds at the trial, but the judgment is reversed on appeal, he is liable in damages for the injury caused by the injunction.[10] The decision in the case of *Bhut Nath* v. *Chandra Benode,*[11] has not been approved in *Norendra*

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[4] (1870) 13 W.R. 305.

[5] (1912) 16 I.C. 443=16 C.L.J. 34 [N. F. in *Norendra* v. *Bhushan,* (1920) 57 I.C. 375=31 C.L.J. 495 (F.B.)].

[6] (1915) 26 I.C. 296=42 Cal. 550=21 C.L.J. 68=18 C.W.N. 1189; see and cf. *Kumaraswamia Pillai* v. *Udayar Nadan,* (1908) 32 Mad. 170=18 M.L.J. 490 and *Sokkalingam Chetty* v. *Krishnaswamy Aiyar,* (1919) 38 M.L.J. 324=55 I.C. 786=1920 M.W.N. 192 (The remedy provided in the section is only optional).

[7] *Ibid.,* 26 I.C. 296=42 Cal. 550.

[8] (1926) 94 I.C. 444 (450, 451)=30 C.W.N. 465=1926 Cal. 757.

[9] *Hari Nath* v. *Mothur Mohun,* 20 I.A. 183=21 Cal. 8 (P.C.).

[10] (1915) 26 I.C. 296=42 Cal. 550=21 C.L.J. 68=18 C.W.N. 1189.

[11] (1912) 16 I.C. 443=16 C.L.J. 34.

*Nath Koer* v. *Bhushan Chandra Pal,*[12] as not consistent with the principles involved in other decisions of the Calcutta High Court, and it was held by the **Full Bench** in the latter case, that no suit lies for damages against a defendant for maliciously and without reasonable and probable cause instituting a civil action. Where the interference with the property rights of the plaintiff, which did take place, was by reason of the injunction, which was a judicial order of the Court made in the suit, brought by the defendant against the plaintiff, and which was in force during the time of the alleged interference, even though the injunction was subsequently discharged."[13] In *Albert Bonnan* v. *Imperial Tobacco Company,*[14] case-law is again fully reviewed, and it was observed that if there was reasonable and probable cause, or absence of malice, no action will lie in respect of damages arising out of the injunction. However, a cause of action may exist in respect of injunction and the resulting damage to plaintiff, where there was no reasonable or probable cause, or malice was present.[15]

**(*ii*) Injunction wrongly obtained.**

1223. In *Ranimina Kumari* v. *Surendra Narain,*[16] it was doubted whether an order under S. 146, Criminal Procedure Code can legitimately be treated as an injunction within the meaning of this article. An attachment by a prohibitory order is not an injunction within the meaning of Art. 42.[17]

1224. **STARTING POINT OF LIMITATION.**—Assuming that a suit contemplated by this article is maintainable (*vide* S. 1222, above), the starting point of limitation is from the time *"when the injunction ceases"*. In *Nund Coomar* v. *Gour Sunkur,*[18] the cause of action was held to have accrued to the plaintiff when he was damaged by the wrongful injunction obtained by the defendant, and to have continued as long as the injunction *remained in force.* This was relied upon in *Bhut Nath* v. *Chandra Benode,*[19] for the view that limitation begins to run as soon as the injunction is at an end. It was held in *Mohini Mohan* v. *Surendra Narain,*[20] that an interlocutory injunction granted in such a suit is *ipso facto* dissolved by a decree of the Court granting a perpetual injunction. Therefore, if a suit for damages is maintainable, limitation under Art. 42 would begin to run from the date when the interlocutory injunction ceases.

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[12] (1920) 57 I.C. 375=31 C.L.J. 495 (F.B.).

[13] 31 C.L.J. 495 (499)=57 I.C. 375 (F.B.).

[14] (1926) 94 I.C. 444 (450, 451)=30 C.W.N. 465=1926 Cal. 757 [Affirmed on appeal s.c. (1929) 50 C.L.J. 351=57 M.L.J. 558 (P.C.)].

[15] *Ibid.,* 94 I.C. 444 (450, 451)=1926 Cal. 757; also see and cf. *Nanjappa* v. *Ganapathi,* (1911) 35 Mad. 598=21 M.L.J. 1052 (In case of remedy by separate suit, plaintiff will have to prove want of reasonable and probable cause, and *also malice*).

[16] (1909) 10 C.L.J. 226.

[17] *Veeramma* v. *Subba Row,* (1916) 35 I.C. 98=31 M.L.J. 257.

[18] (1870) 13 W.R. 305; also see *Surajmal* v. *Manek Chand,* (1903) 6 Bom.L.R. 704 (707).

[19] (1912) 16 C.L.J. 34=16 I.C. 443.

[20] (1915) 42 Cal. 550=26 I.C. 296=21 C.L.J. 68.

### 1225. ILLUSTRATIVE CASES—

(1) In *Idu Miah* v. *Rahmat,*[21] where the defendant attached in execution of his decree certain goods as belonging to his judgment-debtor, and the attachment being released on plaintiff's objections under O. 21, R. 60, Civil Procedure Code, the same was maintained by an injunction procured by the defendant in a suit under O. 21, R. 63, Civil Procedure Code, and such suit was ultimately dismissed, a suit by plaintiff to recover damages for the loss of part and the deterioration of the rest of moveable property while under the defendant's attachment, was held to be governed by Art. 42, and not by Art. 29.

(2) In the above case, the starting point of limitation was the date when the injunction (maintaining the attachment) ceased, not from the time when the plaintiff's property was first seized or attached.[22]

(3) A suit for compensation for wrongful attachment of moveables by the issue of a *prohibitory order,* is governed by Art. 36, and not by Art. 42, 46, 62 or 120.[23]

(4) In a suit by *A* against *B,* where property of *B* was attached before judgment, without reasonable and probable cause, in 1888, and the suit was dismissed in 1889, and appeal also was dismissed later in 1890, a suit, by *B,* against *A,* brought in 1892 for damages occasioned by the attachment before judgment was held barred by limitation, under Art. 49, under which the time runs from the date of the wrong. If Art. 49 did not apply, the suit would be governed by Art. 36, regarded as one for misfeasance independent of contract.[24]

(5) But, where defendants having attached certain goods belonging to plaintiff, in execution of a decree obtained by them against *M,* and the plaintiff's claim though rejected under O. 21, R. 60, Civil Procedure Code, he succeeded in establishing his right in a suit under O. 21, R. 63, Civil Procedure Code, and then instituted a suit for compensation for the wrongful attachment, the general Art. 29 was applied to the alleged wrongful seizure made under legal process.[25]

The case of *Manavikraman* v. *Avisilan Koya,*[25-a] was distinguished on the ground that, in that case, the wrong complained of was the institution of a suit without reasonable grounds followed by an attachment of the goods of the defendant in the suit; whereas in the present case the goods belonged to a person who was not a party to the suit in which the attachment was made.[26]

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[21] (1901) 24 All. 146 (Aikman, J.).

[22] *Ibid.*

[23] *Veeramma* v. *Subba Rao,* (1916) 35 I.C. 98=31 M.L.J. 257; cf. *Surajmal* v. *Manek Chand,* (1903) 6 Bom.L.R. 704 (707).

[24] *Manavikraman* v. *Avisilan Koya,* (1895) 19 Mad. 80=6 M.L.J. 11.

[25] *Murgesa Mudaliar* v. *Jatta Ram,* (1900) 23 Mad. 621.

[25-a] (1895) 19 Mad. 80=6 M.L.J. 11.

[26] *Murugesa Mudaliar* v. *Jatta Ram,* (1900), 23 Mad. 621 (626).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 43. | Under the "Indian Succession Act, 1925, section 360 or section 361," to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets. | Three years. | The date of the payment or distribution. |

## SYNOPSIS.

1226. Legislative changes.
1227. Scope and application.

## NOTES.

**1226. LEGISLATIVE CHANGES.**—This article corresponds to Art. 43 of Act XV of 1877. But, the words and figures "*Indian Succession Act,* 1925, *S.* 360 *or S.* 361", have been substituted for the words and figures "Indian Succession Act, 1865, S. 320 and S. 321, or under the Probate and Administration Act, 1881, S. 139 and S. 140".

**1227. SCOPE AND APPLICATION.**—(1) This article does not cover suits by *a legatee* to recover the legacy payable to him from the executor *personally* on the ground of his having wasted the assets. Such a suit is governed by Art. 123, Limitation Act.[27] A suit against an executor or administrator *personally,* founded on *Devastavit,* in distributing the assets or otherwise, is governed in England by the six years' rule.[28]

(2) An executor *de son tort* takes all the liabilities of an executor, and Art. 123 applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased. Article 62, barring suits for money received in 3 years, and Art. 120 are not applicable to the case.[29] A suit for a legacy or for a share of a residue bequeathed by a testator can fall under Art. 123 not only if it is against an executor but also if it is against one in possession of assets which are liable for payment of the legacies.[30]

(3) This article will apply to suits by a creditor, or other claimant against the estate of a deceased person to follow the assets

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[27] *Cursetji* v. *Dadabhai,* (1896) 19 Mad. 425 (432).

[28] Mitra's Limitation Act, Vol. II, p. 1151, citing In re *Gale Blake* v. *Gale,* (1883) 22 Ch. D. 820.

[29] *Zemindar of Bhadrachalam* v. *Venkatadri Appa Rao,* 1922 Mad. 457=46 Mad. 190.

[30] *Ibid.*

or any part of them in the hands of the persons who may have received the same from the executor or administrator.[31]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 44. | By a ward who has attained majority, to set aside a transfer of property by his guardian. | Three years. | When the ward attains majority. |

### SYNOPSIS.

1228. Corresponding provisions.
1229. Legislative changes.
1230. **Article explained.**—"Ward" and "Guardian".
1231. Natural guardians, etc.
1232. De facto *Guardian.*
1233. Testamentary guardian.
1234-1240. **Transfer of property.**
1234. (*i*) **includes mortgages and leases.**
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  (*i*) Void transfers.
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1245. Article applied—Illustrative cases.
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1247. *Effect of Bar of Limitation.*
1248. Article not applicable to defence.
1249. Starting point of limitation.
1250. Sections 6, 7 and 8, Limitation Act.

### NOTES.

**1228. CORRESPONDING PROVISIONS.**—There was no corresponding article in Act IX of 1871.

In Act XV of 1877, the corresponding provision was made in Art. 44, but it applied only to *sales* by the guardian.

**1229. LEGISLATIVE CHANGES.**—The present article uses the expression *"transfer of property"*, instead of the narrower term *"sale"* in the previous Act, which could not include mortgage or lease. However, even under Act XV of 1877, in *Madugula* v. *Pally,*[32] the Madras High Court held that the term "sale" must be considered to have been used in the general sense as covering or including an assignment of the ward's interest whatever it may be, and not merely a transfer of ownership. The Legislature seems to have adopted the suggestion of Dr. Stakes in his Anglo-Indian Code, Vol. II, p. 950, to extend this article to mortgages and leases. Under the Act XV of 1877, a suit for possession of immoveable property, and for setting aside a mortgage by conditional sale of such property, made on plaintiff's behalf during his minority, was held to be governed by Art. 142, and not by Art. 91, Sch. II, Limitation Act.[33]

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[31] Mitra's Limitation Act, Vol. II, p. 1151.

[32] (1907) 30 Mad. 393=17 M.L.J. 220.

"Ward."

1230. **ARTICLE EXPLAINED.**—A "ward" as the term is defined in the Guardian and Wards Act, VIII of 1890, S. 4, Cl. (3) means a minor for whose person or property, or both, there is a guardian.

Guardian.

"*Guardian*" means a person having the care of the person of a minor or of his property, or of both his person and property. "*Minor*" means a person who under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. As to age of majority under the Indian Majority Act, *see* S. 3 of Act IX of 1875. Thus guardians of minors are those who take charge of the affairs of infants, who by the use of their matured experience make up for the want of such experience **in the minors.**

> "A guardian, in the popular sense of one who guards, preserves, or secures, is the generic term applied in legal usage to a person whose duty it is to protect the rights, whether of person or property, of some other person, his ward, who, as in the case of minors, is conclusively presumed to be incompetent to manage his affairs".[34]

Natural guardians.

1231. In this article, the expression **guardian is not confined to guardians appointed by Court; but would** include **natural guardians,**[35] or those indicated by nature to be the best and most proper persons to take care of the infant's affairs; and **testamentary guardians,** that is persons appointed privately by the father or mother by means of his or her testament.

Macleod, C.J., has observed in *Fakirappa Limanna* v. *Lumanna Mahadu*,[36]

> "that the use of the word 'ward' in Art. 44 of the Limitation Act is peculiar, and there seems no reason why the word 'minor' should not have been used. It was argued that '*ward*' in Art. 44 means a minor to whom a guardian has been appointed by the Court under the Guardian and Wards Act or by Will. 'Ward' is defined in the Guardian and Wards Act as a minor who has a guardian, but the only guardians referred to in the Act are guardians appointed by the Court or by Will, and there is nothing unreasonable in the

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[33] *Ramanasar Pandey* v. *Raghubar Jati*, (1883) 5 All. 490 (Compare and see "Transfer of Property", S. 1232, *ante*).

[34] Am. Cycl., Vol. XXI, p. 12.

[35] *See* S. 1231, below.

[36] (1920) 44 Bom. 742=58 I.C. 257=22 Bom.L.R. 680.

suggestion that the term 'Ward' is confined to a minor who has such a guardian and does not include minors who have natural guardians. That appears to have been the view underlying the remarks of Scott, C.J., in *Anandappa* v. *Totappa.*[37] But, on reference to the judgment of the Privy Council in *Malkarjun* v. *Narhari,*[38] and *Matadin* v. *Ahmad Ali,*[39] it will be seen that their Lordships expressly state that Art. 44 applies to transfers by guardians without excluding natural guardians, and as in the one case they were referring to a Hindu mother, and in the other to guardians under Muhammadan Law, it is obvious that they considered that natural guardians under Hindu or Muhammadan Law were not excluded".[40]

Thus, a suit to set aside a sale of a minor's property, effected by his mother who was his natural guardian, brought more than three years after the minor's attaining majority is barred under Art. 44 of Sch. I of the Limitation Act.[41] The words of Art. 44 are very general, and have application to every case in which a ward, on attaining majority, impugns the transfer made by his or her guardian during his or her minority, and there is absolutely no warrant for restricting the application of that article to cases of transfers made by a certificated guardian.[42] The Limitation Act does not contain the definition of "guardian" and "ward", but from the definitions as given in S. 4 of the Guardian and Wards Act, it would appear that the word "guardian" is of general import and **includes natural and testamentary guardians and guardians appointed by Court.**[43] We find no justification for interpreting the word "*guardian*" in Art. 44 as having reference only to a guardian appointed by the Court and the word "*ward*" in that article as having reference only to a minor the guardian of whose property has been appointed by the Court.[44] It is now well-settled that this article applies not only to setting aside the transfer of property made by a guardian appointed by a Court, or by will, but also to suits for setting aside a transfer of property made by a **natural guardian.**[45] Article 44 is not restricted to cases of transfer by a certified guardian. **The Madras High Court** has held recently that the word "*guardian*" as used in the article is of general import and covers the case of a Christian mother acting as a ***de facto* guardian.**[46] Similar views have been expressed by the Madras High Court, in *Satyalakshmi* v. *Jagannadham,*[47] and *Arumugam Pillay* v. *Ambalam.*[48] In *Ramaswami* v. *Govindammal,*[49] it has been observed that

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[37] 33 I.C. 441=17 Bom.L.R. 1137 note.

[38] 25 Bom. 337 (351)=2 Bom.L.R. 927=27 I.A. 216 (P.C.).

[39] 13 I.C. 976=34 All. 213=39 I.A. 49 (P.C.).

[40] (1920) 58 I.C. 257 (262)=44 Bom. 742 [O. R. *Bhagvant Govind* v. *Kondi,* 14 Bom. 270=7 Ind. Dec. (N.S.) 645; *Anandappa* v. *Totappa,* 33 I.C. 441=17 Bom.L.R. 1137 note; *Balappa Dandappa* v. *Chanbasappa Shivalingappa,* 33 I.C. 444=17 Bom.L.R. 1134 (1136)].

[41] *Laxmana* v. *Rachappa,* (1918) 46 I.C. 22=42 Bom. 626=20 Bom. L.R. 408.

[42] *Dipchand* v. *Munni Lal,* 1929 All. 879=1929 A.L.J. 1248=122 I.C. 680=52 All. 110.

[43] *Dipchand* v. *Munni Lal,* 1929 All. 879, *supra.*

[44] *Ibid.,* 1929 All. 879 (880).

[45] *Ramaswami* v. *Govindammal,* 1929 Mad. 313=56 M.L.J. 332=118 I.C. 481=1929 M.W.N. 124=29 M.L.W. 169.

> "it is now well settled that Art. 44 applies not only to setting aside the transfer of property made by a guardian appointed by a Court or by will, but also to suits for setting aside a transfer of property made by a natural guardian".[49]

And the **Lahore High Court** has held in a number of cases that a suit for possession of immoveable property by a minor on the allegation that the sale of the same during his minority, by his mother, or natural guardian, was not for his benefit, and therefore, was not binding, is governed by Art. 44 and not by Art. 144 of the Limitation Act.[50] The **Bombay High Court** has held recently that a Hindu mother, acting as a natural guardian of his sons, having sold family property without necessity, a suit to set aside the sale was barred by limitation under S. 7 and Art. 44, three years after the eldest son had attained majority.[1]

However, the expression "guardian" does not cover the case of a wholly unauthorized person, where the transaction is void *ab initio,* and it is not necessary for the minor in order to recover possession of the property transferred to have the transfer set aside.[2] In ***Matadin*** v. ***Ahmad Ali,***[3] their Lordships of the Privy Council held that

> "Article 44 prescribes a period of three years within which a ward, who has attained majority may set aside a sale made by his guardian, the time running from the date of the ward's majority. This provision has no application to the case where the sale was effected, not by a guardian, but by a wholly unauthorized person".[4]

***De facto* guardians.**

**1232.** The expression guardian is not limited to guardians *de jure,* but would embrace guardians *de facto,* where their powers are the same as those of guardians *de jure,* as under Hindu Law. In *Thayammal* v. *Kuppanna,*[5] after holding that a paternal aunt is not a natural guardian, Sadasiva Aiyar, J., observed that therefore her alienation need not be set aside, and that Art. 44 did not apply. Similarly, in *Mahadeo* v. *Somaji,*[6] Art. 144 was applied to a suit for setting aside a sale of a minor's property by a *de facto* guardian. In *Ramasami Pillai* v. *Kasinath Iyer,*[7] it was recognized that a *de facto* guardian is under Hindu Law in the same position as a *de jure* guardian so far as acts done by him for the benefit of the minors are concerned, and as regards such acts the same test is to be applied as would be applied in cases of alienation by a legal guardian.[8] An alienation, therefore, by a *de facto* guardian of a Hindu minor for purposes of necessity would bind the estate of the minor. However, Art. 44 was held not to apply to cases of alienations by *de facto* guardians.[9] These decisions seem to be influenced by the Privy Council decisions in the case of *Mata Din* v. *Ahmad Ali,*[10] and *Imambandi* v. *Mutsaddi,*[11] in reaching the conclusion that Art. 44 of the Limitation Act does not apply to the cases of alienations by *de facto* guardians.[12] This view, however, is unsound, where the powers of a *de facto* Hindu guardian are concerned. The Privy Council judgment in *Mata Din* v. *Ahmad Ali,*[13] was given on basis of Mahomedan Law, which unlike Hindu Law does not recognize a *de facto* guardian. The cases relating to Mahomedans have received some notice in *Seetharamanna* v. *Appiah,*[14] where it was held that an alienation by the *de facto* guardian of a Hindu minor was valid if for necessity, and if not for necessity was voidable only, so that it could be ratified by the minor on attaining majority. It was followed by Odgers, J., in *Erulandi Thevan* v. *Subramania Aiyar.*[15] It is well settled that the powers of a *de facto* guardian are the same as those of a lawful guardian under the Hindu Law, and authority is cited for the proposition in *Chinna Alagumperumal* v. *Vinayagathammal,*[16] and in *Ramaswami* v. *Kasinatha,*[17] and such authority as is furnished by the decisions of the **Madras High**

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[46] *Bangarammal* v. *Lydia Kent,* 1934 Mad. 605 (607)=67 M.L.J. 322=57 Mad. 1062=152 I.C. 546; Relied on 1929 All. 879=122 I.C. 680 =52 All. 110.

[47] 1918 Mad. 487=42 I.C. 939.

[48] 1921 Mad. 425=62 I.C. 630.

[49] 1929 Mad. 313=56 M.L.J. 332=118 I.C. 481.

[50] *Dataram* v. *Raghunath,* (1929) 116 I.C. 893=11 L.L.J. 108; Relied on *Said Shah* v. *Abdulla,* 19 P.R. 1902; *Tarachand* v. *Murlidhar,* 61 I.C. 384=3 L.L.J. 280; *Labha Mal* v. *Malik Ram,* 89 I.C. 602=6 Lah. 447=1925 Lah. 619 and *Khushia* v. *Faiz Muhd.* 9 Lah. 33=103 I.C. 365= 1928 Lah. 115=29 P.L.R. 305.

[1] *Kondaji* v. *Dagadu,* 1935 Bom. 259=37 Bom.L.R. 225.

[2] *Dipchand* v. *Munni Lal,* 1929 All. 879=122 I.C. 680=52 All. 110 =1929 A.L.J. 1248.

[3] 34 All. 213=13 I.C. 976=39 I.A. 49 (P.C.).

[4] *Ibid.,* 34 All. 213 (P.C.); Relied in *Fakirappa* v. *Lumanna,* (1920) 58 I.C. 257=44 Bom. 742.

[5] (1914) 38 Mad. 1125=26 I.C. 179=27 M.L.J. 285.

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[6] (1927) 99 I.C. 1050=1927 Nag. 145.

[7] (1928) 108 I.C. 529=1928 Mad. 226.

[8] *Ibid.,* 108 I.C. 529 (532); Relied on *Vembu Iyer* v. *Srinivasa Iyengar,* 17 I.C. 609=23 M.L.J. 638=12 M.L.T. 547; and *Arunachalli Reddi* v. *Chidambara,* 13 M.L.J. 223; also see *Vemulpallai Seetharamanna* v. *Maganti Appiah,* 92 I.C. 827=1926 Mad. 457=49 Mad. 768.

[9] (1928) 108 I.C. 529=1928 Mad. 226, *supra.*

[10] (1912) 34 All. 213=13 I.C. 976=39 I.A. 49 (P.C.).

[11] 45 Cal. 878=47 I.C. 513=45 I.A. 73 (P.C.).

[12] *Balappa Dundappa* v. *Chanbasappa Shivalingappa,* 33 I.C. 444=17 Bom.L.R. 1134 and *Kathaperumal* v. *Ramalinga,* 27 I.C. 695=17 M.L.T. 138.

[13] (1912) 34 All. 213=13 I.C. 976=39 I.A. 49 (P.C.).

[14] (1926) 92 I.C. 827=49 Mad. 768=1926 Mad. 457=50 M.L.J. 68.

[15] (1926) 97 I.C. 611.

[16] (1929) 117 I.C. 731=1929 Mad. 110.

[17] (1928) 108 I.C. 529=1928 Mad. 226.

**Court** is perceptibly in favour of the view that such an alienation is voidable not void.[18] The cases decided by the Judicial Commissioner, Nagpur, in *Hussein* v. *Raja Ram*[19] and *Mahadeo* v. *Somaji,*[20] do not take into consideration the difference between Mahomedan and Hindu Law upon the subject. The statement of law in *Vithu* v. *Devidas,*[21] is to the same effect. But, as pointed out in the Full Bench case of *Kesheo* v. *Jagannath,*[22]

> "there is a fundamental distinction between the guardian under the two systems of jurisprudence",

*viz.,* Hindu Law and the Mahomedan Law.

> "Under the Mahomedan Law a *de facto* guardian has no recognised position, while the Hindu Law gives to him a position identical to that acknowledged in a *de jure* guardian."

A **Full Bench** of the **Punjab Chief Court** has likewise held in *Mastu* v. *Nand Lal,*[23] that

> "there is a wide distinction between the powers of a guardian, whether *de facto* or *de jure* under Mahomedan Law, and those of a Hindu guardian".

In a recent Lahore case, *Tapassi Ram* v. *Raja Ram,*[24] it was held that under Hindu Law a *de facto* guardian's alienation was not void, but only voidable. The Madras High Court has taken this view in *Adeyya* v. *Govindu,*[25] that the alienation by a *de facto* guardian, under Hindu Law, has to be avoided under Art. 44, just as any transfer of a minor's property by his *de jure* guardian. No doubt a *de facto* guardian is unknown to Mahomedan Law, and a transfer by a *de facto* guardian of a *Muhammadan* minor is null and void, and beyond the purview of Art. 44 of Sch. I, to the Limitation Act, and this is fully established by the Privy Council decisions, in *Matadin* v. *Ahmadali,*[26] and in *Imam Bandi* v. *Mutsaddi,*[27] which have been followed in numerous cases by different High Courts. See *Zaida* v. *Roshnai,*[28] where it was held

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[18] Per Curgenven, J., in *Adeyya* v. *Govindu,* 1931 Mad. 274=131 I.C. 609=58 M.L.J. 417; Compare *Purushotama Ratho* v. *Brundavana Dass,* 1931 Mad. 597 (2)=1931 M.W.N. 417=133 I.C. 77 (*Held,* that Art. 44 did not apply to alienation by natural father of an adopted minor); also see and cf. *Sundara Nadan* v. *Annammal,* 1931 Mad. 529=60 M.L.J. 695=132 I. C. 120 (Suit to set aside alienation by *de facto* guardian of an Indian Christian).

[19] (1914) 10 N.L.R. 133=26 I.C. 813.

[20] (1927) 99 I.C. 1050=1927 Nag. 145.

[21] (1919) 51 I.C. 943=15 N.L.R. 55.

[22] (1926) 92 I.C. 121=1926 Nag. 81=22 N.L.R. 5 (F.B.); Followed *Somwarpuri* v. *Gopal Singh,* 49 I.C. 246.

[23] 73 P.R. 1890 (F.B.); also see *Ghulam Rasul* v. *Ajabgul,* 57 P.R. 1891.

[24] (1930) 115 I.C. 417=1930 Lah. 136.

[25] 1931 Mad. 274=131 I.C. 609=58 M.L.J. 417.

[26] (1912) 34 All. 213=13 I.C. 976=39 I.A. 49 (P.C.).

[27] 45 Cal. 878=47 I.C. 513=45 I.A. 73 (P.C.).

[28] (1928) 113 I.C. 53=1928 Lah. 250=10 L.L.J. 183.

"that having regard to the Privy Council case in *Imambandi* v. *Mutsaddi*, the term '*de facto* guardian' which had been introduced in some decisions of the various Courts in this country, loses all its significance, and their Lordships have laid down once for all that a person who is not under the law authorised to transfer a minor's property cannot give a valid title to the transferee of such property and that the transfer effected by a person who thus arrogates to himself the functions of a lawful guardian is absolutely void and of no legal effect".

**Testamentary guardian.**

**1233.** A testamentary guardian may be appointed by a Hindu father for his minor child, but only in respect of the deceased's self-acquired or separate property over which he has a free power of disposal. But, a testamentary guardian cannot be appointed in respect of property of a joint Hindu family devolving not by inheritance, but by rule of survivorship. It is not competent even to the only adult co-parcener of a mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners.[29] The **Bombay High Court** held in *Harilal Bapuji* v. *Bai Mani*,[30] that where the whole of the testator's property became the property of his son living jointly with him, at the moment of the testator's death, the appointment of trustees by the will was void. But, in *Mahableshwar* v. *Ramchandra*,[31] the right of a dying Hindu father to appoint managers and trustees of the family estate without interfering with succession was recognized, and it was held that any such arrangement for guardianship and management made by him is binding on his sons and wives. However, it has been doubted in view of a conflict of authority on the question, whether a Hindu father in a joint mitakshara family has power to appoint a testamentary guardian of his property for his minor sons by a will.[32] A Hindu father has no power to alienate joint-family property for anything that may be of general benefit to the family, apart from necessity.[33] The **Calcutta**,[34] High Court has held that the Hindu Law does not prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children. The **Allahabad High Court** has accepted this statement of the law in *Deba Nand* v. *Anandamani*,[35] that a Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death, and that he is unrestricted in the choice of a guardian, and may exclude even the mother from the guardianship.

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[29] *Chidambara* v. *Rangasami*, (1918) 45 I.C. 905=41 Mad. 561=34 M.L.J. 381 (F.B.); Compare *Jagannadha* v. *Ramayamma*, (1920) 44 Mad. 189=40 M.L.J. 46.

[30] (1905) 29 Bom. 351.

[31] (1913) 21 I.C. 350=38 Bom. 94=15 Bom.L.R. 882.

[32] *Venkatarama Mukund* v. *Janardhan*, (1927) 106 I.C. 79=1928 Bom. 8=52 Bom. 16=29 Bom.L.R. 1522.

[33] *Ibid.*, 106 I.C. 79=1928 Bom. 8.

[34] (1866) 7 W.R. 74.

[35] (1920) 43 All. 213=1921 All. 346=59 I.C. 909=18 A.L.J. 1127; Relied on *Albrecht* v. *Bathee Jellamma*, 13 I.C. 453=22 M.L.J. 247.

**Transfer of property.**

**(*i*) Includes mortgages and leases.**

**1234-1240.** As noticed in S. 1229, *ante*, the term *"sale"*, as used in the corresponding Art. 44 of Sch. II, Limitation Act XV of 1877, has now been replaced by the much wider term *"transfer of property"*, which **includes mortgages, and leases.** In *Muthukumara Chttti* v. *Anthony Udayan*,[36] it was held that a **lease** executed by a guardian beyond his powers is not void altogether, against the minor, but is voidable by him. Also see *Prohlad Chandra* v. *Ramsaran*,[37] as to the scope of Art. 44 of the present Act. In *Velayudham Pillai* v. *Perumal Naicker*,[38] Art. 44 has been applied to a suit by minor to set aside a **mortgage** by his mother and natural guardian. Where a suit was brought by a Hindu son to declare that a release deed executed by his mother as his guardian during plaintiff's minority was invalid, and for injunction restraining the defendant from interfering with plaintiff's rights in partnership, it was held that Art. 44 applied to the case as the relief was really one for the cancellation of the **release-deed.**[39] Article 44 of Sch. I to the Limitation Act does not merely apply to sales but applies to all transfers of property.[40]

**(*ii*) Execution sales not included.**

**1235.** This article will apply only to private transfers of property of minors by their guardians, and a sale in execution of the property of a minor represented by his guardian is outside the scope of this article. Such a sale made by process of law in execution of a decree cannot be considered to be a *transfer* of property *by the guardian*.[41] Where a suit is brought to set aside a sale of immoveable property unlawfully alienated during the plaintiff's minority, it must be instituted within one year of the plaintiff's attaining his majority, under Art. 12 of the Limitation Act.[42] The period of limitation applicable to a suit for possession of property sold in execution of a decree is prescribed by Art. 12, Sch. I of the Limitation Act.[43]

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[36] (1914) 38 Mad. 867=24 I.C. 120=29 M.L.J. 617.

[37] (1923) 38 C.L.J. 213=1924 Cal. 420=81 I.C. 680.

[38] (1915) 31 I.C. 811=2 L.W. 1210.

[39] *Doraiswamy Mudaliar* v. *Thangavelu*, (1929) 119 I.C. 38=1929 Mad. 668.

[40] *Vithu* v. *Devidas*, (1919) 51 I.C. 943=15 N.L.R. 55; also see *Anandappa* v. *Totappa*, 33 I.C. 441=17 Bom.L.R. 1137 note [Exchange is a transfer within Art. 44, Limitation Act and *Irangauda* v. *Ningappa*, (1923) 76 I.C. 636=1924 B. 517].

[41] *Ma Nge Ma* v. *Ma Shwe Hai*, (1916) 36 I.C. 3 (U.B.) (Where Art. 44 seems to have been wrongly applied).

[42] *Subramanya Pandya* v. *Siva Subramanya Pillai*, (1894) 17 Mad. 316=4 M.L.J. 152; also see *Pala Singh* v. *Harnama*, (1918) 43 I.C. 712=30 P.W.R. 1918=40 P.L.R. 1918.

**(iii) Transfers without consideration.**

**1236.** The adequacy or inadequacy of consideration for a transfer has no bearing on the application of this article. A sale by a guardian does not become void merely by reason of its being for an inadequate consideration, and a suit brought by the ward, who has attained majority, for possession of properties alienated by his guardian during his minority is governed by Art. 44 and not by Art. 144 of the Limitation Act.[44] Once a sale of property belonging to a minor is proved to have been effected by the certificated guardian of the minor without the permission of the Court it becomes voidable without any enquiry whether the terms of the transfer were favourable to the minor or not.[45]

**(iv) Fraudulent transfers.**

**1237.** A transfer brought about by the fraud or misrepresentation on the part of the guardian has to be avoided under Art. 44 of the Limitation Act, therefore, Art. 144 was not applied to a suit for possession of property by the quondam minor, in which such sale came in question.[46] Even in the case of a suit to set aside a sale made by a certificated guardian, under S. 18 of Act XL of 1858, where the plaintiff alleges fraud or illegality as a ground for setting aside the sale, the onus lies upon him to make out a *prima facie* case, and to show that the debt, which formed the sale consideration was not binding on the minor.[47] A sale of a minor's property by his guardian in fraud of his rights is only voidable. It is valid unless avoided by the minor, within 3 years on attaining majority under Art. 44 of the Limitation Act.[48]

**(v) Transfer by guardian.**

**1238.** Article 44 is concerned with transfer of property *by a guardian,* and it cannot apply to a sale by a transferee from the certificated guardian, to the defendant in the position of a trespasser, the transfer in his favour not being made by the ward's guardian.[49]

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[43] *Imam Din* v. *Puran Chand,* (1920) 55 I.C. 833=1 Lah. 27.

[44] *Kopparti Suryanarayana* v. *Chikkala Narayanaswami,* (1915) 28 I.C. 704 (Mad.); Relied on *Madugulah Latchiah* v. *Palli Mukkalinga,* 30 Mad. 393=17 M.L.J. 220=2 M.L.T. 350; and *Sivavadivelu* v. *Ponnammal,* (1912) 15 I.C. 365=22 M.L.J. 404=11 M.L.T. 198.

[45] *Mohanlal* v. *Mohammad Adil,* (1925) 89 I.C. 69 (Oudh).

[46] *Ranga Reddi* v. *Narayana Reddi,* (1905) 28 Mad. 423.

[47] *Sikher Chund* v. *Dulputty Singh,* 5 Cal. 363=5 C.L.R. 374; cf. (1920) 44 Bom. 742 (757).

[48] *Krishna Dhone* v. *Bhagaban Chandra,* (1916) 34 I.C. 188 (Cal.); also see *Devichilai Iyengar* v. *Raghupathi,* 88 I.C. 967=1926 Mad. 46=49 M.L.J. 317.

[49] *Mohan Lal* v. *Mohammad Adil,* (1925) 89 I.C. 69 (81) (Oudh).

A partition of joint Hindu family property in which the minor member is represented by his mother as his guardian, is not a transfer *by the guardian* within the meaning of Art. 44, Sch. I, Limitation Act.[50] But this article will apply to a sale of ward's exclusive property, by a guardian, to which his father and brother have been joined in the conveyance for sake of precaution.[1] Cases contemplated by Art. 44 are those in which "transfer of property" has been made by a guardian. It implies that the property transferred has changed hands and it does not apply to cases where possession has not been parted with although it ought to have been delivered.[2]

***(vi) Oral and unregistered transfers.***

**1239.** Article 44 does not apply where there is no sale at all in law to be set aside.[3] Sales which are *ab initio* void cannot become valid if not set aside within three years by suit.[4] A suit to recover property from the vendee conveyed by a deed which was practically a fraud upon the law of registration, was held to be governed by Art. 144 and not by Art. 44 of Sch. I to the Limitation Act.[5]

Article 44 is applicable also in the case of *oral* transactions.[6]

**(*vii*) Transfer by manager of Hindu family.**

**1240.** The manager of a mitakshara joint-family is not the "guardian" of the property of the minor members of the co-parcenary, within the meaning of Art. 44, Limitation Act. He is manager of the whole family property, whether his co-parceners are minors or majors.[7] In *Gharibulla* v. *Khalik Singh,*[8] their Lodships of the **Privy Council** held that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided mitakshara family. A manager of the joint-property of himself and his minor brother, could not by styling himself guardian alter the position. **A suit by a co-parcener** in a Hindu joint family **to recover** possession of his share of the **property alienated** during the plaintiff's minority **by another co-parcener** who purported to act as, but was not in fact, the guardian of the plaintiff **is governed by Art. 144** and not by Art. 44 of Sch. I to the Limitation Act.[9] This article has no application to the sale by the manager of a joint Hindu family of ancestral property without legal necessity.[10] It applies only to an alienation by a guardian of minor's property.[11] A Hindu mother, or a female cannot be the manager or *karta* in the technical sense of the term, and her position is that of a guardian to her sons.[12] Consequently a **suit by minor to challenge an alienation by** his mother **as guardian is governed by Art. 44,**[13] while Art. 144 of the Limitation Act applies to a suit for setting aside an alienation of joint-family property by the *karta,* or managing member of the family.[14]

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[50] *Venkata Reddi* v. *Kuppu Reddi,* (1921) 61 I.C. 762=13 L.W. 260.

[1] *Arumugam* v. *Panayadian,* (1920) 40 M.L.J. 475=1921 Mad. 425 =62 I.C. 630.

[2] *Mohomed Raza Ahmed* v. *Zahoor Ahmad,* (1930) 52 All. 979=1930 All. 858=132 I.C. 21.

[3] *Gokarakonda Narasimha Rao* v. *Gokarakonda Papanna,* (1920) 56 I.C. 519=43 Mad. 436=38 M.L.J. 327.

[4] *Narayanan Chettiar* v. *Lakshmanan Chettiar,* 29 I.C. 1=39 Mad. 456=28 M.L.J. 571.

[5] *Narasimha Rao* v. *Papanna,* (1920) 56 I.C. 519=43 Mad. 436= 38 M.L.J. 327.

[6] Rustamji, p. 386.

[7] *Asaram* v. *Ratan Singh,* (1916) 32 I.C. 242 (Nag.); also see *Kaka* v. *Faqir Chand,* 1934 Lah. 601=152 I.C. 633=35 P.L.R. 722.

[8] 25 All. 407=30 I.A. 165 (P.C.); and *Dnyanu Yesu* v. *Vishnu Parasharam,* 1925 Bom. 372=87 I.C. 721=27 Bom.L.R. 495.

**1241. SUIT BY WARD.**—The **Bombay High Court,** has explained in *Hanmant Gurunath* v. *Ramappa,*[15] that

**Bombay.**

> "the cause of action for setting aside an improper alienation by the guardian of a minor arises from the date of alienation. But the remedy contemplated by Art. 44 is open to the ward for three years from the date of his attaining majority".

In this case it was doubted **whether Art. 44 would apply to a suit by a transferee of the ward.** But, it was held that there is no objection to the ward joining his transferee in a suit to set aside **the alienation,** though as a result of setting aside the alienation the property would go to the transferee.[16] The analogy of the view taken in certain cases[17] that an assignee of a minor's interest cannot get the benefit of S. 6 of the Indian Limitation Act, could not be applied against the plain meaning of the article.[18] An assignee cannot take advantage of S. 6 of the Limitation Act.[19] But, S. 6 of the Limitation Act has nothing to do with the point arising for discussion here.[20] However, this article had been held applicable in *Fakirappa* v. *Lumanna*,[21] to a suit by the next reversioners of a Hindu minor suing to redeem a mortgage of the minor's property, where the minor's mother acting as his natural guardian had sold the equity of redemption to the mortgagee. Similarly in ***Lakshmava*** v. *Rachappa*,[22] Art. 44 was applied to a suit brought by the transferee of the ward after the latter attained majority, for possession of property which had been alienated by the natural guardian of the minor.

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[9] *Sunder* v. *Shiaman,* (1922) 68 I.C. 731=1922 Lah. 386; *Veerasami Naidu* v. *Sivagurunatha,* (1925) 86 I.C. 234=1925 Mad. 793=21 L.W. 111; also see *Kaka* v. *Faqir Chand,* 1934 Lah. 601=152 I.C. 633.

[10] *Sheo Raj* v. *Ajudhia,* (1929) 116 I.C. 195=1929 Oudh 284; also see *Kanna Pannikar* v. *Nanchan,* 46 M.L.J. 340=1924 Mad. 607=78 I.C. 564 (Alienation by Karnavan of a Malabar Tarvad).

[11] *Shampuri* v. *Ramchandra,* (1925) 88 I.C. 268=1925 Nag. 385.

[12] *Kesheo* v. *Jagannath,* (1926) 92 I.C. 121=1926 Nag. 81=22 N.L.R. 5 (F.B.).

[13] (1925) 88 I.C. 268=1925 Nag. 385, *supra.*

[14] *Waman* v. *Vishnu,* (1928) 107 I.C. 516=1928 Nag. 151; Followed *Asaram* v. *Ratan Singh,* 32 I.C. 242=12 N.L.R. 12.

[15] (1925) 49 Bom. 309=1925 Bom. 292=27 Bom.L.R. 211=86 I.C. 879.

[16] *Ibid.,* 49 Bom. 309; see and cf. *Jhaverbhai Hathibai* v. *Kabhai Becher,* (1933) 1933 Bom. 42=34 Bom.L.R. 1512=141 I.C. 806 (Where the minor had withdrawn from the suit without the consent of the subsequent purchaser, the latter could not continue the suit).

[17] *Rudra Kant* v. *Nobo Kishore,* 9 Cal. 663=12 C.L.R. 269; *Mahadev* v. *Babi,* 26 Bom. 730=4 Bom.L.R. 513; and *Rangasami* v. *Thangavelu,* (1919) 42 Mad. 637=50 I.C. 380=1919 M.W.N. 448.

**Madras.**

1242. The **Madras High Court** has observed in *Doraisami* v. *Nondisami*,[23] that Art. 44 of the Limitation Act seems to give each ward who attains majority a separate right to sue to set aside the transfer of his property made by his guardian and the language of column 3 of the article suggests that the cause of action itself arises on the attainment of majority and not before.

> "This view is capable of being further supported by the fact that a minor, as soon as he attains majority and *on the date of his* attaining majority, has got the right to repudiate or ratify a transaction effected by his guardian during his minority."[24] "But there are cases . . . which show that even before the ward attains majority, a suit could be brought on behalf of the minor by a next friend to set aside the alienation made by the guardian, though, in such a case, the Court has got large powers of interference with the course of litigation."[25]......"This seems to indicate that the cause of action to set aside the alienation arises at once, though the ward has three years to sue after he attains his majority, *provided that a previous suit had not been bona fide instituted during his minority on that same cause of action* on his behalf and *bona fide* conducted to its natural termination."[26]

In *Ramasami* v. *Govindammal*,[27] Wallace and Thiruvenkatachariar, JJ., have held that a suit by transferee from minor is governed by Art. 44. Two Bombay decisions were discussed and followed in support of the view, that so far as Art. 44 is concerned, those claiming under the ward stand in the same position as the ward himself and if he is barred under Art. 44 they are in no better position.[28] The opposite view that 12 years rule is to be applied to the assignee of the ward, would result in many anomalies and could not be accepted as sound. This was the view taken by **the Bombay High Court** in *Hanmant Gurunath* v. *Ramappa Lagamappa,*[29] based on a construction leading to such anomalous results, as for instance,

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[18] *Hanmant Gurunath* v. *Ramappa Lagumappa*, (1925) 49 Bom. 309 =86 I.C. 879 (881).

[19] *Sitla Bux Singh* v. *Ram Nuvar*, (1925) 90 I.C. 741=1926 Oudh 20=2 O.W.N. 811; Relied on *Muhammad Nur Khan* v. *Lachhmi Narayan*, 66 I.C. 101=1922 Oudh 31.

[20] *Hanmant Gurunath* v. *Ramappa Lagumappa*, (1925) 49 Bom. 309= 86 I.C. 879 (881)=1925 Bom. 292.

[21] (1920) 44 Bom. 742=58 I.C. 257=22 Bom.L.R. 680.

[22] (1918) 42 Bom. 626=46 I.C. 22=20 Bom.L.R. 408.

[23] (1913) 21 I.C. 410=38 Mad. 118=25 M.L.J. 405.

[24] *Ibid.*, 21 I.C. 410 (412)=38 Mad. 118.

[25] *Ibid.*, 21 I.C. 410 (412)=38 Mad. 118.

[26] *Ibid.*, 21 I.C. 410 (412).

[27] 1929 Mad. 313=56 M.L.J. 332=118 I.C. 481=29 M.L.W. 169 =1929 M.W.N. 124.

> "if the ward dies soon after he attains majority but more than 12 years after the date from which time begins to run, his legal representatives will be barred if Art. 44 does not apply to them as they will not have the benefit of Sub-S. (3) of S. 6 as the minor died after his disability had ceased".

The Madras High Court, therefore, preferred to follow the Bombay view in the case of *Laxmava* v. *Rachappa.*[30]

> "It proceeds on **the principle,** that a person who claims under another whether as his legal representative or as assignee should in such character be governed by the same rule as would apply to the person from whom he derives his claim, the only limitation being that he is not entitled to any privileges or exemptions which the latter had."[30]

In *Tholeti Ramiah* v. *Konala Brahmiah,*[31] Venkatasubba Row, J., was dealing with a case where a minor's property was alienated by his mother acting as his guardian. The minor died before attaining majority, and was succeeded by his mother. After the mother's death the reversionary heirs instituted a suit to set aside the sale more than three years after the minor's death. It was held that the suit was time-barred. In the case of the minor himself, the cause of action arose from the date of the alienation, and S. 6 only made minority a cause for suspending limitation. Article 44 was drafted fixing the starting point as the attaining by the infant of his majority. But this article

> "does no more than express the result of applying to the particular kind of case it contemplates, the general principles embodied in Ss. 6 and 8, Limitation Act".

This view receives support from the observations of Sadasiva Aiyar, J., in *Doraswami* v. *Nondisami,*[32] a case decided by a Bench of three Judges. The learned Judge, therefore, concluded that

> "the limitation is therefore to be reckoned from the death of the ward. In that case the fact that on his death the estate is taken by a female heir makes no difference".[33]

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[28] *Laxmava* v. *Rachappa,* (1918) 42 Bom. 626=46 I.C. 22=20 Bom. L.R. 408; *Fakirappa* v. *Lammanna,* (1920) 44 Bom. 742=58 I.C. 257=22 Bom.L.R. 680 (F.B.).

[29] (1925) 49 Bom. 309=1925 Bom. 292 (Not followed in 1929 Mad. 313, *supra*).

[30] (1918) 42 Bom. 626=46 I.C. 22=20 Bom.L.R. 408; Followed in 1929 Mad. 313, *supra.*

[31] 1930 Mad. 821=59 M.L.J. 196=1930 M.W.N. 708=32 M.L.W. 206=127 I.C. 801.

[32] (1915) 38 Mad. 118=21 I.C. 410.

[33] *Ramiah* v. *Brahmiah,* 1930 Mad. 821 (823)=59 M.L.J. 196=127 I.C. 801.

1243. Where a Hindu widow, acting as guardian or mother of her minor son, made an alienation of certain property, and the son having died before attaining majority, the widow adopted plaintiff, who brought a suit some 12 years later to set aside the alienation by the widow, it was held by Mitter and Maclean, JJ., that if the alienation was made by the widow as guardian of her minor son, the suit was not barred, it having been brought within three years after the plaintiff had attained his majority; if made by her as a Hindu widow, the suit was still not barred, the cause of action not arising until her death, when the plaintiff was a minor.[34]

**Calcutta.**

This view is supportable only on the ground that in such a case, the adopted son occupies the same position as the first ward for whom the guardian acted at the time of the alienation, and that a suit to set aside the alienation is not barred if brought within three years of the second ward's attaining his majority. This dictum is based on the supposition that the cause of action did not arise, and that time does not *commence* to run until the adopted son attains his majority.[35] This view has not been accepted as correct by Mr. Mayne, and it has been doubted by Mitra and Starling in their works on Limitation: and, it was distinguished and not followed in *Amrita Lal* v. *Jatindra Nath*,[36] where the cause of action in respect of the alienation made prior to plaintiff's adoption, was held to have arisen as soon as he was adopted, and the cause of action having accrued to the adopted son during his lifetime. Article 141, did not govern the suit by plaintiffs, as his reversionary heirs.

1244. **SUIT TO SET ASIDE.**—The scope of Art. 44 is a suit to set aside a transfer made by a guardian of property belonging to the minor, brought by him after attaining majority.

Where the alienation made by the guardian, in respect of property belonging to his ward, is a void transfer, or an absolute nullity, the minor is not required to get it set aside under Art. 44 of the Limitation Act, but he may sue for possession within a period of 12 years as prescribed by Art. 144, Sch. I, Limitation Act.

**Void transfers.**

On the other hand, where the alienation is not void, but voidable only, and would bind the minor until it is set aside, he cannot ignore the transaction, but must come forward to sue to set aside the transfer within the shorter periol of 3 years prescribed by Art. 44, even though the suit has been framed as a suit for possession, or for other suitable relief with a longer period of prescribed limitation.

**Voidable transfers.**

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[34] *Prosanna Nath* v. *Afzolonnessa,* (1878) 4 Cal. 523=3 C.L.R. 311.

[35] Mitra's Limitation Act, Vol. I, p. 347.

[36] (1904) 32 Cal. 165.

"It has generally been recognized that the Limitation Act draws a distinction between voidable transactions and void transactions and while a longer period is allowed for remedies arising out of void transactions a shorter period has been prescribed for all actions that seek to avoid voidable transactions."[37]

## 1245. ARTICLE APPLIED—ILLUSTRATIVE CASES.

**Privy Council.**

(1) In the case of *Gnanasambanda* v. *Velu Pandaram,*[38] where the sale-deed executed by the mother of a minor, described as guardian, purported to transfer the hereditary right of management of a religious endowment, their Lordships of the Privy Council, held that the property dealt with was not transferable, and the sale was inoperative in giving any title to the purchaser. However it was observed, by way of an *obiter dictum* that the minor defendant "had by Art. 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so, and by S. 28 of the Limitation Act his right became extinguished". [Mookerji, J., in *Sham Chandra Dafadar* v. *Gadadhar Mandal,*[39] has taken this observation to support the view that the alienation for consideration by the natural guardian of an infant is *voidable* transaction which has to be avoided within the period prescribed by Art. 44, Sch. I, to the Limitation Act. However, Wallis, C.J., in *Narayanan* v. *Lakshmanan,*[40] has expressed the view that the observations above referred to did not correctly represent what their Lordships intended to lay down. It would appear that the transaction though void from the point of view of *nature of the property* dealt with, was but *voidable* merely, considered as a transaction between the guardian and ward, not involving any defect in guardian's power or action.[41]

(2) Art. 44 can be applied in suits to set aside **alienations** made **during the minority of** the adult **members of the coparcenary** by persons purporting to act as guardian.[42]

(3) **An alienation by a Christian mother** acting as a natural guardian of their minor child is *voidable,* and not void; and, Art. 44 applies to a suit by the minor to set aside the transfer.[43]

(4) **An alienation made by a certificated guardian,** on a permission obtained by a fraudulent misrepresentation, is only voidable, and a suit by the ward to set aside the transfer is governed by Art. 44, and not by Art. 144, Sch. I, Limitation Act.[44]

(5) **An alienation by a *de facto* guardian of a Hindu minor,** not for a binding purpose is not *per se* void, but only voidable, and becomes valid where it is ratified by the minor on attaining majority. Under the Hindu Law, the powers of a *de facto* guardian of a minor are the same as those of a *de jure*

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[37] Per Varadachariar, J., in *Koya Ankamma* v. *Konaganchi,* (1934) 1935 Mad. 1=1934 M.W.N. 960=40 L.W. 760.

[38] (1899) 27 I.A. 69 (76)=23 Mad. 271=4 C.W.N. 329 (P.C.).

[39] (1911) 13 C.L.J. 277 (282)=9 I.C. 377.

[40] (1915) 39 Mad. 456=28 M.L.J. 571=29 I.C. 1.

[41] Dr. Pal's Limitation Act, p. 563.

[42] *Koya Ankammal* v. *Konaganchi,* 1935 Mad. 1=154 I.C. 616=40 L.W. 760.

[43] *Bangarammal* v. *Lydia Kent,* (1934) 152 I.C. 546=1934 Mad. 605=57 Mad. 1062=67 M.L.J. 322=40 L.W. 406=1934 M.W.N. 499.

[44] *Ram Charitter* v. *Suraj Teli,* 1931 A.L.J. 997=53 All. 738=136 I.C. 71=1932 All. 108.

guardian.[45] However, under the influence of the Privy Council rulings in *Matadin* v. *Ahmad Ali*,[46] *and Imam Bandi* v. *Mutsaddi*,[47] the distinction between Hindu Law and Mahomedan Law in this respect has been lost sight of in several cases.[48]

(6) **An alienation by a natural or a lawful guardian**, which is beyond the scope of his authority, or without the justification of a legal necessity, is not void, but *voidable* merely at the option of the minor, and a suit to set aside such alienation is governed by Art. 44, and not by Art. 144, even though the suit is brought in the form of relief claiming possession of the property transferred.[49] A transfer by the natural guardian of a minor of his ward's property is voidable and not void, and a suit to set aside such transfer must be brought within the shorter period of limitation prescribed by Art. 44, Sch. I, Limitation Act.[50] The period of limitation will not be that prescribed for a suit for possession of immoveable property.[1] A suit to set aside an alienation of the properties surrendered by the releasee's guardian is governed by Art. 44 of Sch. I, Limitation Act.[2]

(7) When a guardian acting in his capacity of guardian sells or otherwise transfers the property of his ward, the transaction is not void, but only voidable; and when property cannot be recovered without avoiding it, it is now settled that Art. 44 will apply to the suit.[3] **A suit for cancelling a deed of sale** executed by the plaintiff's guardian on the ground of fraud and misrepresentation, **and for recovery of possession** of the properties comprised therein falls within Art. 44, and not within Art. 144, Limitation Act.[4] Though Art. 44 describes the suit to be brought by the ward as

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[45] *Seetharamamma* v. *Appiah,* (1925) 92 I.C. 827=1926 Mad. 457=23 L.W. 285=1926 M.W.N. 238; *Kesheo* v. *Jagannath,* (1926) 92 I.C. 121=1926 Nag. 81 (F.B.); *Mastu* v. *Nandlal,* 73 P.R. 1890 (F.B.); *Tapassi* v. *Raja Ram,* (1930) 115 I.C. 417=1930 Lah. 136; *Adeyya* v. *Goomda,* 1931 Mad. 274=131 I.C. 609.

[46] (1912) 34 All. 213=13 I.C. 976 (P.C.).

[47] 45 Cal. 878=47 I.C. 513 (P.C.).

[48] *Balappa* v. *Chanbasappa,* 17 Bom.L.R. 1134=33 I.C. 444; *Aunandappa* v. *Totappa,* 33 I.C. 441=17 Bom.L.R. 1137 (Note); *Laloo Karikar* v. *Jagat,* (1921) 25 C.W.N. 258=62 I.C. 428; *Thyammal* v. *Rupanna,* 38 Mad. 1125; *Krishnadhan* v. *Brojendra,* 34 C.W.N. 642; *Satrohan* v. *Inder Bikram,* 10 Oudh Cas. 367; *Ghandulal* v. *Anant Ram,* 135 P.R. 1892; *Uttam Singh* v. *Gurumukh Singh,* 15 P.R. 1913=19 I.C. 235.

[49] *See* **S. 1231,** *ante*; *Laxmava* v. *Rachappa,* (1918) 42 Bom. 626=46 I.C. 22=20 Bom.L.R. 408; *Fakirappa* v. *Lumanna,* 44 Bom. 742=58 I.C. 257; *Kondaji* v. *Dagadu,* 1935 Bom. 259=37 Bom. L. R. 225; *Ramaswami* v. *Govindammal,* 1929 Mad. 313=56 M.L.J. 332=118 I.C. 481; *Data Ram* v. *Raghunath,* (1929) 116 I.C. 893=11 L.L.J. 108; *Labhamal* v. *Malik Ram,* 89 I.C. 602=6 Lah. 447=1925 Lah. 619; *Khushia* v. *Faiz Muhd.,* (1928) 9 Lah. 33=103 I.C. 365=1928 Lah. 115; *Tarachand* v. *Murlidhar,* 61 I.C. 384=3 L.L.J. 280.

[50] *Brojendra Chandra* v. *Prosunna Kumar,* (1921) 59 I.C. 589=24 C.W.N. 1016.

[1] *Lachiah* v. *Mukkalinga,* (1907) 30 Mad. 393.

[2] *Sattyalakshmi* v. *Jagannadhan,* (1917) 42 I.C. 939=34 M.L.J. 229.

[3] *Arumugam Pillai* v. *Pandigam,* (1921) 62 I.C. 630=1921 Mad. 425=40 M.L.J. 475.

[4] *Ranga Reddi* v. *Narayana Reddi,* (1905) 28 Mad. 423.

a suit merely to set aside the transfer of his property by his guardian, if the transferee has obtained, and is in possession and the ward has, therefore, to add a prayer for possession, Art. 44 alone still applies to the suit, though it is brought for both reliefs.[5]

(8) The period of limitation for a **suit for a declaration** that a sale of the plaintiff's property by his mother as his guardian is not binding on him is three years from the date of the plaintiff's majority under Art. 44 of the Limitation Act.[6] Where a Hindu son sued for a declaration that a release deed executed by mother-guardian during his minority is invalid, and prayed for injunction restraining the defendant from interfering with plaintiff's participation in the partnership business, *held,* that Art. 44 of Sch. I to the Limitation Act applied to the case as the relief was really one for cancellation of the release deed.[7]

(9) **A suit for possession** of immoveable property by a minor on the allegation that the sale of the same during his minority by his mother was not for his benefit, and, therefore, was not binding, is governed by Art. 44, and not by Art. 144 of Sch. I to the Limitation Act.[8]

(10) Art. 44 applies to alienations of **unofficial guardians** as well.[9] Where certain minors of a Gond family, not governed by Hindu Law, with their mother were living with their step-brother, who managed the whole estate, and was regarded by the family and others as the natural and rightful guardian of the minor's property, it was held that he must, according to equity and justice, be treated to be, as against the mother, a guardian both *de facto* and *de jure.*[10]

### 1246. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

(1) In *Mata Din* v. *Ahmad Ali,*[11] the Judicial Committee of the Privy Council held that Art. 44 of the Limitation Act has no application to a sale where the **sale** is effected, **not by a guardian but by a wholly unauthorized person.** In such a case, a suit for possession of the property by the ward would be governed by Art. 144, Limitation Act. [This was a case where the brothers of a Mahomedan minor were held to have no right whatever to act except under the authority of an appointment by the Court. It was observed that the situation of an unauthorized guardian was not bettered by describing him as a *de facto* guardian.]

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5. *Kandasami Naicken* v. *Irusappa Naicken,* (1917) 40 I.C. 664=41 Mad. 102=33 M.L.J. 309; also see *Ramaswami* v. *Govindammal,* 56 M.L.J. 332=118 I.C. 481=1929 Mad. 313 (317) (It is not the form of relief claimed which determines the real character of the suit).

6. *Sivavadivelu* v. *Ponnammal,* (1912) 15 I.C. 365 (Not Foll. *Unni* v. *Kunchi,* 14 Mad. 26).

7. *Doraiswamy* v. *Thangavelu,* 1929 Mad. 668=119 I.C. 38.

8. *Data Ram* v. *Raghunath,* 11 L.L.J. 108=116 I.C. 893; also see *Labha Mal* v. *Malak Ram,* 6 Lah. 447=89 I.C. 602=1925 Lah. 619.

9. *Irangauda Fakirgauda* v. *Nunjappa,* 76 I.C. 636=1924 Bom. 517.

10. *Kolhu* v. *Bel Singh,* (1922) 66 I.C. 303=1922 Nag. 201=17 N.L.R. 183.

11. (1912) 13 I.C. 976=34 All. 213=39 I.A. 49 (P.C.); also see and cf. *Punjab Rao* v. *Atma Ram,* (1925) 87 I.C. 1018=1926 Nag. 124 and *Uma Charan* v. *Guiram Bag,* (1924) 83 I.C. 1040=1924 Cal. 1008=39 C.L.J. 394 (Art. 44 not applied to a suit to set aside a transfer of property by a wholly unauthorized person); *Vithu* v. *Devi Das,* (1919) 51 I.C. 943=15 N.L.R. 155 (Sale by a step-mother held to be by an unauthorized guardian).

(2) Where an **alienation by a *de facto* guardian of a Mahomedan minor,** who has no authority to act as his guardian under Mahomedan Law, *e.g.*, a mother, or a step-mother, or a brother, the **alienation is a nullity,** and does not require to be set aside under Art. 44, Sch. I, Limitation Act. The transaction being void *ab initio,* a suit by the minor to recover possession of the property will be governed by Art. 144, Limitation Act.[12]

(3) Art. 44 does not apply to cases of alienations by *de facto* guardians amongst persons governed by Mahomedan law.[13] Under the Mahomedan law a mother has no power as *de facto* guardian of her infant children to alienate their property. Such an alienation is deemed to be wholly unauthorized.[14] This principle has in some cases been applied to Hindu minors, under a misapprehension of the scope of the pronouncement of Privy Council rulings applicable to the case of Mahomedans.[15]

(4) Where the **property** has been **alienated by the guardian** as if it were **his own,** and the transferee treats it as the property of the alleged guardian personally, Art. 44 cannot apply. It cannot be said to be a case of a transfer of minor's property by his guardian, and minor's interest is not affected by such transfer which is void.[16] Art. 44, Sch. I to the Limitation Act does not apply where the property transferred does not belong to the ward. One condition precedent is that the **property must belong to the ward.**[17] Another condition is that the transferor must be a real guardian acting or purporting to act as such guardian.

(5) In *Purushotama* v. *Brundavana,*[18] Ramesam, J., has divided suits brought by persons to set aside alienations by their guardians during their minority into **three categories:** "(1) Where guardians are *de jure* guardians, such suits are obviously governed by Art. 44. . . . See *Fakirappa*

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[12] *Dip Chand* v. *Munni Lal,* 52 All. 110=1929 All. 879=122 I.C. 680; also see and cf. *Brojendra* v. *Prosanna,* (1920) 59 I.C. 489=32 C.L.J. 48=24 C.W.N. 1016; *Latchia* v. *Mukkalinga,* (1907) 30 Mad. 393=17 M.L.J. 220; *Fakirappa* v. *Lumanna,* (1920) 44 Bom. 742=58 I.C. 257=22 Bom. L. R. 680; *Labhamal* v. *Malak Ram,* 1925 Lah. 619=6 Lah. 447 and *Khushia* v. *Faiz Muhammad,* (1928) 9 Lah. 33=1928 Lah. 115.

[13] *See* **S. 1232 and cf. 1245, *ante*.** *Mata Din* v. *Ahmed Ali,* (1912) 34 All. 213=13 I.C. 976 (P.C.); *Imam Bandi* v. *Mutsaddi,* 45 Cal. 878=47 I.C. 513 (P.C.); *Zaida* v. *Roshnai,* (1928) 113 I.C. 53=1928 Lah. 250=10 L.L.J. 183; *Saadulla* v. *Suleman,* 84 I.C. 923=1925 Lah. 239=6 L.L.J. 516; *Sardar Shah* v. *Haji,* 28 P.R. 1909=1 I.C. 545=182 P.L.R. 1908; *Tajjad* v. *Mohammed Zulfikar,* 83 P.R. 1916=33 I.C. 943.

[14] *Lalloo* v. *Jagat,* (1921) 62 I.C. 428=28 C.W.N. 258; *Rajab* v. *Wazir,* (1916) 34 I.C. 85=1 P. L. J. 188; *Husen* v. *Raja Ram,* 10 N.L.R. 133=26 I.C. 813 (Guardian *de facto* but no *de jure*).

[15] *Balappa* v. *Chanbasappa,* (1916) 33 I.C. 444 (Bom.); *Anandappa* v. *Totappa,* 33 I.C. 441=17 Bom. L. R. 1137 (Note); *Thayammal* v. *Kuppanna,* 38 Mad. 1125; *Satrohan* v. *Inder Bikram,* 10 Oudh Cas. 367; *Ghandu Lal* v. *Anant Ram,* 135 P.R. 1892; *Uttam Singh* v. *Gurmukh Singh,* 15 P.R. 1913=19 I.C. 235; *Punjab Rao* v. *Atma Ram,* 1926 Nag. 124=87 I.C. 1018 (Married sister not an authorized guardian of her unmarried sister).

[16] *Bhagwan Das* v. *Kashi Prasad,* 1935 All. 417.

[17] *Iqbal Narain* v. *Bankey Lal,* 1930 Oudh 82=128 I.C. 72=7 Oudh W. N. 150.

[18] 1931 Mad. 597 (598)=33 L.W. 664=1931 M.W.N. 417=133 I.C. 773.

v. *Lumanna,*[19] in which certain observations suggesting the opposite view in *Balappa* v. *Chanbasappa*[20] and *Anandappa* v. *Totappa*[21] were disapproved." "(2) Alienations by *de facto* guardians: to this class Art. 44 does not apply: vide *Thayammal* v. *Kuppanna Koundan*[22] and *Ramaswami Pillai* v. *Kasinatha Aiyar.*[23] Such alienations by *de facto* guardians can be ignored by a minor and he can bring a suit within the larger period, generally twelve years allowed by the general law. . . . The word *voidable* in such cases is not used in the same sense in which it is used in the law of contracts." "(3) Where the alienation is made by a person who pretends to be a guardian, though he is not the real guardian and is only an intermeddler just for the purpose of the transaction."

(6) Art. 44 does not apply to cases where the property transferred cannot be validly alienated, *e.g.*, the interest of a reversioner expectant on the death of a Hindu female which is a mere *spes successionis*. Where an alienation by a guardian is absolutely void, the ward can bring a suit for possession against the alienee within twelve years of the deed of sale.[24]

(7) Similarly, if a sale is held to be void owing to fraudulent registration, there will be no need to set it aside, and a suit to recover possession of the properties by the sale-deed will not be barred, though brought by the ward within twelve years from the date of the sale.[25] Where a sale-deed executed by a guardian in respect of properties in a certain district was registered in another place by including a small item of property situated in the latter District, it was held that the sale-deed was not duly registered, and being totally inoperative, Art. 144, and not Art. 44, applied to a suit to recover possession of the properties of the minor.[26]

(8) A manager of a joint family cannot be said to be *guardian* of a minor coparcener, within the meaning of Art. 44, Sch. I, Limitation Act, for the simple reason that such an interest is not individual property at all. Accordingly where an alienation has been effected by the manager of the joint Hindu family, the minor coparcener is not bound to sue within three years of such alienation, and Art. 144, would apply to the suit.[27] Art. 44 has never been applied to set aside a sale by a *karta* of joint family property, as he is not the *guardian* of the property of his brother or other coparceners in the

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[19] (1920) 44 Bom. 742=58 I.C. 257=22 Bom. L. R. 680.

[20] (1915) 33 I.C. 444 (Bom.).

[21] (1915) 17 Bom. L. R. 1137 (Note).

[22] (1915) 38 Mad. 1125=26 I.C. 179.

[23] 1928 Mad. 226=108 I.C. 529=1927 M.W.N. 356. See and cf. cases noted in S. 1232, *ante;* also S. 1245, Illustration (5), above.

[24] *Maroti Suryabhai* v. *Raiwant Rao,* 107 I.C. 897=1928 Nag. 262.

[25] *Sobhanadri Apparao* v. *Iruganti Venkoba,* 54 Mad. 352=129 I.C. 245=1931 Mad. 45=60 M.L.J. 701.

[26] *Narasimha Rao* v. *Papanna,* 43 Mad. 436=56 I.C. 519=38 M.L.J. 227.

[27] See **S. 1240,** *ante. Gharibullah* v. *Khalik,* 25 All. 407=30 I.A. 165 (P.C.); *Asaram* v. *Ratan Singh,* (1916) 32 I.C. 242 (Nag.); *Kaka* v. *Faqir,* 1934 Lah. 601=152 I.C. 633; *Hanmantappa* v. *Dundappa,* 1934 Bom. 234=151 I.C. 1043; *Veerasami* v. *Sivagurunatha,* (1925) 86 I.C. 234=1925 Mad. 793; *Sheoraj* v. *Ajudhia,* (1929) 116 I.C. 195=1929 Oudh 284=4 Luck. 503; *Waman* v. *Vishnu,* (1928) 107 I.C. 516=1928 Nag. 151; *Dnyanu* v. *Vishnu,* 1925 Bom. 372=27 Bom. L. R. 495=87 I. C. 721 (Elder brother, as manager of the family, is not the guardian of his minor brothers, because there can be no guardianship in such a case).

family.[28] Article 44 of Sch. I to Limitation Act has no application to a suit by a minor member of a joint undivided Hindu family on attainment of majority to declare that an alienation made by his natural guardian is not valid, and is not binding upon him.[29]

(9) A lease which amounts to a clog on the equity of redemption is a void transfer; and, such a lease executed by a guardian does not require to be set aside within three years under Art. 44, Sch. I, Limitation Act.[30]

(10) The members of a Malabar tarwad need not sue to set aside an invalid alienation by the karnavan, but can sue to recover possession on the strength of title, and it makes no difference that the *karnavan* purported to act not only as *karnavan,* but also as the guardian of the minor members of the family.[31]

(11) A suit for recovery of possession on declaration of title, impeaching a transfer (lease) by a person other than the natural guardian of the minor, the transaction not being for legal necessity or benefit of the minor, is not barred by limitation if brought within twelve years of the transfer.[32]

(12) If a ward on attaining majority does not seek to set aside a transaction, but sues for possession of property on the ground that the transaction or transfer entered into by the guardian is *in fact* a mortgage though it is *in form* a sale, that would not be covered by Art. 44, Limitation Act.[33]

1247. **EFFECT OF BAR OF LIMITATION.**—It has been held by the **Madras High Court,** that an alienation by a guardian ought to be set aside by a ward by instituting a suit within the period mentioned in Art. 44 of the Limitation Act. On failure of the ward to sue to set aside the alienation within three years of his attaining majority under Art. 44 of the Limitation Act, his right to the property is wholly extinguished under **S. 28** of the Act, and title vests exclusively in the alienee from that date.[34] Where a suit was brought by the plaintiff for possession of an hereditary office to which Art. 124 of the Limitation Act was applicable, and the defendant who had attained majority, had not sued to set aside the sale by his guardian of the property of the endowment, the Judicial Committee of the **Privy Council** held that by S. 28 of

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28. *Kalyan Singh* v. *Pitambar Singh,* (1915) 27 I.C. 687=13 A.L.J. 94.

29. *Appanna Prosada* v. *Appanna Mahapatro,* (1917) 40 I.C. 145 (Mad.) (Folld. *Kathaperumal* v. *Ramalinga Thevan,* 27 I.C. 695=17 M.L.T. 138).

30. *Parashram* v. *Lakshmi Bai,* 53 Bom. 360=1929 Bom. 186=115 I.C. 405.

31. *Kanna Pannikkar* v. *Nanchan,* (1924) 78 I.C. 564=1924 Mad. 607.

32. *Krishnadhan Laha* v. *Brojendra Nath,* 1930 Cal. 748=34 C.W. N. 642.

33. *Shivbasappa Ningappa* v. *Balapa Basappa,* (1923) 81 I.C. 673=25 Bom. L. R. 1209=1924 Bom. 172.

34. *Kandasami Naicken* v. *Irusappa Naicken,* (1917) 40 I.C. 664=41 Mad. 102 (105).

the Limitation Act his right became extinguished.[35] The minor has to exercise his option of avoiding a voidable transaction of transfer of property by his guardian, within three years of his attaining majority.[36]

> "If he allows the period of three years to elapse, his title to the property will be extinguished, inasmuch as the transferee holds the property transferred by the natural guardian not under a void but a voidable transaction. After the expiry of three years from the date of attaining majority the transfer cannot be set aside, and then a suit for possession of immoveable property cannot be maintained by the ward, inasmuch as, during the subsistence of a valid deed of transfer which has not been avoided by the ward the title to the property must be deemed to be with the transferee."[37]

**Article not applicable to defence.**

**1248.** However, it is competent to a defendant to defend his rights to the land in his possession by relying on the invalidity of the transfer, notwithstanding he had not sued to set it aside within three years from the time he attained his majority.[38] Section 28 of the Limitation Act has no application to persons who are in possession and who have had no occasion to sue for recovery of possession.[39] Section 28 only operates to extinguish the right to any property of a person who does not sue for its *possession* within the time allowed by law. If the party were in possession of property throughout, there being no occasion for their bringing a suit at all, S. 28 would not in that case apply.[40] In a suit by the vendee for possession brought after the expiry of three years after attainment of majority by the ward, the latter is entitled to plead the invalidity of the sale though he could not actually sue to set it aside.[41] Thus only in a case where possession has passed to the purchaser the title of the ward will be extinguished on the expiry of the period provided under Art. 44, if he has failed to institute a suit for setting aside the transfer.[42] Cases contemplated by Art. 44 are those in which "transfer of property" has been made by a guardian, and this article does not apply if in spite of the deed of transfer executed by the guardian, the erstwhile minor has been in possession of his property.[43]

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[35] *Gnanasambanda* v. *Velu Pandaram*, 23 Mad. 271 (279) (P.C.).

[36] *Dip Chand* v. *Munni Lal*, 1929 All. 879 (881)=1929 A.L.J. 1248.

[37] *Ibid.*

[38] *Lakshmi Doss* v. *Roop Laul*, 30 Mad. 169 (F.B.); Reld. in *Madugula Latchiah* v. *Pally Mukkalinga*, 30 Mad. 393 (396)=17 M.L.J. 220.

[39] *Orr* v. *Sundra Pandia*, (1893) 17 Mad. 255.

[40] *Chauhar* v. *Mansha Singh*, (1922) 70 I.C. 966 (2) (Lah.).

[41] *Chinnaswami* v. *Krishnaswami*, (1918) 48 I.C. 856=42 Mad. 36 =35 M.L.J. 652.

[42] *Latchiah* v. *Mukkalinga*, (1907) 30 Mad. 393; *Kandasami* v. *Irusappa*, 41 Mad. 102=33 M.L.J. 309.

[43] *Mahomed Raza* v. *Zahoor Ahmad*, 1930 All. 858.

1249. **STARTING POINT OF LIMITATION.**—In a case under Art. 44, the starting point is the date when the ward attained majority. And, the *onus* is on the plaintiff to prove that the suit was instituted within three years of his ceasing to be a minor.[44] This view of the Lahore High Court receives support from the Calcutta[45] and Madras[46] decisions.

**Ss. 6, 7 and 8, Limitation Act.**

1250. *See* notes under Ss. 6, 7 and 8 of the Limitation Act. The **Madras High Court** has observed in *Ramiah* v. *Brahmiah,*[47] that Art. 44 is only an illustration of a specific case under Ss. 6 and 8; and in *Doraiswami* v. *Nondisami,*[48] the view taken was that this article must be read along with Ss. 6 and 7. Abdul Rahim, J.'s view that the applicability of Art. 44 would not preclude the applicability of the first part of S. 7 also has been upheld on Letters Patent appeal, but Sundara Aiyar, J., was of opinion per *contra,* that S. 7 would be inapplicable to a case governed by this article. The majority view is supported by the Madras decision in *Mahableshwar* v. *Ram Chandra,*[49] but a contrary view has been held by the Allahabad High Court in *Ganga Dayal* v. *Mani Ram.*[50] The Privy Council decision in the case of *Jowahir Singh* v. *Udai Prakash*[1] seems to approve of the Allahabad view. The Privy Council ruling has been followed by the **Madras High Court** in *Narayana* v. *Venkataswami,*[2] but distinguished in the case of *Surayya* v. *Subbamma.*[3] The conclusion reached by the Madras High Court was that if the eldest brother, who is naturally the managing member of the family, does not bring a suit within time to set aside an alienation, any suit by a younger brother would be barred inasmuch as the suit is barred against the elder brother. The Full Bench decision in *Doraiswami* v. *Nondisami,*[4] was followed, as its authority had not been challenged by any decision of that Court.

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[44] *Jagat Singh* v. *Balaga Singh,* (1922) 70 I.C. 984=1923 Lah. 254.

[45] *Prohlad Chandra* v. *Ram Saran,* (1924) 81 I.C. 680=1924 Cal. 420=38 C.L.J. 213; Reld. on *Brojendra Chandra* v. *Prosanna Kumar,* 59 I.C. 589=32 C.L.J. 48=24 C.W.N. 1016; *Krishna Dhan* v. *Bhagaban Chandra,* 34 I.C. 188.

[46] *Arumugam* v. *Pandigam,* 62 I.C. 630=40 M.L.J. 475.

[47] (1930) 59 M.L.J. 196.

[48] (1912) 38 Mad. 118 (F.B.); also see *Kuppuswami* v. *Kamalammal,* 43 Mad. 842.

[49] (1913) 38 Bom. 94=21 I.C. 350; also see *Bala Tatya* v. *Bala Raoji,* 45 Bom. 446.

[50] (1908) 31 All. 156.

[1] (1925) 53 I.A. 36=48 All. 152=50 M.L.J. 344=93 I.C. 216 (P.C.).

[2] (1926) 51 M.L.J. 845=1926 Mad. 1190=98 I.C. 31.

[3] (1927) 53 M.L.J. 677=1928 Mad. 42=106 I.C. 863=1927 M.W.N. 911.

[4] (1915) 38 Mad. 118=25 M.L.J. 405=21 I.C. 410 (F.B.).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 45. | To contest an award under any of the following Regulations of the Bengal Code:—<br>The Bengal Land-Revenue Settlement Regulation, 1822 (VII of 1822).<br>The Bengal Land-Revenue settlement Regulation, 1825 (IX of 1825)<br>The Bengal Land-Revenue (Settlement and Deputy Collectors) Regulation, 1833 (IX of 1833). | Three years. | The date of the final award or order in the case. |
| 46. | By a party bound by such award to recover any property comprised therein. | Three years. | The date of the final award or order in the case. |

## SYNOPSIS.

1251. Corresponding provisions.
1252-53. **Scope and application.**
1252. (*i*) Suit to contest an award.
1253. (*ii*) Suit to recover possession.
1254. **Award: Three essential elements of—**
    (*i*) a contest and decision;
    (*ii*) between parties to proceedings;
    (*iii*) Judicial character of enquiry;
    (*iv*) Illustrations.
1255. Article applied—Illustrative cases.
1256. Article not applied—Illustrative cases.
1257. **Starting point of limitation.**
    (*i*) Appeal against orders.
    (*ii*) Other provisions of law.
1258. **Article 46.**

## NOTES.

**1251. CORRESPONDING PROVISIONS.**—Act XIV of 1859, provided for these cases in its S. 1, cl. 16. Prior to this, Act XIII of 1848 made express provision for such suits.

In Act IX of 1871, Art. 44, Sch. II, corresponded to the present article, which is a re-enactment of Art. 45, Sch. II, Act XV of 1877.

1252. **SCOPE AND APPLICATION.**—Art. 46, unlike Art. 45, applies to suits by a party bound by the award.

**(i) Suit to contest an award.**

Art. 45, applies to a suit having for its object *"to contest an award"*, and not merely to recover possession of property subject to the order of the Revenue Authorities settling the amount of revenue payable. In the case of *Midnapore Zemindary Co., Ltd.* v. *Naresh Narain Roy,*[5] Art. 45 was not applied to a suit, the object of which was not to set aside an award made by the Revenue Authorities. The plaintiff was suing to recover possession, and if successful, the settlement made by the Revenue Authorities, in so far as it determined the amount of revenue payable by the holder thereof was not in any way to be affected.[6]

**(ii) Suit to recover possession.**

1253. Where a plaintiff sued not only for the cancelment of a survey award, but also to be restored to possession of land from which he had been subsequently dispossessed, his suit was held not to be barred because not brought within three years of the award, the latter claim being a different cause of action, to be governed by the limitation of twelve years (S. 1, cl. 12, Act XIV of 1859).[7]

1254. **AWARD—THREE ESSENTIAL ELEMENTS.**

**(i) A contest and a decision.**

—The "award" contemplated by Art. 45 of the Limitation Act **pre-supposes a contest between the parties, and a decision** after proper investigation into the points at issue, and Art. 45 is not, therefore, applicable to a case where land has been settled in another's name without any contest or a decision after investigation.[8] This article is not applicable, where there is no necessity for the plaintiff in a suit for confirmation of possession, to sue to set aside an award.[9] The term 'award' means an adjudication on rights as between rival claimants made by a Revenue officer in exercise of the judicial powers conferred by the Regulations mentioned in this article.[10]

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[5] (1922) 65 I.C. 833=33 C.L.J. 497=49 Cal. 37=1922 Cal. 345; Dist. *Abdul Kader* v. *Hamid Meah,* (1908) 12 C.W.N. 910; Reld. on *Maharaja Rajendar Pertub* v. *Laljee Sahoo,* (1873) 20 W.R. 427 (P.C.) and *Rughoabur Dyal* v. *Kishen Pertub,* (1879) 6 I.A. 211 (P.C.).

[6] *Latifa Khatun* v. *Tofer Ali,* (1927) 104 I.C. 655=55 Cal. 201=1927 Cal. 902 (Object of suit to obtain confirmation of possession, and no necessity to sue to set aside award) and *Mohima Chunder* v. *Raj Coomar,* 10 W.R. 22.

[7] *Mozuffar Ali* v. *Grish Chunder Doss,* (1868) 10 W.R. 71.

[8] *Latifa Khatun* v. *Tofer Ali,* (1927) 104 I.C. 655=55 Cal. 201=1927 Cal. 902; Reld. on *Nubo Kishen Roy* v. *Gobind Chunder Sein,* 6 W.R. 317; *Radha Pershad* v. *Ram Jeewun Singh,* 11 W.R. 389 and *Kristomoni Gupta* v. *Secretary of State,* 3 C.W.N. 99.

[9] *Ibid.,* 104 I.C. 655 (657)=55 Cal. 201=1927 Cal. 902; Folld. 65 I.C. 833=49 Cal. 37=1922 Cal. 345=33 C.L.J. 497, *supra.*

**(ii) Between parties to proceedings.**

An order of the Board of Revenue under Regulation VII of 1822, declaring a particular person entitled to a settlement of certain lands, is no ground for declaring a third person, who was no **party to** those **settlement proceedings** in any stage, debarred under Art. 44, Act IX of 1871 (corresponding with Art. 45, Act XV of 1877, and IX of 1908) from bringing a suit to establish his title in and to recover possession of the lands after three years and within the general law of limitation.[11] The operation of Act XIII of 1848, was in terms limited to awards made by the Revenue authorities under Bengal Regulation VII of 1822, IX of 1825, and IX of 1833.[12] A question arose, which it was not found necessary to determine whether the *thakbust* proceeding was an award made under either of those Regulations, as the suit was barred by the general law of limitation.[13]

**Survey award.**

A co-proprietor of a joint undivided estate is bound by a survey award and compromise to which the other joint proprietors were parties, where notice of the survey proceedings was served on the proprietors jointly, and not on him individually.[14] Accordingly, the plaintiff co-proprietor, was held bound by the special law of limitation as much as those who directly were parties to the award and compromise.[15]

**(iii) Judicial character of enquiry.**

The finding of a Survey Deputy Collector that a party has been in possession of certain land for more than a year, where the fact is *not disputed,* is not a "summary award" under Regulation VII of 1822.[16] A decision under Regulation has the force of an award by the Settlement Officer only when it is passed after opportunity given to them to establish their respective claims before him, or upon evidence taken by him.[17] An order passed by such officer upon a reference made by some other officer on inquiries instituted by him, has no element of a **judicial character**, so as to give the order the authority of an award under the Regulation.[18] Where the award is not a judicial act, but a determination of a purely executive character by the Government, this article does not apply.[19]

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[10] *Hurree* v. *Government,* (1870) 2 All. H. C. 1226.

[11] *Kanto Prasad Hazari* v. *Asad Ali Khan,* (1879) 5 C.L.R. 452.

[12] *Raja Sahib Perhlad Sein* v. *Maharaja Rajender Kishore Singh,* 12 M.I.A. 289 (P.C.); also see *Jowala Buksh* v. *Dharm Singh,* 10 M.I.A. 511 (The award of the Collector could determine certain questions of possession, but not of title, which were raised in the suit. An order for mutations of names in the Register, held not to be an award).

[13] *Ibid.,* 12 M.I.A. 289 (P.C.).

[14] *Hur Lal Roy* v. *Soomj Narain Roy,* (1865) 3 W.R. 7.

[15] *Ibid.*

[16] *Radha Pershad Singh* v. *Ram Jeewun,* (1869) 11 W.R. 389.

[17] *Bhaoni* v. *Maharaja Singh,* (1881) 3 All. 738=1 A.W.N. (1881) 48.

### (iv) *Illustrations.*

(1) When a Collector, acting in exercise of his powers under S. 20 of Regulation VII of 1822, has adjudicated upon a claim to proprietary right of lands in a *khana khali* estate, such adjudication is as between the parties contesting between themselves before the Collector an award by the Collector, within the meaning of the Limitation Act. But, a declaration by the Collector *proprio motu* that a farmer is proprietor and an order that he is so registered or an order declining to investigate a claim, is not an award, which unless contested becomes final.[20]

(2) An order of the Collector setting aside the decision of an assistant settlement officer and directing that the defendants should be entered in the settlement records as tenants with occupancy rights is an *award* within the meaning of Art. 45 of the Limitation Act.[21]

(3) The Settlement officers, when engaged in preparing the record of rights under Regulation VII of 1822, were directed to enquire into present or very recent possession, and to frame their record in accordance with the result of that enquiry, and if the parties affected appear before them, and an award is made, the award is final and conclusive, unless within three years from the date of the award, the party who is aggrieved by it, institutes a regular suit to question it.[22]

### 1255. ARTICLE APPLIED—ILLUSTRATIVE CASES.—

(1) On a Collector proceeding to settle a mortgaged estate, both mortgagee and mortgagor appeared before him, and contended for the right of settlement. His **award, under Regulation** VII of 1822, was in favour of the mortgagee in possession, and the mortgagor allowed that award to remain unchallenged for three years. *Held,* that the award became binding under cl. 6, S. 1, Act XIV of 1859 (now Art. 45).[23]

(2) An order by the Commissioner refusing to make a settlement of khas mehal land with the plaintiff who claimed settlement of it as an accretion to his *jote* under Regulation XI of 1825, is **an order under the Regulation,** and a suit to set aside such an order is governed by Art. 45, and not by Art. 14.[24]

(3) **A suit to have a declaration of right, and to set aside a thakbust proceeding** in respect to certain land is governed by Art. 45, Limita-

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18. *Bhaoni* v. *Maharaja Singh,* (1881) 3 All. 738.

19. *Kristomoni* v. *Secretary of State,* (1898) 3 C.W.N. 99 (105); s.c. on appeal, 29 Cal. 518 (526)=29 I.A. 104 (P.C.).

20. *Lutf Ali* v. *Khushwakt Rai,* (1881) 41 P.R. 1881.

21. *Midnapore Zemindary Co.* v. *Nares Narain Roy,* (1921) 63 I.C. 161=33 C.L.J. 317.

22. *Badri Prasad* v. *Muhammad Yusaf,* (1877) 1 All. 381 (386) (F.B.).

23. *Sree Chund* v. *Mullick Choolbun,* (1868) 9 W.R. 564.

24. *Abdul* v. *Hamda,* (1908) 12 C.W.N. 910.

tion Act: and, a suit by plaintiff in possession to contest a thakbast award and map under Regulation VII of 1822, and IX of 1825, is barred, unless brought within three years, whether plaintiff is legally bound by it or not.[25]

### 1256. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

(1) **The award of the Collector** under Regulations VII of 1822, IX of 1825 and IX of 1833, which gave to the revenue authorities judicial power to determine certain questions of possession, and other matters, **could not conclude any question of title,** as distinguished from possession. These, therefore, could only be affected by the general law of limitation.[26]

(2) It was not intended by the provisions of Regulation VII of 1822, that Collectors should decide disputes as to title between *raiyats* in which the *Zemindars* or *Sadr Malguzars* had no interest, and which could in no way affect the assessment. **A decision by the Collector, as to the title between two raiyats, is not an award** under the Regulation or within the meaning of Art. 46 of the Limitation Act.[27]

(3) There is nothing in law which makes the order of a Collector in a *butwara* proceeding final as regards questions of title. A suit to void a *butwara* decision by the Collector is not within Art. 45, but may be brought within six years.[28] **A map made in carrying out the *batwarah*** of an estate is not an award binding on the owners of an adjoining estate.[29]

### 1257. STARTING POINT OF LIMITATION.—

**(*i*) Appeal against award.**

Where a survey award relates to land belonging to parties whose rights and interests are distinct and separate, and one of the parties appeals against the award, limitation runs against the other party not from the date of such appeal, but from the date of the survey award.[30] Where an award by a Survey Deputy Collector, confirmed by the Superintendent of Survey, is appealed successively to the Commissioner, and the Board of Revenue, both of whom decline to go into the merits of the case, a suit to contest the justice of the award, and obtain a declaration of title may be brought within three years from the date, not of the Deputy Collector's award, but of the order of the Board of Revenue.[31] The word "order" refers only to a subsisting order. Where, therefore, there was an appeal against the order, it is the **date of the order of the appellate Court** that gives the starting point of limitation.[32]

**(*ii*) Other provisions of law.**

Under this article the possessory titles by virtue of awards under the Regulation shall become final unless questioned within three years. But, that will not enable a person to come in within three years after the date of such awards, and recover possession of lands, in respect of which his suit has been barred by the other provisions of the law of limitation.[33] Parties claiming as heirs of property sold without their consent held by the purchasers in adverse possession are bound to appear and press their title within the period prescribed by law; the mere fact that by some proceedings of the Settlement Officers they obtained a settlement of the estate cannot give them a right which they have lost by limitation.[34]

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[25] *Mohima Chunder* v. *Raj Coomar,* (1868) 10 W.R. 22.
[26] *Jowala Buksh* v. *Dharm Singh,* 10 M.I.A. 511 (P.C.).
[27] *Rajani Kant* v. *Ram Dulal,* (1912) 17 I.C. 881 (Cal.).
[28] *Rughoobur Singh* v. *Huree Pershad,* (1866) 6 W.R. 75.
[29] *Ooday Singh* v. *Paluck Singh,* (1871) 16 W.R. 271.
[30] *Toolsee Ram* v. *Mahomed Afzal,* (1868) 10 W.R. 49.
[31] *Kishen Chunder* v. *Mahomed Afzal,* (1868) 10 W.R. 51.
[32] *Venugopal Mudali* v. *Venkata Subbiah,* (1915) 28 I.C. 367 (Mad.).

1258. **ARTICLE 46.**—The "award" referred to in Art. 46 is, of course, the award contemplated by Art. 45, *viz.*, an award under one of the three Regulations mentioned in Art. 45, Limitation Act.[35] An award passed in the course of a civil suit,[36] or an order made under S. 41 of the Bengal Survey Act are outside the scope of Art. 46.[37]

Article 46 pre-supposes that at the date of the award the party bound by it is out of possession, but if he gets possession and is subsequently dispossessed, this will afford a *new and distinct* cause of action for a suit to recover possession, governed by Art. 142 of the Limitation Act.[38] A person remaining in possession for upwards of three years after an award is not barred by Art. 46 from suing to *confirm* his title, as this is not a suit *to recover property* within the meaning of that article.[39]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 47. | By any person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898, or the Mamlatdar's Courts Act, 1906, or by any one claming under such person, to recover the property comprised in such order. | Three years. | The date of the final order in the case. |

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[33] *Beer Chunder Joobraj* v. *Ram Gutty Dutt,* (1867) 8 W.R. 209.

[34] *Moula Bukhsh* v. *Koshoram,* (1868) 10 W.R. 249.

[35] *Lachman* v. *Atma,* 25 P.R. 1883 and *Maharaja Cooch-Behar* v. *Mahendra Ranjan,* 66 I.C. 923=34 C.L.J. 465.

[36] *Lachman* v. *Atma,* 25 P.R. 1883.

[37] *Maharaja Cooch-Behar* v. *Mahendra,* supra.

[38] *Mozaffar* v. *Grish Chander,* (1868) 10 W.R. 71=1 B.L.R.A.C. 25.

[39] *Mohima Chunder* v. *Raj Coomar,* (1868) 10 W.R. 22 and *Latif Khatun* v. *Tofer Ali,* (1927) 104 I.C. 655=55 Cal. 201=1927 Cal. 902.

## SYNOPSIS.

1259. Corresponding provisions.
1260-63. **Scope and application.**
1260. (*i*) Applies to immoveable property;
1261. (*ii*) Not confined to Ch. XII, Cr. P. Code.
1262. (*iii*) Contemplates existing right to sue.
1263. (*iv*) Suit to set aside summary order.
1264. (*v*) Order when ceasing to be operative.
1265-1268. **Summary order of Magistrate.**
1265. (*i*) Order of competent Court.
1266. (*ii*) Mere irregularity no bar.
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1268. (*iv*) **Effect of an order**—Extinguishment of right to possession.
1269. Suit to recover property.
1270. Suit upon title.
1271-74. **Parties bound by the order.**
1272. Representative suits.
1273. Parties with notice of proceedings.
1274. Parties in a different capacity.
1275. **Starting point of limitation.**

## NOTES.

**1259. CORRESPONDING PROVISIONS.**—The corresponding provision in **Act XIV of 1859**, was made in its S. 1, cl. 7.

In **Act IX of 1871**, Art. 46, which corresponded with the present article, was worded as follows:—

"By any person bound by an order respecting the possession of property made under Act No. XVI of 1838, S. 1, cl. 2, or Act No. XXV of 1861, Chapter XXII, or Bombay Act No. V of 1864, or by any one claiming under such person, to recover the property comprised in such order"—"Three years"—"The date of the final order in the case."

In **Act XV of 1877**, Art. 47, Sch. II was worded slightly different from the present article. It had the word "*property*" instead of 'immoveable property,' and "under the Code of Criminal Procedure, Chapter XL," instead of "under the Code of Criminal Procedure". Also, we had "the Bombay Mamlatdars' Courts Act", instead of "the Mamlatdars' Courts Act, 1906".

**(*i*) Applies to immoveable property.**

**1260. SCOPE AND APPLICATION.**—Unlike Art. 47 of Act XV of 1877, the present article has a restricted application to *immoveable property* only.[40]

**(*ii*) Not confined to Ch. XII, Cr. P. Code.**

**1261. This article does not refer to any particular chapter of the Code** of Criminal Procedure; and, there is no reason to confine the operation of Art. 47 to an order under Ch. XII only.[41] An **order restoring possession under**

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[40] Compare *Kangali Churn* v. *Zomurrud,* (1881) 6 Cal. 709 and *Bhaghuji* v. *Anniaba,* 5 Bom. 25 (Art. 47, Act XV of 1877 had application to moveable as well as immoveable property).

[41] *Pakki Adinarayana* v. *Suramma,* (1925) 86 I.C. 744=48 M.L.J. 372.

S. 522, **Criminal Procedure Code,** is an order respecting possession of property within Art. 47 of the Limitation Act.[42]

**(iii) Contemplates right to sue in ejectment.**

1262. This article contemplates a **right to sue in ejectment being in existence at the time** of the passing of an order under S. 145 of the Code of Criminal Procedure.[43] In *Bolai Chand* v. *Samiruddin,*[44] a suit was instituted by four co-sharers against a *Zemindar* for specific performance of an agreement to lease lands and a decree was obtained directing the *Zemindar* to execute a *patta.* Before the *patta* was actually executed, in a proceeding by one of the co-sharers an order was passed by the Magistrate under S. 530 corresponding to S. 145, of the present Criminal Procedure Code, on the ground that the petitioner had failed to establish possession. Afterwards a *patta* was obtained by the co-sharers by an order of the Court in execution of the decree for specific performance. In a suit instituted by the co-sharers more than three years after the order of the Magistrate, it was held that the right which was the basis of the suit did not exist at the time of criminal proceedings and Art. 47 did not apply. The suit was governed by Art. 144 of the Limitation Act, limitation commencing to run from the date of the *pattah.*[45] Following this view it has been held by the Madras High Court that where the order by the Magistrate was passed when the first plaintiff had no legal right to institute a suit in ejectment against the defendants, and he obtained such right only after the passing of the Magistrate's order, Art. 47 was no bar to his suit.[46]

**(iv) Suit to set aside summary order.**

1263. If the whole language of Art. 47 be taken into consideration, it is clear that the nature and scope of the suit intended to be comprised in the article must be one whose main object is to set aside the summary order of a Magistrate with regard to possession in the interests of public peace.[47] It is a suit for possession in spite of the order, which is to be in force till otherwise decided by a Court of competent jurisdiction.[48] Article 47 of Sch. I to the Limitation Act, is **inapplicable**

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[42] *Pakki Adinarayana* v. *Suramma,* (1925) 86 I.C. 744=48 M.L.J. 372.

[43] *Bolai Chand* v. *Samiruddin,* 19 Cal. 646; Folld. in *Subbalakshmi* v. *Narasiah,* 102 I.C. 360=1927 Mad. 586=52 M.L.J. 482.

[44] 19 Cal. 646.

[45] *Ibid.*

[46] *Subba Lakshmi* v. *Narasiah,* (1927) 102 I.C. 360=1927 Mad. 586=52 M.L.J. 482.

[47] *Alagarswami Thevan* v. *Ramabadra,* 1929 Mad. 38 (2)=111 I.C. 152.

[48] Cf. Dr. Pal's Limitation Act, pp. 572, 573.

**where there was no order** respecting the possession of immoveable property under the Criminal Procedure Code although the complaint of the plaintiffs was dismissed as they failed to prove possession.[49] Verbal order of a Magistrate is not within Art. 47, Limitation Act.[50]

**(v) Order when ceasing to be operative.**

**1264.** Similarly, Art. 47 of Sch. I to the Limitation Act, is not applicable, where the summary order ceases to be operative. For instance, where the order of the Mamlatdar in a possessory suit directing the plaintiff to give up possession of the property was followed by an agreement between the parties, in pursuance of which the property was sold by the defendant to the plaintiffs, and the transaction was complete inspite of sale-consideration being left unpaid, it was held that the order of the Mamlatdar in the possessory suit had rendered it unnecessary for the plaintiffs to sue to set it aside. Accordingly, the suit based on the contract of sale was held not barred by Art. 47, Limitation Act.[1] An order against plaintiff in a suit brought by him in a personal and private capacity, has no operation against him when he is suing in an altogether different capacity as manager and representative of a *math*. Accordingly, where the possessory suit in a Mamlatdar's Court was brought by the plaintiff in a personal and private capacity, but the subsequent civil suit was brought by him in a representative capacity as manager, and on behalf of a *math,* it was held that the plaintiff in whose name the second suit was brought was therein a stranger to himself in his personal and private capacity in a Court of law, and his second suit could not be barred under Art. 47 of the Limitation Act.[2] Where the Mamlatdar's order had no conclusive effect and was rendered ineffectual by the subsequent decree of the Civil Court, and the plaintiff continued in possession notwithstanding that order, it was held that Art. 47 did not bar the claim, and neither the remedy nor the right to the land was extinguished.[3]

**(i) Order of competent Court re. possession.**

**1265. SUMMARY ORDER BY MAGISTRATE.**—(*i*) Article 47 of the Limitation Act prescribes a period of three years for a suit by a party against whom possession has been found under S. 145, Criminal Procedure Code.[4]

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[49] *Thakun Chowdhry* v. *Manrup,* (1912) 16 I.C. 735 (Cal.).

[50] 2 Agra 26.

[1] *Sagaji* v. *Namdev,* (1899) 23 Bom. 525.

[2] *Babaji Rao* v. *Laxman Das,* (1904) 28 Bom. 215.

[3] *Krishnacharya* v. *Lingava,* (1895) 20 Bom. 270.

[4] *Rahim Nandan* v. *Jadunandan,* (1926) 97 I.C. 73 (77)=30 C.W.N. 873=1926 Cal. 1022.

That article has no relation to any portion of the order of the Criminal Court which has no **reference to the question of possession.**[5] Where the order of the Magistrate does not dispossess the plaintiff, or maintain defendant's possession to the exclusion of the plaintiffs, Art. 47 does not apply.[6] The intention of the law of limitation is that in the case of an **order of a competent Court,** if no suit is brought within the statutory period, the remedy is lost, and the order remains binding between the parties.[7] But if Magistrate's order as to the mode of possession is not an order of a competent Court, and has no binding force, it cannot give a cause of action for a suit which, if not brought within the statutory period, makes that portion of the order binding between the parties.[8] Where in a proceeding under S. 145 of the Criminal Procedure Code an order is made awarding possession of immoveable property, but that order is made without jurisdiction, a suit to recover possession is, as regards limitation, governed by Art. 142 and not by Art. 47, Sch. I to the Limitation Act.[9]

**(*ii*) Irregularity of order, no bar to application of Art. 47.**

1266. However, it has been held in *Yar Mohammad* v. *Hayat Mohammad*,[10] that

> "before want of jurisdiction can be predicated in this class of cases, a vice must be clearly established which infects the whole proceedings".

The result of the proceedings will not be invalidated by any and every error.[11] Where the order of Magistrate, though not following precisely the terms of Form XXII of Sch. V to the Criminal Procedure Code, was a sufficient compliance with the terms of cl. (6) of S. 145, and could be taken as deciding the **question of possession** in favour of the defendant, plaintiff was held barred by limitation applying Art. 47 of the Limitation Act.[12] The distinction must not be neglected between things done "wholly without jurisdiction", and things done with jurisdiction though erroneously and irregularly done. A Magistrate's order under S. 145, Criminal Procedure Code, cannot be held *ultra vires,* unless there is an illegality as opposed to mere irregularity.[13] The Civil Court has no jurisdiction to declare the order to be void, and consequently the longer period of twelve years would not apply, even if the order was defective, and the formalities of S. 145, Criminal Procedure Code, were not complied with.[14]

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[5] *Rahim Nandan* v. *Jadunandan,* (1926) 97 I.C. 73 (77)=30 C.W.N. 873.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] *Bharat Chandra Deb* v. *Ram Sundar,* (1921) 60 I.C. 860 (Cal.).

[10] (1917) 42 I.C. 768=22 C.W.N. 342.

[11] *Abadi Begam* v. *Ahmad Mirza Beg,* 1925 Oudh 190=82 I.C. 691 =11 Oudh L. J. 757 (Follows 42 I.C. 768, *supra*).

[12] *Yar Mohammad* v. *Hayat Muhammad,* (1917) 42 I.C. 768=22 C.W.N. 342.

[13] *Ibid.;* Reld. on *Subramania Ayyar* v. *King-Emperor,* 25 Mad. 61=28 I.A. 257=11 M.L.J. 233 (P.C.); also see *Parasuramayya* v. *Ramachandradu,* (1913) 21 I.C. 564=14 M.L.T. 392=1913 M.W.N. 871.

**Order respecting possession of property.**

**1267.** This article contemplates an order respecting possession of property passed in favour of one party or the other: and it has no application when the land in dispute has been attached under S. 146, Criminal Procedure Code. In *Akilandammal* v. *Periasami*.[15] The **Madras High Court** held that where certain lands are attached by a Magistrate, under S. 146, Criminal Procedure Code, in consequence of disputes relating to their possession, and as a result of inquiry where the Magistrate finds himself unable to "determine who was in actual possession of the lands", the **attachment proceedings** by the Magistrate are not such an order as is contemplated by Art. 47 of the Limitation Act. The **Calcutta High Court** in *Deo Narain* v. *Webb*,[16] doubted whether Art. 47 of the Limitation Act is at all applicable to the case of an order made under S. 146, Criminal Procedure Code, which does not maintain the possession of any party. An **order under S. 146, Criminal Procedure Code,** for possession of immoveable property **merely as a result of civil decree,** is not one promulgated under the Criminal Procedure Code as required by Art. 47 of the Limitation Act.[17]

**A suit for possession** by a person interested in property which is in *custodia legis* is **not necessary.** If the Magistrate appoints a Receiver in possession of immoveable property, the seisin or legal possession is, during the attachment of a property under S. 146 of the Criminal Procedure Code in the true owner, and the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession within the meaning of Art. 142 of the Limitation Act.[18] Article 47, Limitation Act, does not apply in such a case, and consequences of S. 28 of the Limitation Act do not follow.[19] If both claimants institute suits each claiming the lands as his own, and seeks to obtain a **declaration of title** as to them, as well as to the accumulated income, with a view to obtaining possession of the lands from the Magistrate, the suit for declaration of title to immoveable property and the profits therefrom, is **governed by Art.** 120 of the Limitation Act.[20] A Magistrate cannot be a party to a suit for possession.[21] Article 47 of Sch. I to the Limitation Act is inapplicable where there was no order respecting the possession of immoveable property under the Criminal Procedure Code,[22] or where that order if made had ceased to be operative.[23] An order of the Mamlatdar dismissing the plaintiff's claim for possession on account of lack of proof amounts to an order confirming the defendant's possession, and is, therefore, an order "*respecting the possession of property*" within the meaning of this article.[24]

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[14] *Bhagwandas* v. *Bhanamal*, 84 P.R. 1912.

[15] (1877) 1 Mad. 309; Folld. in *Goswami Ranchor Lalji* v. *Sri Girdharji*, (1897) 20 All. 120=17 A.W.N. 214.

[16] (1900) 28 Cal. 86=5 C.W.N. 160.

[17] *Alagarswami* v. *Ramabadra*, 1929 Mad. 38 (2)=111 I.C. 152.

[18] *Brojendra Kishore* v. *Bharat Chandra*, (1915) 31 I.C. 242=22 C.L.J. 283=20 C.W.N. 481; also see *Sarat Chander* v. *Bibhabati*, (1922) 66 I.C. 433=34 C.L.J. 302 (The effect of attachment by Magistrate is continuance of possession of true owner, or interruption of possession of the wrong-doer).

[19] *Alagarswami* v. *Ramabadra*, *supra*.

**Extinguishment of right to possession.**

1268. **The effect of an order** passed by a Magistrate under S. 145, Criminal Procedure Code, putting one of the parties in possession of the property is that he, on failure by the unsuccessful party to sue to get rid of the order within three years under Art. 47 of the Limitation Act, acquires **a title to the property under S. 28 of the Act.**[25] An order of the Magistrate declaring the defendants to be entitled to retain possession till ousted by the decree of a Civil Court, bars plaintiff's suit to recover possession if brought more than 3 years after the order aforesaid.[26] This extinguishes his right of possession.[27] Where a person in whose favour proceedings under S. 145, Criminal Procedure Code, have been decided and he has been in possession of the disputed property for more than three years, and no step is taken by the claimant to question the order under S. 145, and to evict the successful party within a period of three years as provided by Art. 47, then not only the remedy is barred, but the title is also extinguished, even though the person in possession may hand over the possession of the disputed property to a third person.[28]

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[20] *Rajah of Venkatagiri* v. *Isakapalli,* (1902) 26 Mad. 410; Folld. in (1915) 31 I.C. 242, *supra.*

[21] *Panna Lal* v. *Panchu,* (1922) 65 I.C. 200 (Cal.).

[22] See **S. 1263:** *Thakun Chowdhry* v. *Manrup,* (1912) 16 I.C. 735 (Cal.) and 2 Agra 28.

[23] See **S. 1264:** *Sagaji* v. *Namdev,* (1899) 23 Bom. 525; *Babaji Row* v. *Laxman,* (1904) 28 Bom. 215 and *Krishna Charya* v. *Lingava,* (1895) 20 Bom. 270.

[24] *Chinto* v. *Ganesh,* 1883 B.P.J. 131.

[25] *Devasikhamani* v. *Muthian Chetty,* (1912) 15 I.C. 24 (Mad.).

[26] *Parasuramayya* v. *Ramachandradu,* (1913) 21 I.C. 564=38 Mad. 432=1913 M.W.N. 871=14 M.L.T. 392.

[27] *Solai Ammal* v. *Jogi Chetti,* (1920) 56 I.C. 675=10 L.W. 637=27 M.L.T. 53.

[28] *Nando Kahar* v. *Sri Bhup Narain Singh,* 1935 Pat. 164=16 P.L.T. 183; cf. 1925 Mad. 799 and 6 C.L.R. 93.

**1269. SUIT TO RECOVER PROPERTY.**—The suit **contemplated by Art. 47** of the Limitation Act **is one for possession** by a party against whom an order is passed by a Magistrate. **The principle** underlying is that as possession outstanding, the party who is out of it should sue within three years to recover it to avoid extinguishment of right to possession.[29] **The limitation** of three years **prescribed by Art. 47,** Limitation Act, **applies to all persons bound by,** or parties to an **order under S. 145 of the Criminal Procedure Code,** and to any other person who may claim the property through any such persons under a title *derived subsequent* to the order.[30] Article 47 of the Limitation Act has **no application to a suit for a declaration** of the plaintiff's right to put up dams in a river to irrigate his lands, it not being one to recover possession of property.[31] Where by an order passed under S. 147 of the Criminal Procedure Code, no possession was given to either of the parties, and the order passed was not an order declaring one of the parties to be entitled to possession of property, Art. 47 had no application to the case.[32]

**Suit upon title.**

**1270. This article does not apply to a suit** by a plaintiff in the ordinary Courts on his **title for possession of land.**[33] Such a suit is outside the Mamlatdar's jurisdiction.[34] In *Ramchandra* v. *Bhikabai,*[35] it was held that a plaintiff whose plaint had been rejected for default of appearance in the Mamlatdar's Court, under Bombay Act III of 1876, S. 13, could not bring another possessory suit on the same cause of action in the Civil Court under S. 9 of the Specific Relief Act I of 1877; for the rejection of the plaint under this provision was a hearing and final decision of the suit operating as *res judicata.* But in *Purushottam Dayaram* v. *Chatargir,*[36] a regular suit brought in a Civil Court after the rejection of plaint was held time-barred under Art. 47 of the Limitation Act. **A suit for a declaration of a right of way** over the land of the defendant need not be instituted within 2 years of an order made in favour of the defendant in a proceeding under S. 145, Criminal Procedure Code, inasmuch as proceedings under that section had reference to the possession of the soil and involved no question of a right of way.[37] However, the Bombay High Court has held that a suit denying a right of way as affirmed by an order of a Mamlatdar under the Mamlatdar Court's Act, is a suit respecting possession of immoveable property, and as between Arts. 14 and 47, Art. 47 applies to such suits.[38] **A suit for partition is not a suit to recover property** within Art. 47, Limitation Act. A claim to recover the property implies a claim to exclude the defendant therefrom altogether; while a suit for partition is one merely for obtaining a share of such property on the footing that the defendant who had been successful in the Mamlatdar's Court held it for himself and the plaintiff jointly.[39] There are express decisions of the Bombay High Court in *Bhaguji* v. *Aniaba*,[40] and *Shivram* v. *Narayan*,[41] which lay down broadly that Cl. (46) of the Limitation Act of 1871, corresponding to the present Art. 47, does not apply to partition suits. However, it has been held in a recent **Calcutta case**,[42] that an undivided share of the property with regard to which there is an order under S. 145, Criminal Procedure Code, cannot, for the purposes of Art. 47, be regarded as a different property. The learned Judges (Mukerji and Mitter, JJ.), were

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[29] *Solai Ammal* v. *Jogi Chetti,* (1920) 56 I.C. 675=10 L.W. 637=27 M.L.T. 53.

[30] *Jogendra Kishore* v. *Brojendra Kishore,* (1896) 23 Cal. 731 (F.B.).

[31] *Eshan Chandra* v. *Nilmoni,* (1908) 35 Cal. 851.

[32] *Ibid.,* 35 Cal. 851 (856); cf. *Goswami Ranchor Lal* v. *Sri Girdhariji,* 20 All. 120=17 A.W.N. (1897) 214 (*Held,* that it may be that an order under S. 147, Cr. P. Code, is intended to be governed by Art. 147).

[33] *Tukaram* v. *Hari,* (1904) 28 Bom. 601 (F.B.).

[34] *Ibid.*

[35] (1882) 6 Bom. 477.

[36] (1900) 25 Bom. 82; Reld. on *Gulab Bhai* v. *Kasanji,* P.J. (1897) 246.

> "also of opinion that a suit for partition, which seeks for partition of property or to have a share in it, the title to which has already been extinguished by reason of no suit having been instituted to recover possession within three years of the order under S. 145, Cr. P. Code, and by virtue of Art. 47 of the Schedule and of S. 28 of the Act, is another name for a suit for recovery of possession, and a mere device to evade the provisions of the statute".[43]

The Nagpur Judicial Commissioner's Court has taken the same view as the Calcutta High Court. It has been observed in *Jagat Ram* v. *Pitai*,[44] that the expression

> "**'the right to such property' in S. 28 includes a right to joint possession also.** A person, whose right to recover joint possession is extinguished under Art. 47, cannot therefore elude the operation of Art. 47, by framing his suit as one for damages of his share of the produce as the right to claim damages is not separate from the right to claim possession or joint possession".[45]

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[37] *Kala Chand* v. *Jotindranath*, (1920) 57 I.C. 852 (Cal.).

[38] Cf. *Ballappa Bhimappa* v. *Tippan Gowda*, 1931 Bom. 256=33 Bom. L. R. 517=135 I.C. 427.

[39] *Parashram Jethmal* v. *Rakhma*, (1890) 15 Bom. 299.

[40] 5 Bom. 25.

[41] 5 Bom. 27.

[42] *Atab Sunarri* v. *Talib Husain Mia*, 1930 Cal. 612=51 C.L.J. 461=128 I.C. 106.

[43] *Ibid.*, 1930 Cal. 612; Not Foll. (1880) 5 Bom. 25 and 5 Bom. 27.

[44] 1930 Nag. 142=122 I.C. 270=26 N.L.R. 160=13 N.L.J. 85.

[45] *Ibid.*

**1271. PARTIES BOUND BY THE ORDER.**—A **Full Bench of the Calcutta High Court** has held that the limitation of three years prescribed by Art. 47, Sch. I, Limitation Act, applies to all persons bound by, or parties to, an order under S. 145 of the Criminal Procedure Code, and to any other persons who may claim the property through any such persons under a title *derived subsequent* to the order.[46] The Full Bench found it unnecessary to decide the *wider* question raised by Hill and Rampini, JJ., who doubted the correctness of Pontifex, J., in *Aukhil Chander* v. *Mirza Delawar Hossein*.[47] The Madras High Court have in *Pakki Adinarayana* v. *Nambura*,[48] relied upon the Full Bench view in expressing an opinion

> "that an order under S. 522 of Cr. P. Code, 1898, can only be binding between the parties to the order and can have no finality in favour of one who is not a party and does not claim under a party".[49]

Article 47 of the Limitation Act can be no bar to a person who was no party to the criminal proceedings which terminated in the order, nor claimed under any party to such proceedings.[50] Article 47 of the Limitation Act has no application to a person in whose favour an order is made under S. 145, Criminal Procedure Code.[1] Article 47 gives a period of three years to any one bound by an order under Criminal Procedure Code, for a suit to recover possession of property referred to in that order even though part of the property is in possession of the mortgagee.[2]

**Representative suits.**

**1272.** However, where in a proceeding under S. 145 of the Code of Criminal Procedure in respect of certain rights in land belonging to a community one member of the community is selected to represent the entire community, all the members of the community are bound by the order passed in the proceeding.[3] An order under S. 145, Criminal Procedure Code, passed against the head of a joint Hindu family, is binding upon the whole family, whether it was passed against him in his personal capacity or as the managing member of the family.[4] But, a similar order passed against a member of a joint Hindu family, who was not shown to be the head and manager of the joint family, could not bind another member of the family who succeeded to the former's interest in the property by survivorship, and not as his heir.[5]

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[46] *Jogendra Kishore* v. *Brojendra Kishore*, (1896) 23 Cal. 731 (F.B.). See and cf. *Aukhil Chunder* v. *Mirza Delawar*, 6 C.L.R. 93.

[47] 6 C.L.R. 93.

[48] (1925) 86 I.C. 744=1925 Mad. 799=48 M.L.J. 372.

[49] *Ibid.*, (1925) 86 I.C. 744 (745)=1925 Mad. 799=48 M.L.J. 372.

[50] *Kadambi Srinivasacharlu* v. *Durlabha Subuddhi*, (1912) 17 I.C. 589=23 M.L.J. 348; also see and cf. *Ram Dutt Singh* v. *Mohammad Nazir Khan*, 1934 Oudh 449=152 I.C. 180=11 Oudh W. N. 1165 (S. 47 did not apply where the area of the fields in dispute, and parties not the same).

[1] *Ismala Rowther* v. *Sadasiva Asari*, (1927) 99 I.C. 532=1927 Mad. 304=1927 M.W.N. 35=38 M.L.T. 217.

[2] *Bhagwan Das* v. *Bhana Mal*, 84 P.R. 1912.

[3] *Lachman Singh* v. *Diljan Ali*, (1918) 43 I.C. 955=4 P.L.W. 136.

[4] *Ram Sahai* v. *Binod Behari*, (1923) 71 I.C. 402=45 All. 306=21 A.L.J. 102=1923 All. 151.

**Parties with notice of proceedings.**

1273. An order passed against a Hindu father in proceedings taken under S. 145, Criminal Procedure Code, is binding on his undivided sons though they were not parties to the proceedings.[6] In the case of In re *Nathu Bhai Brijlal,*[7] the Bombay High Court held that all parties with actual notice of proceedings under S. 145 were bound by them.

**Parties in a different capacity.**

1274. Conversely, an order passed against the manager of a *math* in his personal and private capacity cannot bind him when he sues as a manager and representative on behalf of the *math.*[8] A lessor does not claim under his own lessee or tenant, and an order under S. 145 against the latter cannot be binding on the former.[9] A mortgagee is not bound by an order passed against the mortgagor, subsequent to his mortgage.[10] In a suit for rent against a tenant instituted by the party put in possession by the Magistrate under S. 145, Criminal Procedure Code, the unsuccessful party in the possession proceedings should be impleaded as a party defendant, if the tenant had, prior to the institution of proceedings under S. 145, Criminal Procedure Code, attorned to the latter.[11]

**Final order.**

1275. **STARTING POINT OF LIMITATION.**—The period of limitation commences to run "from the date of the final order in the case".

Prior to the Amending Act of 1923, Ss. 435 and 436, Criminal Procedure Code, were not applicable to orders passed by Magistrates under S. 145 of the Criminal Procedure Code, and such orders were treated as "final orders", within the meaning of Art. 47 of the Limitation Act.[12] It is doubtful if these rulings of a date prior to 1923, are good law under the amended provisions of the Code relating to powers of revision by High Courts. Under Art. 47 of Sch. I of the Limitation Act, the period of limitation begins to run from the date of the final order of the Magistrate under S. 145 of the Code of Criminal Procedure, and not from the date of the *refusal* of the High Court to interfere with the order.[13] The order of the Magistrate was held to be itself the final order because

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[5] *Ram Lal* v. *Thakur Din,* (1922) 66 I.C. 678=8 Oudh L. J. 410; Dist. 23 Cal. 731 (F.B.).

[6] *Venkatasomaraju* v. *Varahalaraju,* 1930 Mad. 48=52 Mad. 787 =57 M.L.J. 228=1929 M.W.N. 518=30 L.W. 201=122 I.C. 171.

[7] (1909) 11 Bom. L. R. 377=2 I.C. 513.

[8] *Babaji Rao* v. *Laxman Das,* (1903) 28 Bom. 215.

[9] See and cf. *Shaikh Wahid* v. *Nauth,* (1875) 24 W.R. 128; *Ram Narain* v. *Ram Coomar,* (1885) 11 Cal. 562; *Ram Brohmo* v. *Bunsi,* (1882) 10 C.L.R. 122 (Principle of *res judicata* did not apply).

[10] *Amu Dada* v. *Dhondo Raghunath,* (1904) 6 Bom. L. R. 305.

[11] *Devasikhamani* v. *Muttian Chetty,* (1912) 15 I.C. 24 (Mad.); cf. *Bapu bin Mahadaji* v. *Mahadaji Vasudeo,* (1893) 18 Bom. 348 (Landlord or his assignee bound by order in favour of tenant-at-will claiming to have acquired a right of occupancy).

[12] *Kangali Churn* v. *Zomurrudonnissa,* (1881) 6 Cal. 709=8 C.L.R. 154; *Jagannath* v. *Ondal Coal Co.,* 12 C.W.N. 840.

> "it is not subject to appeal and can only be set aside under the power of superintendence vested in the High Court if made without jurisdiction. **The decision of the High Court confirming the jurisdiction of the Court passing the order cannot affect the date from which it came into force.**"[14]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 48. | For specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same. | Three years. | When the person having the right to the possession of the property first learns in whose possession it is. |

## SYNOPSIS.

1276. Corresponding provisions.
1277-1281. **Article explained.**
1277. *"Specific moveable property"*.
1278. Money whether "specific" property.
1279. Property returnable *in specie*.
1280. Government securities, and share certificates.
1281. *"Conversion"*.
1282. **Article applied**—Illustrative cases.

## NOTES.

**1276. CORRESPONDING PROVISIONS.**—In Act XIV of 1859, S. 1, Cl. (2), provided for "suits for damages for injury to the person and personal property"—and the period prescribed was one year, for such suits.

**Act XIV of 1859.**

In Act IX of 1871, Arts. 26, 33, 34, 35, 47 and 48 made similar provisions. Article 26 provided for suits "for taking or damaging moveable property"—period 1 year. Article 33, provided for suits "for wrongfully detaining title-deeds", and Art. 34 provided for suits "for wrongfully detaining any other moveable property", and Art. 35 provided

**Act IX of 1871.**

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13. *Lachman Singh* v. *Diljan Ali,* (1918) 43 I.C. 955=4 P.L.W. 136.

14. *Ibid.,* 43 I.C. 955 (956); also see and cf. In re *Parvatrao Mhaskojirao,* (1918) 44 I.C. 577=42 Bom. 281 (Revision summarily rejected by High Court does not approve or confirm the order of Court below); and *Venugopal Mudali* v. *Venkatasubbiah,* (1915) 28 I.C. 367 (In case of an appeal, it is the date of an appellate order, that gives the starting point of limitation).

for suits "for specific recovery of moveable property in cases not provided for by this schedule (*i.e.*, Sch. II, Act IX of 1871) numbers 48 and 49". The period prescribed by these articles was 2 years. Article 47 provided for suits "for lost moveable property not dishonestly misappropriated or converted". And, Art. 48 provided "for moveable property acquired by theft, extortion, cheating or dishonest misappropriation or conversion".

**Act XV of 1877.**

Article 48 of Act XV of 1877 has been re-enacted as the present Art. 48, Act IX of 1908.

**"Specific moveable property."**

**1277-1281. ARTICLE EXPLAINED.**—This article deals only with "specific moveable property", which falls under one of two classes, namely:—

(1) such property as has been lost; and

(2) such property as has been acquired—

(*a*) by theft;

(*b*) by dishonest misappropriation; or

(*c*) by conversion.

No other kind of moveable property is affected by this article.[15]

**(*i*) Money, whether—,**

**1278.** Money has been held by the **Madras High Court** to come within the phrase "moveable property", but it cannot be held to come within the meaning of the phrase "specific moveable property", specific property which is recoverable *in specie, i.e.*, the very property itself, not its substitute.[16] But, the **Allahabad High Court** has taken a contrary view in *Benares Bank, Ltd.* v. *Ram Prasad*,[17] holding itself bound by the earlier decision in *Rameshar Chaubey* v. *Mata Bhikh*,[18] which has been followed in *Ram Lal* v. *Ghulam Husain*,[19] and *Jaganji* v. *Bandan*.[20] A deposit of a certain sum of money has been held by the **Calcutta High Court** to be specific moveable property within the meaning of Art. 49, Limitation Act.[21]

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[15] *Manganlal Bhukandas* v. *Thakurdas Vrijbhukandas*, (1910) 7 I.C. 447=12 Bom. L. R. 513.

[16] *Sankunni Menon* v. *Govinda Menon*, (1912) 14 I.C. 254=37 Mad. 381=22 M.L.J. 485=11 M.L.T. 325=1912 M.W.N. 516; also see *Agand Mahto* v. *Khajah Alijullah*, (1907) 11 C.W.N. 862 (Specific moveable property means property which can be specified by the delivery of the identical subject, and does not cover money); Diss. from *Govind* v. *Chairman*, 6 C.L.J. 535.

[17] 1930 All. 573=124 I.C. 180.

[18] (1883) 5 All. 341=1883 A.W.N. 48.

[19] (1907) 29 All. 579=4 A.L.J. 671=1907 A.W.N. 181.

[20] 1930 All. 397=124 I.C. 33=1930 A.L.J. 1411.

[21] *Tula Ram* v. *Mohri Lal*, (1910) 7 I.C. 5 (Cal.); also see *Surat Lal* v. *Umar Haji*, (1895) 22 Cal. 877; Folld. 11 Bom. 133 (137).

**(ii) Property returnable in specie.**

**1279. The Sind Judicial Commissioner's Court** has held that "specific property is property which is recovered in specie, *i.e.*, the very property itself, not any equivalent or reparation",[22] relying upon the Madras view in *Sankunni Menon* v. *Govinda Menon*.[23] **The Bombay High Court,** also observes that lawyers use the word specific property not in the dictionary sense of "particular, definite, limited, precise," but "as equivalent to property of which you may demand the delivery in *specie*".[24] Thus a specific legacy is a legacy which can only be satisfied by the delivery of the identical subject.[25] This view has been followed by Norris, J., in *Surat Lal* v. *Umar Haji*.[26] But, it has been dissented from by the Lower Burma Chief Court in *Sithambaram* v. *Ukha Gyi*,[27] where the word "specific" was taken in its ordinary sense and meaning. Hartnoll, J., was unable to import into Art. 49, the meaning which Farran, J., in the Bombay case, does, namely, that the specific moveable property which is injured must be in the possession of some third party for it to apply. He was of opinion that Art. 49 should be given its natural meaning.[28] The Punjab Chief Court has held that *account-books* and mortgage-deeds are specific moveable properties.[29]

**(iii) Government securities.**

**1280.** Government securities differ from money, or currency notes, inasmuch as they are ear-marked just in the same sense that a document evidencing the ownership of shares in a company, for example, is ear-marked.[30] **Share certificates** and title-deeds are specific moveable property.[31] Where executor deposited legacy money including Government Promissory Notes in the Bank, and this was subsequently withdrawn and misappropriated, it was held that the suit was either due for conversion or for money had and received to which Arts. 48 and 62 of the Limitation Act would apply.[32]

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[22] *Ram Das* v. *Ajudhia Das,* (1921) 63 I.C. 685=14 S.L.R. 137.

[23] 14 I.C. 254=37 Mad. 381=11 M.L.T. 325=22 M.L.J. 485.

[24] *Essoji Bhayaji* v. *The "Savitri",* (1886) 11 Bom. 133 (137); Folld. in *Surat Lal* v. *Umar Haji,* 22 Cal. 877.

[25] *Essoji Bhayaji* v. *The "Savitri",* 11 Bom. 133 (137).

[26] (1895) 22 Cal. 877; also see *Swarnamoyee* v. *Probadh Chandra,* 1933 Cal. 253=143 I.C. 402=36 C.W.N. 758=55 C.L.J. 420 (*Held,* that "specific movable property" means property one can demand the delivery in specie).

[27] (1912) 17 I.C. 906=6 L.B.R. 75=5 Bur. L. T. 156.

[28] *Ibid.,* 17 I.C. 906 (L.B.).

[29] *Durga Devi* v. *Ram Nath,* 85 P.R. 1919=52 I.C. 580.

[30] *See* per Hill, J., in *Administrator-General of Bengal* v. *Kristo Kamini Dassi,* (1904) 31 Cal. 519 (535): s.c. (1903) 7 C.W.N. 476; also see *Gopal* v. *Surendra,* (1908) 12 C.W.N. 1010 and *Subbakka* v. *Maruppakkala,* 15 Mad. 157.

[31] *Magan Lal* v. *Thakar Das,* (1910) 12 Bom. L. R. 513.

**"Conversion".**

**1281.** Article 48 provides that a suit for compensation for wrongfully taking specific moveable property should be brought within three years of the time when the person having the right to possession of the property first learns in whose possession it is, and this article would apply when the moveable property "lost or acquired by theft or dishonest misappropriation **or conversion" is still in the possession** of the defendants and not when the property cannot be traced.[33]

**Trover.**

**An action of trover** claiming damages for the conversion by the defendants of specific moveable property, *viz.*, coal wrongfully gotten from the plaintiff's mines and sold or otherwise disposed of by the defendants to their own use, is governed by Art. 48.[34] Their Lordships of the Privy Council observed in *Lewis Pugh* v. *Ashutosh Sen*,[35] that

> "the two articles (48 and 49) are the only ones that apply to claims in respect of specific moveable property. Art. 48 alone refers to conversion, and their Lordships can see no ground for splitting up conversion into two classes, one dishonest and the other not dishonest."

"Conversion", is a well-known legal term for a particular class of tort, and this is referred to as one of the modes by which specific moveable property may be wrongfully acquired, the other being theft and dishonest misappropriation.[36] The article is to be read without the commas inserted in the print, as a Court of law is bound to do. The opposite view involves giving different effect to "or" preceding conversion, to that which it has before "dishonest misappropriation". In fact, in each case, it is equivalent to "or by".[37] When a person in lawful possession of another's goods wrongfully sells those goods, he is said to convert them to his own use.[38] As will be found in Clerk and Lindsell on Torts "an act of conversion may be committed (1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market-overt although not delivered, (4) when it is wrongfully retained, and (5) when it is wrongfully destroyed or changed in nature. Any one who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them is *prima facie* guilty of conversion".[39]

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[32] *The Bank of Bombay* v. *Fazulbhoy Ebrahim*, (1922) 67 I.C. 761 =1923 Bom. 155.

[33] *Baijnath Jugalkishore* v. *Manindra Chandra*, 1931 Pat. 436=133 I.C. 453=13 P.L.T. 73.

[34] *Lewis Pugh* v. *Ashutosh Sen*, 1929 P.C. 69=56 I.A. 93=114 I.C. 604=8 Pat. 516 (P.C.).

[35] 1929 P.C. 69=56 I. A. 93 (P. C.); also see *The Adjai Coal Company* v. *Pannalal Ghose*, 58 M. L. J. 136=57 Cal. 1341=1930 P.C. 113= 123 I.C. 726 (P.C.); on appeal from *Pannalal Ghose* v. *Adjai Coal Company*, 101 I.C. 62=1927 Cal. 117=31 C.W.N. 82.

[36] *Lewis Pugh* v. *Ashutosh Sen*, 1929 **P.C. 69 (71)=56 I.A. 93 (P.C.).**

[37] *Ibid.*

[38] *Sundarji Shivji* v. *Secretary of State*, 1934 Pat. 507=151 I.C. 995 =13 Pat. 752=16 P.L.T. 61.

### 1282. ARTICLE APPLIED—ILLUSTRATIVE CASES.—

(1) Article 48 is intended to apply to cases where the plaintiff having the right to the possession of property learns of the acquisition by theft or dishonest misappropriation, or conversion.[40] Where a person got a jewel for being sold, which he wrongly pledged to the defendant, Art. 48 was held applicable to the case as one of conversion.[41]

(2) A suit to recover the value of coal wrongfully cut and appropriated by the defendant from the plaintiff's mine is governed by Art. 48 of Sch. I, Limitation Act, and time begins to run when the plaintiff first learns in whose possession the coal removed is.[42] An action for damages for trespass to mine and removal of coal therefrom is an action for trover so far as removal of coal is concerned, and is governed by Art. 48, and not by Arts. 142 and 144, Limitation Act.[43]

(3) A suit to recover the price of materials of a house removed and misappropriated by the defendants, must be brought within the period of limitation prescribed by Art. 48, and time begins to run from the date when the plaintiff first learns in whose possession the materials are.[44]

(4) A suit against an innocent person to recover stolen property or its value as damages falls under Art. 48 and limitation starts from the date of plaintiff's knowledge that the property had come into defendant's possession.[45]

(5) A suit for damages representing the value of crops belonging to the plaintiff which were wrongfully attached, cut and removed by the defendant is governed either by Art. 48 or 49, Limitation Act, and not by Arts. 29 or 36, Sch. I, Limitation Act.[46]

(6) Where defendant sold certain standing trees to the plaintiff, and subsequently, he sold the land to a third person, who sold the trees which were cut and removed by the purchasers, and plaintiff then sued to recover the trees or compensation for them, it was held that Art. 48 or 49 of the schedule governed the suit, and the limitation began to run from the date on which the trees were cut and misappropriated.[47] There have been contrary decisions of the Calcutta High Court as to what article of the Limitation Act applies to a suit for cutting and carrying away crops, and the Full

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[39] Clerk and Lindsell, 6th Edn., p. 252.

[40] *Kirpa Ram* v. *Kunwar Bahadur,* 1932 All. 256=1932 A.L.J. 241=136 I.C. 809=54 All. 467.

[41] *Seshappier* v. *Subramania,* (1914) 38 Mad. 783 s.c. on Letters Patent appeal (1916) 40 Mad. 678=30 M.L.J. 587.

[42] *The Lodna Colliery* v. *Bepin Behary Bose,* (1920) 55 I.C. 113=1 P.L.T. 84.

[43] *Baijnath Jugal Kishore* v. *Manindra Chandra,* (1931) 133 I.C. 453.

[44] *Tafazzul Khan* v. *Dr. Mohd. Baksh,* (1919) 52 I.C. 361 (Pat.).

[45] *Sohan Singh* v. *Mul Singh,* 229 P.L.R. 1911=11 I.C. 446.

[46] *Maharaj Bahadur Singh* v. *Achala Bala,* (1927) 105 I.C. 763=1928 Cal. 106; Relied on *Jadunath* v. *Harikar,* 18 I.C. 253=17 C.W.N. 308=17 C.L.J. 206.

[47] *Bir Sen* v. *Raja Ram,* (1923) 73 I.C. 33=1924 Lah. 71.

Bench in *Mangun Jha* v. *Dolhin Golab Koer,*[48] held that such a suit does not come within the terms of Art. 36, Limitation Act; but, assuming that the case does not come within the terms of Art. 39, the case is governed by Art. 49 or 48, as the crops, after they had been cut, come under the description of specific moveable property.

(7) A suit to recover a sum of money entrusted to the defendant for a specified purpose and misappropriated by him is a suit to which Art. 48 has been applied by the High Court[49]; but this view has been disapproved by other High Courts.[50]

### 1283. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

(1) In *Gurudas* v. *Ram Narain,*[1] where certain goods of the plaintiffs had been appropriated to his own use by the brother of the defendant, and after his death, the defendant had sold these goods, and held the sale-proceeds for deceased's widow, it was held that the plaintiff's suit to recover the money did not fall under Art. 48, there being no *dishonest* misappropriation or conversion by the defendant; but that Art. 120 applied to the suit.

(2) Similarly, where there was no proof of theft, or dishonest conversion in respect of a Government Promissory Note deposited in Court, which being lost by the Court, was traced some years later to a person who had purchased it in good faith from one since deceased, the suit was not held covered by Art. 48, Limitation Act.[2]

(3) A suit against a defendant to recover articles alleged by the plaintiff to have been left in a house, which he occupied along with the defendant's deceased son, for safe custody and alleged to be in defendant's possession is governed by Art. 145, and not Art. 48 of Sch. I, to the Limitation Act.[3]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 48-A. | To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterwards brought from the trustee, depositary or pawnee for a valuable consideration. | Three years. | When the sale becomes known to the plaintiff. |

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[48] (1898) 25 Cal. 692 (F.B.).

[49] *Rameshar* v. *Mata Bhikh,* (1883) 5 All. 341; *Ram Narain* v. *Umrad Singh,* (1907) 29 All. 615; *Jagamji* v. *Bandan,* (1930) 124 I.C. 33=1930 All. 397=1930 A.L.J. 1411; and *Benares Bank* v. *Ram Prasad,* 1930 All. 573=124 I.C. 180.

[50] *Sankunni Menon* v. *Govinda Menon,* (1912) 14 I.C. 254=37 Mad. 381; also see *Ramdas* v. *Ajudhia,* (1912) 63 I.C. 685=14 S.L.R. 137; *Essaji Bhaiyaji* v. *The "Savitri",* (1886) 11 Bom. 133 (137); *Surat Lal* v. *Umar Haji,* 22 Cal. 877.

[1] 10 Cal. 860 (864) (P.C.).

[2] *Chandra Kali* v. *Chapman,* 32 Cal. 799 (814).

[3] *Krishnaswamy* v. *Gopalachariar,* (1924) 84 I.C. 1026=20 L.W. 758=1925 Mad. 185=1923 M.W.N. 143.

## SYNOPSIS.

1284. Corresponding provisions.
1285. The object of the Amendment.
1286. Legislative changes.

## NOTES.

**1284. CORRESPONDING PROVISIONS.**—This provisions originally appeared as Art. 133 of Act IX of 1908, being a re-enactment of Art. 133 of Act XV of 1877. But, the Amending Act I of 1929, has altered both the prescribed period of limitation by reducing it from 12 years to three years, and the starting point of limitation. The commencing date under Art. 133, was the date of the purchase, but the present article dates it from the knowledge of the plaintiff.

**1285. THE OBJECT OF THE AMENDMENT** has been stated as follows:—

"(1) To make the period of limitation under Arts. 133 and 134 run from the date when the sale or transfer becomes known to the plaintiff.

(2) To reduce the period of limitation under Art. 133 from 12 years to 3 years.

(3) (*a*) To bring Hindu, Muhammadan, and Buddhist religions and charitable endowments within the scope of S. 10 of the Indian Limitation Act, and (*b*) to bring these endowments within the scope of Arts. 133 and 134.

"As regards (1) we consider on the whole that the date when the plaintiff obtains knowledge of the transfer he seeks to attack is the most suitable date from which limitation should run. If limitation runs from the date of the transfer itself it is a simple matter for a dishonest trustee and a colluding transferee to conceal the fact of the transfer until period of limitation has expired. The position is not much improved if the period is made to run from the delivery of possession, for even the fact of possession of the nature to give rise to a cause of action can also be concealed; for instance, land may be given out originally on lease from year to year in the ordinary course of management, and then collusively sold, without any one interested knowing that the vendee's possession is other than that of a lessee from year to year. We, therefore, recommend that the period should run from the date when the transfer becomes known to the plaintiff.

"3. If this point is ceded, then there is no reason to mention such a long period as twelve years in the case of sale of moveable property under Art. 133. We consider that in these cases a period of three years is quite sufficient and that the second object of the Bill should be carried into effect.

"4. As regards the first part of the third object, we are entirely in agreement with Cl. (2) of the Bill, which brings religious and charitable endowments within the scope of S. 10 of the Limitation Act.

"5. As regards the second portion of the third object, we consider that the general intention of the Bill is sound, and that a definite provision should be made in the Schedule to the Limitation Act for suits relating to the recovery of endowment property which has been transferred for a valuable consideration. However, the bill, in our opinion, does not clearly provide for the different cases which arise, which fall into two classes:—

"(1) **Suits by persons interested in the endowment** (who would be called beneficiaries if the endowment were a trust), to set aside alienations of the endowment property made by the manager.

"In these cases the plaintiff is not entitled to possession, and cannot, therefore, claim to recover the property; but he may sue to have the transfer set aside and for any consequential relief which may be adapted to the circumstances of the case. For this class of case, we propose a new Art. 48-B for moveable property, and 134-A for immoveable property.

(2) **Suits by the manager himself,** attacking alienations made by a predecessor.

Here the plaintiff is himself entitled to possession of the property and the correct frame of the suit is one to recover possession. In connection with these suits, their Lordships of the Privy Council have held in *Vidya Varuthi Thirtha* v. *Balusami Aiyar and others,*[4] that limitation is governed by Art. 144, on the view that when each manager succeeds to the management of the endowment, the possession of the alienee becomes adverse to him and limitation runs from the date of his succession. We consider this rule to be suitable to the circumstances of these endowments. At present it is derived from an application of Art. 144, which is a general rule, to the special case of the alienation of endowment property; and their Lordships themselves in *Lal Chand Marwari* v. *Ram Rup,*[5] have doubted the legality of the application. We, therefore, propose to put the matter beyond doubt by embodying the rule in special articles in the schedule to the Limitation Act. These articles will be in accordance with the principle underlying new Arts. 48-B, and 134-A, for it may be presumed that when a new manager takes over charge he will at once acquaint himself with the affairs of the endowment and obtain knowledge of any improper alienation. For this class of suits, therefore, we propose Arts. 48-C, and 134-B, relating to moveables and immoveables respectively.

6. As a result of the insertion of these articles relating specially to religious and charitable endowments, Art. 134 will remain applicable to trust property or mortgaged property only, and will be amended only in the 3rd column; and Art. 133 will be similarly amended and transferred to a place at Art. 48-A in order to curtail the period of limitation."[6]

1286. **LEGISLATIVE CHANGES.**—Under **Act XIV of 1859,** S. 5, time was fixed when the cause of action in such cases would arise, *viz.,* at the *date of purchase.* Subject to this the ordinary period of limitation as to moveables, and immoveable property applied as was given in the various clauses of S. 1, Limitation Act. According to the proviso, which referred to Cl. (15), the time prescribed was 30 years in the case of moveables, and 60 years in case of immoveable property *from the time of the deposit, pawn or* pledge. It was held under this law that the sale of mortgaged property by the heirs of a mortgagee, after it had been held and enjoyed by them upwards of sixty years, did not give a fresh cause of action to the representatives of the mortgagor.[7] Only *bona fide* purchasers from trustees were entitled to the benefit of S. 5, Act XIV of 1859.[8] Before a person could obtain the benefit of S. 15 of Act XIV of 1859, he had clearly and distinctly to show that he filled the position of the person contemplated by that section as a person who ought to be protected, and he must show three things: first, that he is a purchaser according to the proper meaning of that term; second, that he is a purchaser *bona fide*; and third, that he is a purchaser for valuable consideration.[9]

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[4] 44 Mad. 831.

[5] L.R. 53 I.A. 24 (35) (P.C.).

[6] See *Gazette of India,* 1927, Part V, p. 258.

[7] *Ram Dhun Bhuggut* v. *Guneshee Mahton,* (1871) 16 W.R. 96.

**In Act IX of 1871**, the article similarly used the words *"in good faith"*, which have been omitted since Act XV of 1877. The words *"or bequeathed"* were inserted for the first time in Act XV of 1877, and, the words *"for a valuable consideration"* were substituted in Act XV of 1877, for the words "and for value".

For Comments *see* Notes under S. 49.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 48-B. | To set aside sale of moveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration. | Three years. | When the sale becomes known to the plaintiff. |

NOTES.

1287. **LEGISLATIVE CHANGES.**—This is a *new* provision introduced by the Limitation Amending Act I of 1928, as explained in the Report of the Select Committee on the Bill (vide *Gazette of India,* Part V, p. 258—quoted in S. 1284, *ante.*).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 49. | For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same. | Three years. | When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful. |

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[8] *Mt. Khyroonnissa* v. *Salehoonnissa,* (1866) 5 W.R. 238.

[9] *Radhanath Doss* v. *Gisborne & Co.,* (1871) 15 W.R. 24 (P.C.); also see *Juggernath Sahoo* v. *Shah Mahomed,* (1874) 23 W.R. 99 (P.C.).

## SYNOPSIS.

1288. Corresponding provisions.
1289. Scope of Arts. 48 and 49.
1290. **Article explained.**
  (*i*) Other specific moveable property.
  (*ii*) Compensation.
  (*iii*) Wrongful detention.
1291. **Article applied**—*Illustrative cases.*
1292. **Article not applied**—*Illustrative cases.*
1293. Starting point of limitation.

## NOTES.

**1288. CORRESPONDING PROVISIONS.**—This article re-enacts Art. 49 of Act XV of 1877.

In Act IX of 1871, the provision was made by a number of articles, Nos. 48, 47, 35, 33 and 26, as noticed already in comments under Art. 48, *ante. See* S. 1276, *ante.*

**1289. SCOPE OF ARTS. 48 AND 49.**—Arts. 49 deals with injuries to specific moveable property, other than moveable property such as is described in Art. 48. The *expression "other specific moveable property"* in Art. 49 seems to be used in antithesis to the specific moveable property referred to in Art. 48, which prescribes a limitation of the same period of three years to suits *"for specific moveable property lost, or acquired by theft, or dishonest misappropriation, or conversion, or for compensation for wrongfully taking or detaining the same"*, but fixes the period, from which limitation is to run, at the time "when the person having the right to the possession of the property first learns in whose possession it is".

"Compensation for *injuring* specific moveable property of the latter description, curiously enough, is not provided for in Art. 48; so that in respect of injury to such property, the complainant is, apparently, thrown back upon the general provision of Art. 36."[10]

Art. 48 is a special section, whereas Art. 49 is a general section. The former deals only with specific moveable property which falls under one of two classes, namely, (1) such property as has been lost or (2) as has been acquired (*a*) by theft, (*b*) dishonest misappropriation, or (*c*) conversion. No other kind of moveable property is affected by this article. If the case is not covered by Art. 48, then undoubtedly Art. 49 will apply.[11] The words "wrongfully taking or detaining the same" in Art. 48, refer to wrongfully taking or detaining specific moveable property lost or stolen or misappropriated or converted. However, the same words in Art. 49 merely refer to wrongfully taking or detaining "*other* specific moveable property". The **Allahabad High Court**, in *Kripa Ram* v. *Kunwar Bahadur*,[12] has held that Art. 48 is intended to apply to cases where the plaintiff having the right to possession of the property learns of the acquisition by theft or dishonest misappropriation or conversion. Art. 49 is a more general article and applies to other cases of specific moveable property being wrongfully taken, injured or detained. It is explained that

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[10] *Essoji Bhayaji* v. *The "Savitri"*, (1886) 11 Bom. 133 (136).

[11] *The Lodna Colliery Company* v. *Bepin Behary Bose,* (1920) 55 I.C. 113 (133)=1 P.L.T. 84 (Applied in *Lewis Pugh* v. *Ashutosh Sen,* 1929 P.C. 69=56 I.A. 93=114 I.C. 604=8 Pat. 516 (P.C.)].

> "**the difference between Arts. 48 and 49** is that while the former refers to cases where the property has been lost, acquired by theft or dishonest misappropriation or conversion, the latter applies to other cases of wrongfully taking, injuring or detaining moveable property. No clear authority directly in point either way has been brought to our notice. But we think that having regard to its language Art. 49 also is intended to apply to cases where the plaintiff had a right to the possession of the moveable property which was wrongfully taken from him, injured or wrongfully detained. The plaintiff's remedy is to sue for the recovery of the specific moveable property or in the alteranative for its compensation for wrongfully taking, injuring or wrongfully detaining."[13] Where neither Art. 48, or 49 applies, the more general Art. 36 will apply.[14]

It would be noticed that Arts. 48 and 49 cover cases not only of recovery of property *in specie*, but in the alternative for compensation. Both these articles apply only when the plaintiff is seeking **personal relief** merely. This feature these articles have in common with Art. 48-A, which deals with a special class of suits for recovery of the property only. The relief sought in Art. 48-B need not be personal at all. This Art. 48-B is applicable to suits for setting aside the sale, where plaintiff may not even be claiming recovery of possession, because he has no right to possess the property in question. Articles 48-A and 48-B deal with special cases which have no necessary connection with Art. 48, and might as easily have been placed before Art. 48, as they have been placed after it in the sequence of articles. Art. 48, as the starting point in column 3 indicates, is applicable to cases where the person having the right to possession is not in possession. Where the main relief claimed, by way of possession of specific moveable property, contains a prayer for an **ancillary relief** of declaration, the limitation applicable to the main relief claimed, that is, Art. 49 of Sch. I to the Limitation Act, applies to the suit.[15] Similarly, in a suit for the recovery of specific moveable property, an alternative prayer *for its value*, may be read as ancillary to the main relief, for possession governed by this article.[16]

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[12] 1932 All. 256=1932 A.L.J. 241=136 I.C. 809=54 All. 467.

[13] *Kripa Ram* v. *Kunwar Bahadur*, 1932 All. 256=136 I.C. 809=54 All. 467 (470)=1932 A.L.J. 241.

[14] *Ibid.*

[15] *Pun Aung* v. *Brijlal*, (1922) 70 I.C. 841=1923 Rang. 11.

[16] *Murugesa* v. *Jotharam*, (1900) 22 Mad. 478.

**1290. ART. 49 EXPLAINED.**—The words *"other specific movable property,"* refer back to the kinds of specific moveable property described in Art. 48, *i.e.*, those which are lost or acquired by dishonest misappropriation or conversion. The introduction of the two new Arts. 48-A and 48-B, which describes certain kinds of specific moveable property should not be understood as also qualifying the term 'other'.[17]

**(*i*) *Other* specific moveable property.**

"Compensation" includes compensation for the *value* of the goods as well as compensation by way of *damages* which are consequential on the wrongful taking, etc.[18] The relief to compensation in Arts. 48 and 49, is by way of an alternative relief only.[19]

**(*ii*) Compensation.**

A breach of the bailee's duty to deliver up the goods constitutes wrongful detention within the meaning of Art. 49, Limitation Act. But, the mere non-payment of rent for a sewing machine taken on the hire purchase system would not amount to wrongful taking or wrongful detention of the machine within the meaning of Art. 49 of the Limitation Act. There must be some overt act or **demand** for the machine by the hirer **and refusal** by the purchaser.[20] This conclusion is supported by the view taken under similar circumstances, by the **Calcutta High Court,** in *Gopal Chandra Bose* v. *Surendra Nath Dutt.*[21] This was a case where the defendant who held certain G. P. Notes in trust for the plaintiff pledged the same for his own purposes, and subsequently refused to deliver them upon plaintiff's demand or request.[22] Where a person *B,* was entrusted with a jewel to raise a loan on it for *A,* the owner, and the loan was so raised, but on repayment of the loan, the jewel was detained by *B,* and the same was not returned to the owner *A,* inspite of the latter's demand, *held,* that the suit by owner *A,* against the agent *B,* for recovery of the jewel was governed by Art. 49, and not by Art. 145, as there was no agreement as to deposit after repayment of the loan.[23]

**(*iii*) Wrongful detention.**

Where according to plaintiff's allegation the articles deposited with defendant for safe custody were not returned, it was held, that this did not make the latter's possession unlawful, unless a demand was made and he refused to comply with it.[24] It is an implied term of every contract of bailment or deposit that the goods bailed or deposited shall be returned on demand, and the failure to return them is a breach of contract. If the demand for the return of goods be not complied with, the possession of the bailee or depositee becomes unlawful and the owner may sue in detinue, or tort, to which Art. 49 of the schedule would furnish the period within which the suit must be brought.[25] Where the original possession of moveables is permissive, the character of that possession is not changed by the fact that the person in possession sets up a claim to the property as his own. The possession does not become unlawful until a formal demand for its return is made and refused. A suit for recovery of possession under such circumstances is governed by Art. 49, and limitation starts from date of refusal.[26]

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[17] Mitra's Limitation Act, Vol. II, p. 1181.

[18] *Ibid.*; *Murgesa* v. *Jatta Ram,* (1900) 23 Mad. 621 (626).

[19] *See* S. 1289, above.

[20] *The Singer Manufacturing Company* v. *Felyum,* (1915) 27 I.C. 637 =13 A.L.J. 81.

[21] 12 C.W.N. 1010; also see *Wilkinson* v. *Verity,* (1871) L.R. 6 C.P. 206.

[22] *Ibid.*

[23] *Gopalsami Ayyar* v. *Subramania Sastri,* 12 I.C. 207=35 Mad. 636= (1911) 2 M.W.N. 190.

### 1291. ARTICLE APPLIED—ILLUSTRATIVE CASES.—

**Specific moveable property.**

(1) In a suit by *shebaits* claiming to recover the custody of the idols, the plaintiff's claim for a personal relief will be no bar to the application of Art. 49 to such a case, considering the suit as one for recovery of specific moveable property.[27] In *Gossamee Sree Greedharejee* v. *Rumanlalljee*,[28] their Lordships of the Privy Council observed that the suit rested "quite as much on the right of the Thakoor to have the conduct of his worship, and his own custody placed in right hands, as upon the personal right of the plaintiff to property." A suit to recover specific moveable property from a person in unlawful possession thereof, is governed by this article, even though the **property** is the **subject of a legacy.**[29] Account-books and mortgage deeds have been held to be specific moveable properties within the meaning of this article.[30]

**Cutting and carrying away standing crops.**

(2) A suit for compensation for cutting and carrying away standing crops from plaintiff's land falls under Art. 49, Limitation Act.[31] A suit by the landlord against his occupancy tenant for compensation for the trees cut is a suit for compensation for the breach of an implied contract not specifically provided in the Limitation Act and is governed by Art. 49.[32]

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[24] *Mt. Laddo Begam* v. *Jamal-ud-din,* (1919) 52 I.C. 382=42 All. 45=17 A.L.J. 907; Followed 35 Mad. 636=12 I.C. 207; Relied 27 I.C. 637=13 A.L.J. 81.

[25] *Kalyanmal* v. *Kishenchand,* (1920) 55 I.C. 45=17 A.L.J. 888=41 All. 643.

[26] *Ma Mary* v. *Ma Hla Win,* (1925) 85 I.C. 10=1925 Rang. 146=2 Rang. 555.

[27] Referred and cf. *Bali Pandu* v. *Jadumani,* (1910) 38 Cal. 284 (An idol was held not to be moveable property, but a juridical person, especially as the idols were plaintiffs in the suit along with their shebait).

[28] (1889) 16 I.A. 137 (P.C.).

[29] *Issur* v. *Juggut,* 9 Cal. 79.

[30] *Durga Devi* v. *Ramnath,* 85 P. R. 1919=52 I.C. 580.

[31] *Mangun Jha* v. *Dulhim Golab Koer,* 25 Cal. 692 (F.B.); *Jadunath* v. *Harikar,* (1913) 18 I.C. 253=17 C.W.N. 308=17 C.L.J. 206 (Reversing 36 Cal. 141).

[32] *Jagdish* v. *Raghubir,* (1926) 94 I.C. 336=1926 All. 462.

**Wrongfully taking property.**

(3) The article covers all other cases of specific moveable property wrongfully taken, or wrongfully detained which do not arise out of theft or dishonest conversion as provided for by Art. 48.[33] Where a mortgagee of a house with power of sale took possession of the house and sold it to a third person, and certain timber and other articles were stored in the house, about which the mortgagee was unaware when giving delivery of possession to the purchaser, and the mortgagor then sued the mortgagee for the **specific moveables or for compensation for wrongfully taking the same,** and not accounting for it, *held* that the suit fell under Art. 49, Sch. I to the Limitation Act.[34]

**Cutting and removing trees.**

(4) A suit for damages sustained by the plaintiff on account of the defendant cutting plaintiff's lac trees and removing the same is primarily a suit for compensation for "trespass upon immoveable property" and is governed by three years' rule under Art. 39 or Art. 49 may apply to the same.[35]

**Wrongful injury.**

(5) Where a mortgagee sued for recovery of the mortgage amount by sale of the mortgaged property; and pending the suit another co-tenant of the mortgagor cut down all the trees on the land and appropriated the same to himself, and the mortgagee subsequently sued the defendant for the damage suffered by him by reason of the defendant having appropriated his co-tenants' share of the wood, it was held that the act of the defendant was a **wrongful injury** on plaintiff's right, and limitation began to run from the date when the defendant appropriated the wood to himself.[36] The injury to property mentioned in this article is limited to cases of injury to property while in the custody of some person other than the owner. For instance, where damage was done to a ship of the plaintiff, while it was in his possession, by collision with the defendant's ship on the high seas, this article was held inapplicable.[37]

**Wrongful taking.**

(6) Article 49, Sch. I, Limitation Act is the ordinary article applicable to a case where the original possession of the defendant is lawful, but it becomes unlawful by reason of certain subsequent facts.[38] Accordingly, where plaintiff's mother died possessed of valuable ornaments, and her husband was in possession of the ornaments till his death, and thereafter they remained in the family safe with her step-brothers. *Held,* that a suit for the recovery of the ornaments was governed by Art. 49, and the cause of action for the suit arose only when the plaintiff demanded the ornaments from the defendants, and her demand was refused.[39]

(7) Similarly, where the plaintiff had made over a certain quantity of gold to the defendant to be made into ornaments, but no time was fixed, and

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[33] *Jagdish* v. *Raghubir,* (1926) 94 I.C. 336=1926 All. 462.

[34] *Passanha* v. *Madras D. and B. Society,* (1888) 11 Mad. 333.

[35] *Nirbada Prasad* v. *Akbar Khan,* (1929) 80 I.C. 769=1924 Nag. 125=20 N.L.R. 80.

[36] *Aiyappa Reddi* v. *Kuppusami,* (1904) 28 Mad. 208.

[37] *Essoo* v. *Steam Ship "Savitri",* 11 Bom. 133.

[38] *Bhupendra Nath* v. *Goonendra Nath,* 106 I.C. 885=1929 Cal. 42 =32 C.W.N. 133.

[39] *Ibid.,* 106 I.C. 885=1929 Cal. 42.

the latter put him off from time to time until being pressed by plaintiff he promised to make and deliver the ornaments on a given date, but failed to do so, *held,* that a suit for the recovery of the gold deposited was governed by Art. 49, and the detainer's possession had become unlawful from his wrongful refusal to apply the gold to make the ornaments as he had agreed to do.[40]

(8) Where property belonging to the plaintiff was wrongly ordered by a Magistrate to be delivered to the defendant, it was held that Art. 49 was applicable to a suit in respect of the property wrongfully taken by the defendant. And time began to run from the date when the property was so taken under the erroneous order of the Magistrate, even though the defendant had been in wrongful possession previous to the seizure by the Magistrate.[41]

**Wrongful detention.**

(9) Where suit is brought for compensation for unlawful detention of certain share certificates to which the plaintiff as transferee was entitled, the suit would be governed by Art. 49, and not by Art. 48.[42] Where plaintiff gave certain jewellery to the defendant on condition that its price would be paid if it would be approved, and it would be returned if not approved; but the defendant failed to return the jewellery in question to the plaintiff, though the latter demanded it by telegram, held that the defendant's possession after the demand and refusal became unlawful, within the meaning of Art. 49.[43]

(10) A suit for return of property which has been wrongfully attached and subsequently released from the attachment is governed by Art. 49, and not by Art. 29, as it is not one for compensation for wrongful seizure. Limitation starts from the date when the detainer's possession becomes unlawful *i.e.*, after it is released from attachment.[44]

(11) Where *A* entered into an agreement with *B* for the purchase of movable and immovable property and paid a deposit; but *B* instead of conveying to *A*, conveyed the property to *C* and put *C* in possession, whereupon *A* brought a suit against *B* and *C*, and obtained a decree for specific performance against *B*, and for setting aside the conveyance to *C*: and *C* had to be sued later for recovery of the possession of property detained by him; it was held that the suit for possession of the property within three years of the decree for specific performance was within time under Art. 49, Limitation Act.[45]

(12) A suit for recovery of deeds of title which remained with the mortgagee after redemption of the mortgage, was governed by Art. 49, limitation commencing from demand for the deeds, after which the retention became unlawful.[46]

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[40] *Ganga Hari* v. *Nabin Chandra,* 34 I.C. 959=20 C.W.N. 232 (233).

[41] *Ramaswamy Aiyar* v. *Muthusamy Ayyar,* (1906) 30 Mad. 12.

[42] *Maganlal Bhukander* v. *Thakurdas Vrijbhukandas,* (1910) 12 Bom. L.R. 513=7 I.C. 447.

[43] *Kali Charn* v. *Ganeshilal,* 1928 Oudh 47 (1)=105 I.C. 224; *also see* S. 1290, *ante; Laddo Begum* v. *Jamal-ud-din,* 42 All. 45=52 I.C. 382; and *Ma Mary* v. *Ma Hla Win,* (1925) 85 I.C. 10=1925 Rang. 146=2 Rang. 555.

[44] *Parshadi Lal* v. *Chandan,* 1935 All. 915.

[46] *Subbakka* v. *Marupakkala,* 15 Mad. 157.

[45] *Dhondiba* v. *Ramchandra,* 5 Bom. 554.

### 1292. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

**Deposits.**

(1) Article 49 of Sch. I to the Limitation Act deals not with suits for recovery of property deposited with another but only with those in respect of property wrongfully taken or wrongfully detained.[47] This is a general article applicable to suits for specific moveable property or for compensation for wrongfully taking or injuring or wrongfully detaining the same.[48] All actions for the recovery of a deposit of moveable property are, by the express words of Art. 145 of Sch. I, to the Limitation Act, comprised within it, and no exception is made as regards deposits where demand and refusal make the continuance of possession unlawful.[49] Art. 49 applies even in the case of a bailment upon a promise not to recall the thing gratuitously lent for twenty years or more.[50] A suit against a defendant for recovery of articles deposited for safe custody is governed by Art. 145, Limitation Act.[1] The mere fact that the depositor demands the thing, and the depositee refuses to return the same, does not make Art. 49 applicable to the case.[2]

(2) In *Administrator-General of Bengal* v. *Kristo Kamini Doss*,[3] it was held that where Government securities were deposited with a person to be used by him, if necessary, to raise money, the transaction amounted to a deposit, and not a loan, and that Art. 145 governed the case. But where the defendant was entrusted with a jewel to raise a loan on it on behalf of the plaintiff, and the jewel was so pledged, but the loan was repaid and the defendant got back the jewel from the pledgee, but did not return it to the plaintiff in spite of a demand for its return by the latter, held that there was no agreement as to deposit of the jewel after the repayment of the loan, and Art. 49 would govern the case, rather than Art. 145.[4] There is no deposit in the legal sense where the moveable property deposited is not itself to be returned in the condition in which it would naturally remain at the time of the return but some work is agreed to be performed in connection with the moveable property. Such a transaction is a *mandatum*. Art. 49 or 80 or 90 would apply and not Art. 145.[5]

**Breaches of contract.**

(3) Article 115, is a residuary article for actions *ex contractu*. Where *A* lent some ornaments to *B*, to be used by the latter in a religious procession, the transaction was in the nature of a loan. If these ornaments were stolen and *B* admitted liability at one time, but denied it later on, a suit for recovery of the ornaments would be governed by Art. 115 and not Art. 49.[6]

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[47] *Kishtappa Chetty* v. *Lakshmi Ammal*, (1923) 72 I.C. 842=1923 Mad. 578=44 M.L.J. 431=17 L.W. 467=1923 M.W.N. 284=32 M.L.T. 217.

[48] *Promotho Nath* v. *Prodyumno Kumar*, (1922) 69 I.C. 900=26 C.W.N. 772.

[49] *Ibid.*

[50] *Ganginenni Kondiah* v. *Gottipati Kondappa*, (1910) 5 I.C. 1=33 Mad. 56=20 M.L.J. 41.

[1] *Krishnaswamy Iyengar* v. *Gopala Chariar*, (1924) 84 I.C. 1026=1925 Mad. 185=1923 M.W.N. 143=20 L.W. 758.

[2] *Ma Shwe On* v. *Ma Saw*, 1928 Rang. 309=6 Rang. 547.

[3] (1904) 31 Cal. 519=8 C.W.N. 500.

[4] *Gopalasami* v. *Subramania*, 35 Mad. 636 (638).

[5] *Narayanasamy Thevar* v. *Aiyasami Iyengar*, (1913) 18 I.C. 921=24 M.L.J. 184.

[6] *Chaturgun* v. *Shahzady*, 1930 Oudh 395=126 I.C. 682=7 Oudh W. N. 769.

**Wrongful seizure.**

(4) Article 49, does not apply where the moveable property is attached or detained in execution of a legal process by the Court.[7] In such cases Art. 29 would be more appropriate, as a specific article applicable to all cases of attachment before judgment where specific property is seized, and the seizure is wrongful both when the Court has no jurisdiction, or when the attachment was obtained on insufficient grounds.[8] In *Madras S. and N. Company, Ltd.* v. *Shalimar Works*,[9] a suit for compensation for wrongful seizure of a ship under an order of Court was held to be governed by the more specific Art. 29, rather than Art. 36, or Art. 49, Limitation Act.

**Specific moveables.**

(5) Article 49 is not applicable to a suit for a half-share in certain moveable property, (Government Promissory Notes) sought to be recovered on a declaration of title, such a suit not being for a specific moveable property, which means property one can demand delivery of, *in specie*.[10] Art. 36, and not Art. 49 is applicable to a suit for compensation against the *ijaradar* of a market. Where as a result of a quarrel between the plaintiff and the *ijaradar* about the payments of tolls, the plaintiff's goods are detained at the police station and there deteriorate.[11]

(6) A claim to recover a share of certain specified moveable properties left by the deceased, is really **a suit for partition of cash and moveables**, and as such is governed by Art. 120, there being no specific provision for a claim of this kind.[12]

(7) This article is not applicable to cases **where the plaintiff is claiming in a representative capacity**, as *shebait* of a temple, and is not suing as an individual having a personal claim to property.[13]

(8) **Where the property is not in possession of the detainer**, this article is not applicable. In a suit against a Navigation company for compensation for non-delivery of timber, this article was held inapplicable and Art. 31 was applied to the suit.[14]

**1293. STARTING POINT OF LIMITATION.**—Under Art. 49 of Sch. I to the Limitation Act, the prescribed period is three years from when the detainer's possession becomes unlawful.[15]

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[7] *Ram Narain* v. *Umrao Singh*, 29 All. 615 (617); also see *Narasingh* v. *Gangaraju*, 31 Mad. 431 (438); Compare *Manavikraman* v. *Avisilan*, 19 Mad. 80 (82) (Where Art. 49 or Art. 36 was applied, rather than Art. 29).

[8] *Pannaji Devichand* v. *Savaji Kapur*, 1930 Mad. 635=53 Mad. 621.

[9] 42 Cal. 85 (108).

[10] *Surnamoyee* v. *Probodh Chandra*, 1933 Cal. 253=143 I.C. 402=36 C.W.N. 758=55 C.L.J. 420.

[11] *Ananda Chandra* v. *Barada Kant*, (1925) 90 I.C. 509=42 C.L.J. 203=1926 Cal. 177.

[12] *Bashirulnissa* v. *Abdul Rahman*, (1921) 64 I.C. 974=44 All. 244=1922 All. 525; Followed *Mahomed Riasat* v. *Hasin Banu*, 21 Cal. 157=20 I.A. 155 (P. C.).

[13] *Gossami Sri Gridharji* v. *Ramanlalji*, 17 Cal. 3 (P.C.).

[14] *Venkatasubba* v. *Asiatic Steam Navigation Company*, 39 Mad. 1 (F.B.).

[15] *Narayanaswami Thevar* v. *Aiyasami Iyengar*, (1913) 18 I.C. 921 =24 M.L.J. 184.

Where the plaintiff made over to a goldsmith gold ornaments to be melted and made into new ornaments, without fixing the time within which the work was to be finished, but when pressed for the ornaments, the defendants had promised to make and deliver them within a given number of days, a suit for the return of the gold or its price was brought, it was held that the suit fell under Art. 49 or Art. 115, and that limitation began to run from the date on which the goldsmith wrongfully refused to do the work.[16] A suit for the recovery of specific moveable property, which has been originally obtained lawfully but has since been unlawfully converted or retained is governed by Art. 48 and not Art. 49 of the Limitation Act.[17] Under Art. 48, Limitation runs from the time when the plaintiff learns in whose possession the property is.[18] Article 48 applies to all conversions, whether dishonest or not: and the limitation period of three years begins to run when the person having the right to possession of the property first learns in whose possession it is.[18-a] In a suit for wrongfully detaining title-deeds, the starting point of limitation is the date when the detainer's possession becomes unlawful, or from the date when the title to the property comprised in the deeds is adjudged to the plaintiff.[19] The mortgagee's retention of the title-deeds after the redemption of a mortgage is not unlawful, though the mortgagor on redemption has a legal right to demand delivery. Limitation in such cases runs from the date of demand for delivery, after which the retention becomes illegal.[20] Time under Art. 49 begins to run from the date of the defendant's refusal.[21] A suit brought more than three years from the date of the demand, but within three years of the date of refusal is within time under Art. 49, Limitation Act.[22] Where moveables are entrusted to any person on condition that they will be returned on the expiry of a specified period, the fact that they are detained beyond that period does not render the detainer's possession unlawful, Limitation in such cases runs from date of demand and refusal under Art. 49 of Sch. I, Limitation Act.[23] In the case of a conversion falling under Art. 48, Limitation Act, limitation would commence to run from the date when the plaintiff learnt in whose possession the property was.[24] But, where there is a trespass on a piece of land this is by itself no proof of any conversion of moveables lying upon the land at the time that trespass takes place; that conversion in such cases is not constituted by trespass but by refusal to deliver moveables after a demand is made for their recovery.[25] This was also the view taken in an English case,[25-a] where the plaintiff's goods and servants were on the land which the defendant recovered in ejectment, and the defendant on entering under the writ of possession turned the plaintiff's servants off the land and would not let them remain for the purpose of removing the goods. It was held that there was no conversion without any subsequent demand or refusal, although the plaintiff certainly had a right to the goods.

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[16] *Ganga Hari Chakrbarti* v. *Nabin Chandra Banikya,* (1916) 34 I.C. 959=20 C.W.N. 232 (233).

[17] *Seshappier* v. *Subramania Chettiar,* (1914) 23 I.C. 174=15 M.L.T. 221=1914 M.W.N. 319; s.c. on appeal 34 I.C. 751=40 Mad. 678.

[18] *Ibid.*, 23 I.C. 174 (Mad.); 34 I.C. 757.

[18-a] *Adjai Coal Company, Ltd.* v. *Pama Lal Ghose,* 1930 P.C. 113=123 I.C. 726=57 I.A. 144=57 Cal. 1341 (P.C.).

[19] *See* No. 33, Act IX of 1871.

[20] *Subbakka* v. *Maruppakkala,* (1891) 15 Mad. 157=2 M.L.J. 54.

[21] *Maganlal* v. *Thakardas,* (1910) 12 Bom.L.R. 513=7 I.C. 447.

[22] *Gopalasami Iyer* v. *Subramania Sastri,* (1911) 12 I.C. 207=35 Mad. 636.

[23] *Mt. Laddo Begam* v. *Jamaluddin,* (1919) 42 All. 45=52 I.C. 382=17 A.L.J. 907.

| Article. | Description of Suit. | Period of Limitation. | Time from which period beings to run. |
|---|---|---|---|
| 50. | For the hire of animals, boats or household furniture. | Three years. | When the hire becomes payable. |

## NOTES.

**1294. CORRESPONDING PROVISIONS.**—*See* Art. 49, Sch. II, Act IX of 1871, and Art. 50, Sch. II of Act XV of 1877, which have been re-enacted as the present Art. 50, in Act IX of 1908. In Act XIV of 1859, a similar provision was made in Cl. (8), S. 1 of the Act.

**1295. SCOPE AND APPLICATION.**—The right to recover hire is a recurring one, when the goods, etc., are let on hire, the time when the money is to be paid is generally settled by agreement, express or implied. The liability for payment of the hire is *ex-contractu* and where a particular suit does not fall under terms of Art. 50, it may be governed by the general terms of Art. 115, Limitation Act. This article was not applied to a suit for hire of a sewing machine taken on Hire Purchase System, where rent is not paid and there is demand made by the company for the machine and refusal by the defendant to deliver the same, the suit would fall under Art. 49, as a case of wrongful detention,[26] It is only when a demand is made, and there is a refusal to comply with the demand that possession becomes unlawful.[27]

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[24] *Tafazzul Khan* v. *Mohammad Bakshi Khan,* (1919) 52 I.C. 361 (Pat.).

[25] *Moyi* v. *Avuthraman,* (1898) 22 Mad. 197; Relied on *Thorogood* v. *Robinson,* 6 A. and E. (N.S.), 769 at p. 772.

[25-a] *Thorogood* v. *Robinson,* 6 A. and E. (N.S.) 769, at p. 772.

[26] *The Singer Manufacturing Company* v. *Felyun,* (1915) 27 I.C. 637=13 A.L.J. 81; Relied on *Gopaldsami* v. *Subramania,* (1919) 12 I.C. 207=35 Mad. 636=22 M.L.J. 152.

[27] *Laddo Begam* v. *Jamal-ud-din,* (1919) 52 I.C. 382=17 A.L.J. 907.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 51. | For the balance of money advanced in payment of goods to to be delivered. | Three years. | When the goods ought to be delivered. |

### SYNOPSIS.

1296. Corresponding provisions.
1297. Article explained.
1298. Scope and application.
1299. Illustrative cases.
1300. Starting point of limitation.

### NOTES.

1296. **CORRESPONDING PROVISIONS.**—Section 1, Cl. (9), in Act XIV of 1859, was a corresponding provision to the present article.

This article corresponds to Art. 50, in Sch. II, Act IX of 1871 and Art. 51 of Sch. II, Act XV of 1877, which has been re-enacted in the present article.

1297. **ARTICLE EXPLAINED.**—This article relates to suit for the balance of money, which money had been advanced in payment of goods to be delivered in future. In law "money", means and includes not only coin, but also generally any paper, obligation or security that is immediately and certainly convertible into cash, so that nothing can interfere with or prevent such conversion.[28] It includes, in the dictionary sense, any currency usually and lawfully employed in buying and selling as the equivalent of money, as bank-notes and he like.

Money.

1298. **SCOPE AND APPLICATION.**—This article is analogous to the provision in Art. 97, *viz.*, suits "for money paid upon an existing consideration which afterwards fails".

A suit for balance of account consisting of moneys advanced in payment for goods to be subsequently supplied is governed by this article. The principles underlying this article are laid down in the case of *Boiddonath* v. *Lal-un-nissa*,[29] which has been followed in *Indigo Company* v. *Kubeer Mundul*.[30] This article has to be distinguished on the one hand from claims for money over paid in respect of goods sold, which would be covered by Art. 62 of the Limitation Act.[31] And, from suits for compensation for breach of contract, on the other hand, "which are governed by the more general Art. 115, Sch. I, Limitation Act.[32] This article is a special one, applicable to suits for *balance* of money paid in *advance* for goods to be delivered in future, which have not been delivered to the full value of advances within a period fixed, or customary, or reasonable in the circumstances, according to nature and terms of agreement.

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[28] Per Stuart, C.J., in Reference by Board of Revenue, (1881) 3 All. 788 (793).

[29] (1866) 7 W.R. 164.

[30] (1868) 9 W.R. 209.

[31] *Atul Kristo Bose* v. *Lyon & Co.*, 14 Cal. 457.

## 1299. ILLUSTRATIVE CASES.—

(1) Where according to a written agreement, *A*, having contracted to deliver a certain quantity of *kankar* to *B*, within a fixed period, the latter made him various advances from time to time; and as *A* did not deliver the entire quantity within the stipulated time, *B* sued him for the difference between the sums advanced, and the value of the *kankar* delivered, with interest thereon up to date of suit, it was held that the claim based on a breach of contract to deliver *kankar* was one for compensation for loss or damage caused by the breach of contract, and was governed by Art. 115 of the Limitation Act: and limitation started from the time when the contract was broken, or in the case of successive breaches, when the breach in respect of which the suit was instituted occurred.[33]

(2) An action on a *balance* struck which implied a promise to pay, and also for *advances* of seed made in respect of indigo crop to be delivered in future, where plaintiff did not sue for damages on account of defendant not sowing subsequent to the advances, was held covered by cl. 9, S. 1, Act XIV of 1859, corresponding to present article.[34]

(3) In a suit for recovery of indigo advances founded on a *kubooleut* executed by defendant, where defendant had broken no contract, and the discontinuation of indigo cultivation was not his act, but that of the plaintiff it was held that limitation of three years began to run from the date of the *kubooleut,* operating as a written acknowledgment signed by the defendant.[35]

## 1300. STARTING POINT OF LIMITATION.—

The starting point of limitation under this article is the date "when the goods ought to be delivered". If no time is expressly fixed for delivery, it would have to be found whether there is any usage of trade from which the time can be ascertained when the goods paid for in advance ought to be delivered. If no such usage is found, and no time is fixed by the agreement, the Court will consider what time was reasonable for the delivery of goods after the advancement of money having regard to all the circumstances.[36] An acknowledgment of liability, under S. 19 of the Limitation Act, enlarge the period of 3 years prescribed by this article, where the existence of accounts is admitted.[37]

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[32] *Seth Eduljee Byramjee* v. *Arjan Das,* 22 P.R. 1883.

[33] *Seth Eduljee Byramjee* v. *Arjan Das,* 22 P.R. 1883.

[34] *Indigo Company* v. *Kubeer Mundul,* (1868) 9 W.R. 209.

[35] *Bengal Indigo Company* v. *Koylas,* 10 W.R. 293.

[36] *Shanker Singh* v. *Mt. Rekha,* (1915) 28 I.C. 969 (All.); Reld. on *Boiddo Nath* v. *Lalunnissa,* 7 W.R. 164.

[37] *Ganga Sahai* v. *Khazan Chand,* (1920) 1 Lah. 357.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 52. | For the price of goods sold and delivered, where no fixed period of credit is agreed upon. | Three years. | The date of the delivery of the goods. |

### SYNOPSIS.

1301. Corresponding provisions.
1302. **Scope and application.**
1303. Supply of goods on credit—*cf.* Art. 85.
1304. Breaches of contract—*cf.* Art. 115.
1305. Suit for price of goods.
1306. **Starting point of limitation.**

### NOTES.

1301. **CORRESPONDING PROVISIONS.**—This article corresponds to Art. 52 of Act XV of 1877, which was a re-enactment of Art. 51 of Sch. II, Act IX of 1871. In Act XIV of 1859, the corresponding provision was made in cl. 8 of S. 1 of that Act.

1302. **SCOPE AND APPLICATION.**—Under Act XIV of 1859, a special provision was made for suits for the price of **goods** supplied, which were **sold by retail,** as opposed to suits for the price of goods sold wholesale. In *Shama Churn Lal* v. *The Collector of Tirhoot,*[38] a suit for payment of a bill for goods supplied by retail by an ordinary trader, and not for a settlement of accounts between *mahajuns* having mercantile transactions together, was held to be governed by cl. 8, not cl. 16, S. 1, Act XIV of 1859. But there is no separate provision under the present Act for goods sold by retail. In *Satcowrie Singh* v. *Kristo Bengal,*[39] Peacock, C.J., laid the rule that

> "if any evidence should be given to satisfy the Judge that the parties intended that all goods delivered within a month or other fixed period were not to be paid for until the end of the month, or other fixed period of credit, limitation would run in such cases, as in all others of credit given, not from the time of the purchase or delivery, but from the expiration of credit."

But, where a tradesman supplies goods from time to time on credit to a customer who makes payments from time to time on account, no fixed period of credit being agreed upon, the cause of action for purposes of limitation must be taken to arise on the date when each item claimed was supplied, and that the price of all articles supplied more than three years before the plaint was filed, would be barred.[40] Articles 52 and 53 appear to be based on this ruling.[41]

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[38] (1864) 1 W.R. 308.

[39] (1869) 11 W.R. 529.

[40] *Ibid.*

[41] Mitra's Limitation Act, Vol. II, p. 1191.

**Supply of goods on credit—*cf.* Art. 85.**

**1303.** It has been held in *Abdul Aziz* v. *Munna Lal,*[42] by the **Allahabad High Court,** that the period of limitation **for a suit by a tradesman against a customer** to recover the price of goods sold and delivered, in the absence of any period agreed upon for credit, is that prescribed in Art. 52 of Sch. I to the Limitation Act, and begins to run from the date of delivery of each item purchased.

"Unless part-payments have been made in respect of each of these items within the meaning of the statute of limitation so as to take the items out of the three yeears' limit, each item in respect of which no such payment has been made ought to be struck out of the defendant's account."[43]

In the case of a **supply of goods by a tradesman on credit,** for which payments are made on presentation of bills, the article applicable is Art. 52 of the Limitation Act, and not Art. 85, which applies to cases of a balance due on a mutual, open and current account where there have been reciprocal demands between the parties.[44] To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations.[45]

**Breaches of contract—*cf.* Art. 115.**

**1304.** But, when grain is advanced on a contract that it should be repaid in kind and the contract is broken, a suit to recover the cash value of the advance is governed either by Art. 65 or by **Art. 115** of Sch. I to the Limitation Act.[46] Art. 115 is a general provision applying to all actions *ex contractu* not specially provided for otherwise: and relates to suits *for compensation* as denoting a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract.[47] *In Mahamed Ghasita* v. *Sirajuddin,*[48] this Art. 115 was applied to a case where the contract for supply of materials and labour provided a comprehensive rate which could not be split up into two independent portions one governed by Art. 52, and the other by Art. 56. However, **the principle** was recognised that a combination of several claims in one action does not deprive each claim of its specific character and description; and that the Courts might apply to each claim the rule of limitation specially applicable thereto.[49] Similarly, where a tender for building operations undertaken by a contractor was to erect and supply a *building,* and not *labour,* or *labour and materials,* and the sums due to the contractor were to be a charge upon the buildings, Art. 132 was applied, and Arts. 52 and 56 of the Limitation Act did not apply.[50] But, where the defendant, in pursuance of an agreement to purchase certain motor-cars with certain accessories for a lump sum, and possession of some articles was delivered to the purchaser on part-payment, and on failure to pay the balance, a suit was brought for balance of price of articles supplied, it was held that the suit was not a claim for compensation for breach of the contract within Art. 115, Limitation Act, but one for price of goods sold and delivered within Art. 52; on the principle that a combination of claims in one action can be split up into component parts, each of which comes under its own rule of limitation.[1] Where the goods sold remain in the custody of the vendor as security for unpaid price of the goods and the vendor sues the vendee for a personal decree against him and not for the enforcement of any charge on the security, the suit is not governed by Art. 120, but by the three years' rule of limitation so far as personal liability of the defendant is concerned.[2] A claim for price of medicines supplied by a doctor would fall within Art. 52 of the Limitation Act.[3] But, there is no special article applicable to a suit by a medical practitioner for recovery of his fees for attendance on a patient, and the residuary Art. 115, would, therefore, apply to such suits.[4]

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[42] (1921) 63 I.C. 435=19 A.L.J. 555.

[43] *Abdul Aziz* v. *Munna Lal,* (1921) 63 I.C. 435=19 A.L.J. 555.

[44] *Dunsford* v. *Shaw,* (1925) 88 I.C. 747=1925 Pat. 806.

[45] *Lalji* v. *Ghasi Ram,* 1930 Oudh 287=7 O.W.N. 420=128 I.C. 276=6 Luck. 7; Reld. on *Shivi Gowda* v. *Fernandes,* (1911) 34 Mad. 513 =8 I.C. 141=21 M.L.J. 391.

[46] *Mohammad Din* v. *Sohan Singh,* (1922) 65 I.C. 691=4 L.L.J. 268; Reld. on *Menghu Ram* v. *Hassan,* 49 I.C. 231=41 P.R. 1918; also *Surayya* v. *Bapirazu,* (1915) 31 I.C. 335 (Mad.) (Art. 115 and not Art. 49 applied to a suit for damages on breach of contract to perform on demand after a certain date).

[47] *Mahomed Ghasita* v. *Sirajuddin,* 2 Lah. 376=66 I.C. 490=1922 Lah. 198 (F.B.); also see *Saudagar Mal Lachhman Das* v. *Bahadur Chand Harichand,* 107 I.C. 493=1928 Lah. 442 (Art. 115 is a residuary article in that it deals with cases not provided for elsewhere).

[48] *Ibid.,* 2 Lah. 376=66 I.C. 490=1922 Lah. 198 (F.B.); Folld. in *Mahomed Baksh* v. *Rawalpindi Club, Ltd.,* 1935 Lah. 22 (Art. 115, and

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not Art. 52 applied to suit for debts due on a contract for supply of goods and rendering of services for a fixed sum of money).

[49] *Mahomed Ghasita* v. *Sirajuddin,* 2 Lah. 376=66 I.C. 490=1922 Lah. 198 (F.B.); O.R. 100 P.R. 1913=22 I.C. 576 (Where no single article being applicable to the entirety of the claim, the suit was held to fall within the residuary Art. 120, Limitation Act).

[50] *Sher Ali Shah* v. *Lachman Das,* 95 P.R. 1908 (*Held,* that Art. 120 would have applied but for the special agreement which made Art. 132 applicable).

[1] *Bhimamal & Sons* v. *Rahmatullah,* (1931) 130 I.C. 574=1931 Lah. 309; Reld. on *Muhammad Ghasita* v. *Sirajuddin,* 2 Lah. 376=1922 Lah. 198=66 I.C. 490 (F.B.).

[2] *Mukhat Lal* v. *Gulab Singh Puranmal,* 1931 All. 229 (231)=132 I.C. 422=1931 A.L.J. 363.

[3] *Barada Kant Sen* v. *The Court of Wards,* (1931) 133 I.C. 537=1931 All. 752 (753)=1931 A.L.J. 949.

[4] *Ibid.*

A suit for the price of grain sold and delivered where there is no indication in plaintiff's account books that the contract was to return the grain in kind falls under Art. 52 of Sch. I to the Limitation Act.[5]

**Suit for price of goods.**

**1305.** The term "goods" in Art. 52, is wide enough to include fruit even before it has been gathered. Accordingly, a suit to recover the price of the fruit of a garden sold by the plaintiff to the defendant is governed by this article and the period of limitation being extended to six years by Punjab Loans Limitation Act.[6] Where independently of the debt arising from the original transaction with a Hindu father, the plaintiffs obtained a decree against the father, which by its force created a debt as against him which his sons, according to Hindu Law, were under an obligation to discharge, unless the debt could be shown to be illegal or immoral, it was held that if the suit had been brought on the original cause of action, the article of limitation applicable would have been the same as against the father, namely, Art. 52; but as the suit had been brought on the cause of action arising from the decree against the father, Art. 120 was applicable.[7] Article 52 applies to suits for the price of goods sold and delivered[8]; but where grain is advanced on a contract that it should be repaid in kind, it is not a case of "*goods being sold*", which is understood to refer to a case in which the contract is to pay for the price of goods in money and not to return them in kind.[9] Article 52, Sch. I, Limitation Act, provides for suits for the price of goods sold and delivered when no fixed period of credit is agreed upon.[10] A newspaper comes within the category of "goods sold and delivered" and a suit to recover subscription to a newspaper is, therefore, governed by this article.[11]

**1306. STARTING POINT OF LIMITATION.**—It has been noticed above that under Art. 52, the starting point for limitation is the date of the delivery of goods, sold and delivered where no fixed period of credit is agreed upon.[12] Under Art. 52, the date of the delivery of each different article is the date of the cause of action for its price.[13] However, where a tradesman has a bill against a party for any amount in which the items are so connected together, that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided.[14] Part-payments in respect of certain items would extend the period of limitation under S. 20 of the Limitation Act.[15] Having regard to the terms of S. 90 of the Contract Act, **delivery of a Railway Receipt** to the consignee, operates as delivery of the goods covered by the receipt for the purposes of Art. 52 of Sch. I to the Limitation Act.[16] But, where a contract for sale of goods provided that the buyer was to take delivery of the Railway Receipt from a Bank against payment; and the buyer took the Railway Receipt on payment but, on going to take delivery, found that the goods had been lost, and he returned the railway receipt to the seller, and sued the latter for recovery of the amount he had paid to the Bank for obtaining the railway receipt, it was held that there being nothing to show that the railway receipt related to the goods contracted for the delivery of the railway receipt was not tantamount to a delivery of the goods, and the plaintiff was entitled to recover.[17]

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[5] *Diwan Singh Tirlok Singh* v. *Saudagar Singh,* (1926) 95 I.C. 25 =8 L.L.J. 322.

[6] *Wasu Ram* v. *Rahim Baksh,* (1922) 66 I.C. 120 (Lah.).

[7] *Periasami Mudaliar* v. *Seetharama Chettiar,* (1903) 27 Mad. 243.

[8] *Ganga Ram* v. *Nanda,* 65 I.C. 687=2 L.L.J. 191.

[9] *Muhammad Din* v. *Sohan Singh,* (1922) 65 I.C. 691=4 L.L.J. 268.

[10] *Lalji* v. *Ghasi Ram,* 1930 Oudh 287=7 O.W.N. 420=128 I.C. 276=6 Luck. 7.

[11] *Hormasji* v. *Kharsetji,* (1905) 7 Bom. L. R. 190.

[12] *Lalji* v. *Ghasi Ram,* 1930 Oudh 287=128 I.C. 276.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 53. | For the price of goods sold and delivered to be paid after the expiry of a fixed period of credit. | Three years. | When the period of credit expires. |

### SYNOPSIS.

1307. Corresponding provisions.
1308. Scope and application.
1309. Sale on credit.
1310. Starting point of limitation.

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[13] *Satcowrie Singh* v. *Kristo Bangal,* 11 W.R. 529.

[14] *Najan Ahmed Haji Ali* v. *Saleh Mohammed Peer Mahomed,* (1923) 77 I.C. 943=24 Bom. L. R. 998.

[15] *Abdul Aziz* v. *Munna Lal,* (1921) 63 I.C. 435=19 A.L.J. 555.

[16] *Sheo Charn Lal* v. *Ramratan,* (1928) 108 I.C. 801=1928 Nag. 181.

[17] *Gobind Parshad Wazir Singh* v. *Ram Nath,* (1930) 121 I.C. 721 =1930 Lah. 206.

## NOTES.

**1307. CORRESPONDING PROVISIONS.**—*See* Art. 52 of Act IX of 1871; and Art. 53 of Act XV of 1877, which has been re-enacted in the present article. The law was the same under Act XIV of 1859.

**1308. SCOPE AND APPLICATION.**—This article, like Art. 52 of the Schedule to Limitation Act, makes no distinction between **goods sold by retail or by wholesale.** Under Act XIV of 1859, a special provision was made in Cl. (8), S. 1 of the Act for suits for the price of goods sold by retail.[18]

**Sale on credit.**

**1309.** "If no time is fixed for payment, plaintiff cannot by showing a custom on his part to give one year's credit prevent the statute running from date of sale.[18] When time for payment has been fixed, and more property is delivered than was to be delivered under the contract and no contract is made as to time of payment for the extra goods, the statute runs (as to such extra goods) as soon as the goods are delivered.[20] Where *indefinite* credit is given, which the creditor may put an end to at any time,[21] *i.e.,* when the price is payable *on demand,* Art. 52 seems applicable and time would run forthwith.[22] When the price is not claimable *as of right* on the date the goods are delivered, but rather the intention of the parties is that the price would be claimable when the contract was completed or came to an end, the **sale is on credit** within the meaning of Art. 53 of the Limitation Act.[23] In a contract for sale of piece-goods in the City of Madras, where the vendor sent the vendee a bill with the words "debit interest at 3|4 per cent. per mensem after sixty days *thavanai*", it was held that the sale was a *credit* sale and not a cash transaction, and that under Art. 53 of Limitation Act, limitation for the suit commenced to run only on the expiry of the period mentioned, when the price became payable.[24]

**1310. STARTING POINT OF LIMITATION.**—In a simple transaction of sale of goods, the liability to pay full price accrues on date of sale and the mere fact that the purchaser agrees to pay the balance of purchase-money with interest at a certain rate does not prevent the accruing of the vendor's right to recover the whole price on account of the purchase and time begins to run from the date of the sale.[25] If goods are sold at six months' credit and payment is to be then made by a bill at two or three months at the purchaser's option, this amounts in fact to a nine months' credit and limitation will not commence to run till the end of the nine months.[26] Where a tradesman supplied goods from time to time on credit to a customer who made payments from time to time on account, no fixed period of credit being agreed upon, the cause of action in respect of each supply must be taken to arise under this article on the date when each item of goods was supplied. But if there be an implied contract that all goods supplied are to be paid for after the expiration of a specified period, then limitation would run from the expiry of the period of credit.[27]

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[18] *Shama Churn Lall* v. *The Collector of Tirhoot,* (1864) 1 W.R. 308.

[19] Rustomji, p. 408, citing Wood, 4th Edn., p. 756.

[20] *Ibid.,* 408; citing Wood, 4th Edn., p. 757.

[21] *Ibid.,* p. 408; citing Leak, p. 694.

[22] *Surayya* v. *Bapirazu,* (1915) 31 I.C. 335 (Mad.) (The expression "on demand", is a technical one meaning immediately or forthwith).

[23] *Pragi Lal* v. *Maxwell,* (1885) 7 All. 284.

[24] *Km. P. R. N. M. Firm* v. *Somasundram,* (1925) 85 I.C. 299=48 Mad. 275=1925 Mad. 161=47 M.L.J. 844=20 M.L.W. 981.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 54. | For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given. | Three years. | When the period of the proposed bill elapses. |

NOTES.

**1311. CORRESPONDING PROVISIONS.**—*See* Art. 54, Sch. II of Act XV of 1877; also *see* Art. 53, Sch. II, Act IX of 1871.

This article gives effect to the ruling in *Helps* v. *Winterbottom,*[27-a] where it was also observed that the only action that would lie before the expiration of the period of the proposed bill was an action, not for the price, but for breach of contract in not giving the bill.[28]

| Article. | Desription of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 55. | For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon. | Three years. | The date of the sale. |

NOTES.

**1312. CORRESPONDING PROVISIONS.**—*See* Art. 54 of Act IX of 1871; and Art. 55 of Act XV of 1877, which has been re-enacted in the present article.

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[25] *Mukatlal* v. *Gulabsingh-Pranmal,* 1931 All. 229=132 I.C. 422=1931 A.L.J. 363.

[26] Starling, 6th Edn., p. 205; *Helps* v. *Winterbottom,* (1831) 2 B. and Ad. 431; cited by Mitra's Limitation, Vol. II, p. 1193.

[27] *Satcowrie* v. *Kristo,* 11 W.R. 529.

[27-a] (1831) 2 B. and Ad. 431.

[28] Darby and Bosanquet, 2nd Edn., p. 28; Mitra's Limitation Act, Vol. II, p. 1193.

### NOTES.

**1313. SCOPE AND APPLICATION.**—This article treats standing crops and trees, like moveable property, along with goods, etc., in Arts. 52, 53 and 54, Limitation Act. There is no *express* article for suits for the price of immoveable property (other than trees and growing crops). But, Art. 111, Sch. I, now gives a period of three years for a suit "by a vendor of immoveable property for personal payment of unpaid purchase money". If, however, the suit is to enforce a charge on immoveable property, Art. 132 would apply. *See* Notes under Art. 111, *post.* A tree standing on land is immoveable property; whatever the owner's intention might be as to cutting it down and so converting it into moveable property.[29] Suit by vendee for *possession* of a tree is not a suit for *price* within Art. 55 and Art. 144 would apply to such a suit.[30]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 56. | For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment. | Three years. | When the work is done. |

### NOTES.

**1314. CORRESPONDING PROVISIONS.**—*See* Art. 55 of Act IX of 1871; and *also see* Art. 56 of Sch. II, Act. XV of 1877, which corresponded with the present article.

**1315. SCOPE AND APPLICATION.**—This article applies to a suit for price of work or labour, whether mental or manual, done at defendant's request express or implied.

This article has been applied to a suit by a goldsmith for remuneration for making ornaments.[31] Where defendant, though a mere agent is personally liable for money due to a contractor for work done outside British India, at his request, a suit against him will be governed by Art. 56 of the Limitation Act and this limitation would be extended by a good acknowledgment of claim within the meaning of S. 19, Expl. I of the Act.[32] A suit to recover a sum of money for having carried certain casks of beer under a contract with the defendant is governed by Art. 56, Limitation Act.[33]

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[29] *Sakharam* v. *Vishram,* (1894) 19 Bom. 207.

[30] *Jaimal Singh* v. *Ladha,* 112 P.R. 1884; compare *Bir Sen* v. *Rajaram,* (1923) 73 I.C. 33 (Lah.) (Where Art. 48 or Art. 49 were applied to a suit to recover *compensation* for trees wrongfully cut and removed by defendant's purchasers, after a sale of certain standing trees to plaintiff).

[31] 1885 B. P. J. 252 (*See* notes under Art. 7).

[32] *Abdul Ali* v. *Goldstein,* 43 P.R. 1910; also see *Ambica Dat* v. *Nityanand Singh,* (1903) 30 Cal. 687 (A suit for printing work done falling under Art. 56, saved from being barred by an acknowledgment).

[33] *The Murree Brewery Co.* v. *Hazurdmal,* 60 P.R. 1887.

The mere fact that among the terms it is mentioned that for one year the Brewery Company will not transfer their work to any lower tenderer does not show that payment for the work done was not to be made till the close of the year.[34] Where a Zemindar, himself a co-sharer in the village, spent money on repairs to a tank as landlord for the common good of the whole village, a suit by him for re-payment to him of the sums so expended, for which no time was *absolutely* fixed, was held to be governed by Art. 56 of the Limitation Act, as the law will imply under the circumstances that the work was done at the defendant's request.[35] This has to be distinguished for suits for contribution falling under Art. 61,[36] or a claim for contribution for an act done primarily for donor's benefit incidentally benefitting another, which would fall under Art. 120, Limitation Act.[37]

1316. **A COMBINATION OF SEVERAL CLAIMS** would not in general deprive each claim of its specific character and description.[38] But, where the claimant contracted to erect and supply a *building* and not *labour,* or *labour and materials,* it was held that Arts. 52 and 56 of the Limitation Act did not apply and the suit for sums due to the contractor being a charge upon the buildings was held governed by Art. 132 of the Limitation Act.[39] In *Radhakishen* v. *Basantlal,*[40] the **Punjab Chief Court,** applied Art. 120, where plaintiff on different occasions entered into different contracts with the defendant for the supply of labour and materials for repairing and constructing different buildings belonging to the defendants, and the claim was for recovery of a certain sum alleged to be due for the work performed and materials supplied under these contracts. In this case neither Art. 52, nor Art. 56 could be applied to the claim. However, this was overruled by the Full Bench in *Mahomed Ghasita* v. *Sirajuddin.*[41]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run |
|---|---|---|---|
| 57. | For money payable for money lent. | Three years. | When the loan is made. |

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[34] *The Murree Brewery Co.* v. *Hazuramal,* 60 P.R. 1887.

[35] *Sundaram* v. *Sankara,* 9 Mad. 334.

[36] *Surajprasad Dwarkadas* v. *Karmali,* (1920) 57 I.C. 532=44 Bom. 591.

[37] *Viswanadha* v. *Kumara,* (1918) 45 I.C. 786 (Mad.).

[38] Per Jenkins, C.J., in *Shrinivas Murar* v. *Hanmant,* 24 Bom. 260 (F.B.).

[39] *Daulat Ram* v. *Woollen Mills Co., Ltd.,* 95 P.R. 1908=165 P.W.R. 1908.

[40] 103 P.R. 1913 [O.R. in *Mahomed Ghasita* v. *Sirajuddin,* 2 Lah. 376 (F.B.)].

[41] 2 Lah. 376 (F.B.) (*Held,* that Art. 115 applied to the claim based on breach of contract of building).

## SYNOPSIS.

1317. **Corresponding provisions.**
1318-21. **Article explained.**
1318. Money payable.
1319. Money lent.
1320. Deposit receipts.
1321. Lien or pledge.
1322-23. **Scope and application.**
1322. Article applied.
1323. Article not applied.
1324. **Starting point of limitation.**

## NOTES.

**1317. CORRESPONDING PROVISIONS.**—Under Cl. (7) of S. 1, Act XIV of 1859, the period of limitation ran from the time when the debt became due. In Act IX of 1871, the corresponding provision was Art. 56, which was re-enacted as Art. 57, Sch. II, Act XV of 1877. The present article is a re-enactment of Art. 57 of the previous Act.

**Money payable.**

**1318. ARTICLE EXPLAINED.**—A suit on a pledge of certain moveable property, made in respect of a loan of money, praying for a decree for the money lent against the defendant personally, is governed by Art. 57 of the Limitation Act; but, so far as the plaintiff seeks to enforce his charge against the moveable property pledged, the suit falls not within this article, but there being no other article in the Act applicable to it, it falls within Art. 120, which provides for six years' limitation. This view has been taken by the **Punjab Chief Court** in the case of *Dowlatt Ram* v. *Jewan Mal,*[42] and it has been adopted by the **Calcutta High Court** in *Nim Chand Baboo* v. *Jagabundhu Ghose,*[43] where it was observed that

> "there can be no doubt that when moveable property is pledged to a person for money lent, he acquires a special property therein: he has a charge upon it for the satisfaction of the loan advanced, and he is entitled, under S. 176 of the Contract Act, either to bring a suit against the owner upon the debt or promise, retaining the goods pledged as collateral security, or he may sell the things pledged upon giving reasonable notice of the sale. And when he brings a suit for the purpose of a declaration of his right to sell the article pledged for the satisfaction of his claim, the suit is one to enforce his charge upon the said articles".

The **Allahabad High Court** agreed with this opinion in *Madan Mohanlal* v. *Kanhai Lal,*[44] where Art. 120 was applied to the claim, so far as the plaintiff sought to enforce his charge against the property pledged; but *held* that, so far as the plaint prayed for a decree against the defendant personally, Art. 57, Limitation Act was applicable. This view was confirmed by the **Full Bench of Allaha-**

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[42] (1881) 116 P.R. 1881; *see* Rivaz, 3rd Edn., p. 148.

[43] (1894) 22 Cal. 21; cf. *Vitla Kamti* v. *Kalekar,* 11 Mad. 153.

[44] (1895) 17 All. 282=15 A.W.N. (1895) 69.

bad **High Court** in *Saiyid Alikhan* v. *Debi Prasad*,[45] which, however, was not a suit to enforce a pledge, but there the claim was one to recover the unpaid balance of a loan, that is to say, it was a suit for money payable to the plaintiff for money lent by him, a suit which is specifically provided for by Art. 57, Limitation Act. **The fact** that moveable property was pledged as collateral security did not, in the judgment of the Full Bench, render the suit a suit of any other description than that to which the Art. 57 applies. A **Full Bench of the Madras High Court** examined this question in *Mahalinga* v. *Ganapathi*,[46] where the plaintiff having lent money on the pledge of jewels had sued more than three years and less than six years from the date of the pledge, to recover the amount lent, by sale of the jewels and from defendant personally. The majority view *held* that plaintiff was entitled to sue for the sale of property pledged to him notwithstanding that he was also entitled, under S. 176 of the Contract Act, to sell the property without reference to the Court. It was *held also*, that the claim to proceed against the property pledged was governed by Art. 120 and the claim to proceed against the debtor personally was governed by Art. 57, Limitation Act.[47] It was held *per Davies, J.*, that the claim to proceed against the debtor personally was governed by Art. 57 and was barred; but that in so far as the suit was for a sale of the pledged property that was merely an incident in the nature of an accessory to the right to recover the debt, which became barred with the right of suit for that debt. The right of sale, however remained.[48] A suit for money lent is none the less so, because the money lent was secured by a pledge. The period of limitation for such a suit is three years under Art. 57, from the time when the loan is made.[49] However, where a bond hypothecates certain cattle as security for the loan and the creditor sues to enforce the bond as a lien on the cattle, and does not ask for a personal decree against the debtor, the limitation applicable to the suit is that contained in Art. 120 of Sch. I of the Limitation Act.[50]

**Money lent.**

**1319.** Article 57 of the Limitation Act, is confined to cases of a loan of *money* only. **A loan of Government securities is not a loan of *money*** within the meaning of this article.[1] Where *A* made over certain Government securities to *B* to be kept by him in deposit and, if necessary, to be used by him for raising funds wherewith to pay the purchase-money of a house; and *B*, was to draw the interest accruing due on the securities from time to time and pay the same to *A*, and in case *B* had occasion to pledge or sell the securities he would redeem or replace the same on being required so to do by *A*, it was *held*, by Maclean, C.J., and Stevens, J., that the transaction amounted to a **deposit, and not a loan,** and **Art. 145** of the Limitation Act governed the case.[2] Hill, J., dissented from this view, holding that the transaction did not amount to a deposit. Either Art. 49, or Art. 115, or Art. 120 of the Limitation Act would apply to the case.[3]

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[45] (1901) 24 All. 251 (F.B.); Relied on *Ramchandra* v. *Antaji*, B. P. J. 1886, p. 161.

[46] (1902) 27 Mad. 528 (F.B.).

[47] Per Subramania Ayyar and Benson, JJ., in 27 Mad. 528 (F.B.).

[48] Per Davies, J., in *Mahalinga* v. *Ganapathi*, 27 Mad. 528 (F.B.).

[49] *Yellappa* v. *Desyappa*, (1905) 30 Bom. 218 (219).

[50] *Devki Nandan* v. *Gapua*, (1918) 46 I.C. 373=16 A.L.J. 449=40 All. 512.

[1] *Kristo Kaminee* v. *Administrator-General*, (1903) 7 C.W.N. 476; also see *Administrator-General of Bengal* v. *Kristo Kamini Dassee*, (1904) 31 Cal. 519.

**A suit for money lent on a *thavanai* account is governed by Art. 60,** and not by Art. 57, Limitation Act, as this is a deposit repayable on demand only after the expiration of the current thavanai period.[4]

**Deposit receipts.**

**1320.** A loan must be distinguished from a deposit. See *Kristo Kamini* v. *Administrator-General.*[5] In the case of a suit for money payable for money lent, limitation starts under Art. 57, from the date "when the loan is made"; but, in the case of a money deposit, to which Art. 60 would apply, the commencement of limitation is from the time "when the demand is made".[6] Where the transaction between the parties starts as a deposit and subsequently there are several items of deposits and withdrawals in the handwriting of the depositee, the transaction is one between customer and banker and to such a case Art. 60 applies, and not Art. 57, Sch. I of Limitation Act.[7] As to a deposit loan made repayable on production of the deposit receipt, see *Atkinson* v. *Bradford T. E. B. B. Society,*[7-a] where the receipt was lost and destroyed and, *Manoel* v. *Hongkong and Shanghai Banking Corporation,*[8] where the receipt was in the possession of a third person. Also see *Seetharama Aiyar* v. *Munisami,*[9] where the words "on demand" in a provision for payment of whole amount on default of any instalment on demand, were held to mean not merely at once or forthwith in a technical sense, but to imply a condition precedent that a demand should be made if the whole amount was to be asked to be paid at once.

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[2] *Administrator-General of Bengal* v. *Kristo Kamini Dassee,* (1904) 31 Cal. 519.

[3] *Ibid.*

[4] *Muthia* v. *Ramanathan,* (1918) 43 I.C. 972 (Mad.); *Vellayappa* v. *Unnamalai,* (1917) 42 I.C. 573 (Mad.); *Annamalai* v. *Annamalai,* 52 I.C. 456=10 L.W. 67; also see *Chellappa* v. *Subramanian,* (1918) 47 I.C. 948; and cf. *M. Chetty* v. *Palaniappa,* 57 I.C. 908=13 Bur. L. T. 21.

[5] (1903) 7 C.W.N. 476, s.c., on appeal, (1904) 31 Cal. 519.

[6] *Gulab Rai Gujar Mal* v. *Sandhi, etc.,* 1934 Lah. 42=15 Lah. 242=151 I.C. 712=37 P.L.R. 56.

[7] *Ibid.*

[7-a] 1890) 25 Q.B.D. 377.

[8] (1890) 14 Bom. 498.

[9] (1918) 37 M.L.J. 613=1919 M.W.N. 185=50 I.C. 87=9 L.W. 427.

**1321.** **Lien or pledge.** A lien is explained under English Law to mean the right of a creditor to *retain* the goods until his debt is paid. It vests in the creditor no special property in the goods, and gives him no power of sale on default of payment. But it is otherwise with a Common Law *pledge*.[10] It has been noticed in **S. 1318,** *ante,* that under Indian Law also a pledge of moveable property gives a special property to the pledgee who has a charge upon it for the satisfaction of the loan advanced, which may be enforced independently of the power of sale of the thing pledged upon giving reasonable notice of the sale under the provisions of the Indian Contract Act (S. 176).[11]

**1322. SCOPE AND APPLICATION.**—This article applies to suits for money loans payable *on demand,* and not to cases where the action is based on the breach of any stipulation as to re-payment of the loan within a time fixed.[12] The present article is applicable only to suits where money is payable simply because money has been lent. In a suit for recovery of money on a *bahi* account, where the dealings between the parties were simple money loans, as between creditor and debtor, and the defendant borrowed money from the plaintiff from time to time, made payments to him occasionally and struck balance in his favour, the account was not mutual in any sense of the term, and the suit was governed by Art. 57 and not by Art. 85 of the Limitation Act.[13]

A suit by the pawnee for a *personal* decree against the pledgor will be governed by this article, where the money lent is payable on demand.[14] The fact that moveable property is pledged as security for a loan does not render a suit to recover the amount of the loan a suit of any other description than a suit for money lent falling within Art. 57 of Sch. I of the Limitation Act; and no fresh cause of action to recover the amount accrues on the sale of the article pledged.[15] The original contract of loan is not put an end to or superseded by a pledge, and no right which did not exist before accrues by the sale of the pledged property, where the creditor sues for the balance due after selling the pledged property.[16] A suit for the recovery of money secured by a pledge is really a suit for money lent and advanced. If therefore the suit is one to recover the unpaid balance on sale of the property pledged does not change the nature of the suit; and the suit is governed by **Art. 57, Limitation Act.**[17]

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[10] Beal's Law of Bailments, p. 188; cited in Mitra's Limitation Act, Vol. II, p. 1196.

[11] *Nim Chand* v. *Jagabundhoo,* (1894) 22 Cal. 21; *Mahalinga* v. *Ganapathi,* (1902) 27 Mad. 528 (F.B.).

[12] *M. M. K. K. Chetty* v. *Palaniappa Chetty,* (1920) 57 I.C. 908=10 L.B.R. 161=13 Bur.L.T. 21; also see *Diyalumal* v. *Nandu,* (1931) 132 I.C. 590=1931 Lah. 691 (Suit against surety for loan governed by Art. 115; but suit against principal debtor was governed by Art. 57, read with Punjab Loans Limitation Act).

[13] *Ramdhan* v. *Malik Mohd.,* 1931 Lah. 241=12 Lah. 420=134 I.C. 513; Relied on 1921 Lah. 369=59 I.C. 669.

[14] *Madan Mohan* v. *Kanhai Lal,* (1895) 17 All. 284; *Saiyad Ali* v. *Debi Prasad,* (1901) 24 All. 251; *Ramchandra* v. *Antaji,* (1886) 5 B. P. J. 266; *Yellappa* v. *Dasayappa,* (1905) 30 Bom. 318; also see *Malhalinga* v. *Ganapathi,* (1902) 27 Mad. 528 (F.B.); **S. 1318,** *ante.*

**Article not applied.**

**1323.** A suit for recovery of money equivalent to advance in grain together with interest thereon falls under Art. 65 or Art. 115 of the Limitation Act, and is not governed by Art. 57 or Art. 120 of Sch. I of the Limitation Act.[18] Where plaintiff sued for certain *manis* of wheat, alleging that the defendant had signed a balance in his favour of the *manis* with interest payable in kind at the rate of 50 per cent. per annum, it was held that the suit was governed either by Art. 115 of Sch. I to the Limitation Act, in which case limitation began to run when payment was demanded and refused, or by Art. 120, Limitation Act.[19] A suit to recover the value of paddy charged upon immoveable property is a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 132 of Sch. I to the Limitation Act.[20] Similarly, a suit to enforce a pledge by sale of property hypothecated would be governed by Art. 120, Sch. I, Limitation Act, and not by Art. 57.[21] Where *A* entered into an agreement with *B*, under which he paid *B*, a sum of money, and promised to make further advances up to a given amount in order to enable him to prosecute a partition suit, while *B*, in return, agreed to give *A*, a share of whatever property he or his wife or both might get either by suit or private settlement, it was held that a suit by *A*, for recovery of a share of the property awarded to *B*, by the partition decree, or in the alternative to recover his advances with interest was to be treated as one for specific performance, for purposes of limitation, to which Art. 113 of the Limitation Act would apply.[22]

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[15] *Debi Din* v. *Gayaparshad*, (1927) 104 I.C. 641=1927 Nag. 346; Followed 30 Bom. 218=7 Bom.L.R. 739; and 24 All. 251=A.W.N. (1902) 43.

[16] *Ibid.*, 104 I.C. 641=1927 Nag. 346.

[17] *Fisher* v. *Ardeshir*, 1935 Bom. 213=37 Bom.L.R. 165.

[18] *Mengha Ram* v. *Hassu*, 41 P.R. 1918=49 I.C. 231.

[19] *Sohan Singh* v. *Muhammad Din*, (1920) 56 I.C. 162=1922 Lah. 371.

[20] *Ram Chand Sur* v. *Iswar Chandra Giri*, (1921) 61 I.C. 539=48 Cal. 635=1921 Cal. 172 (F.B.).

[21] *Madan Mohanlal* v. *Kanhailal*, (1895) 17 All. 284=15 A.W.N. (1895) 46; *Saiyid Alikhan* v. *Debi Prasad*, (1901) 24 All. 251 (F.B.); also see **S. 1318**, *ante*.

Article 57 is **not applicable where money is made re-payable by an agreement** on the expiry of a fixed period. Article 115 of the Limitation Act would govern such cases. In *Rameshwar* v. *Ramchand,*[23] the **Calcutta High Court** held that where there was an oral agreement to re-pay the loan at the end of a year from the date of loan, the plaintiff had no right of suit until the expiration of the year, and limitation could not run from the time when the advance was made, which was not the time when the plaintiff's right of action accrued. This view was adopted by the **Madras High Court** in *Ramasami* v. *Muthusami*[24]; where the suit was brought against the legal representative of a deceased debtor to recover the amount of the debt which was contracted more than three years, but was payable less than three years before suit, it was *held* that the period of limitation should be computed from the date when the debt was due, and the suit was not barred under Art. 115 of Sch. I of the Limitation Act.

No question of limitation arises **where a creditor has funds belonging to the debtor** at his disposal charged with an obligation to pay himself out of that fund.[25]

Where the transaction between parties starts as a **deposit** and subsequently there are several items of **deposits and withdrawals** in the handwriting of the depositee, the transaction is one **between customer and banker,** falling under Art. 60, and Art. 57 does not apply.[26]

**1324. STARTING POINT OF LIMITATION.—A suit for the recovery of money secured by a pledge** is really a suit for money lent and advanced, which is governed by Art. 57 of the Limitation Act.[27] Under a pledge the right to sue on the security in default of payment is governed by Art. 120, and is simultaneous with the **right to sue on the loan,** and that therefore the right to sue on the security accrues on the date of the pledge.[28] Neither the payment of interest after the period of limitation nor the pledge extend the period of limitation as regards personal claim in a suit for recovery of amount advanced on a pledge.[29]

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[22] *Visram* v. *Bibi Sultan,* (1911) 11 I.C. 25 (Sind).

[23] (1884) 10 Cal. 1033.

[24] (1892) 15 Mad. 380.

[25] *Abul Hassan Khan* v. *Mt. Jagwante,* (1916) 32 I.C. 729=2 Oudh L. J. 620.

[26] *Gulab Rai Gujar Mal* v. *Sandhi,* 1934 Lah. 42=151 I.C. 712=15 Lah. 242.

[27] *Fisher* v. *Ardeshir,* 1935 Bom. 213=37 Bom. L. R. 165.

[28] *Ibid.*

[29] *Ibid.*

In the absence of any special agreement, such as an agreement for a fixed deposit, the relation between a **banker and a customer** who deposits money with him is the ordinary relation of debtor and creditor, and the money is re-payable "on demand" in the legal sense, *i.e.*, it is payable at once without demand. To such a transaction the article applicable is Art. 57, and not Art. 60, Limitation Act.[30]

Where *A* took a loan from *B*, at a certain rate of interest, and signed a *Bahi* entry about the loan, no date for re-payment being fixed; and, on the same day *C* became a surety for the re-payment of the loan by *A*, *held*, that **a suit** instituted by creditor *B*, **against the principal debtor** *A*, **and his surety** *C*, that so far as *C* was concerned, the loan was payable at once, on the date of the loan; the cause of action against *A*, and *C* began to run from the sale date, and the suit was barred against the surety *C*, even though the time against the principle debtor *A*, might be six years under the Punjab Loans Limitation Act.[31] In the case of a suit falling under Art. 57, where the claim is one merely for "money payable for money lent", each transaction of loan might be considered a separate and independent cause of action; the case is to be treated as that of **a simple debt or series of debts,** where limitation runs as regards each loan from the respective dates of the advances.[32]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 58. | Like suit when the lender has given a cheque for the money. | Three years. | When the cheque is paid. |

## NOTES.

**1325. CORRESPONDING PROVISIONS.**—This article re-enacts Arts. 58 of Act XV of 1877, which corresponds to Art. 57, Act IX of 1871.

The English Law is followed in this provision. In *Garden* v. *Bruce*,[33] it was laid down that when the advance is made by cheque, it is deemed to be made when the cheque is presented at the lender's bank and *cashed,* not when it is given. The underlying reason is that a cheque on presentation might be dishonoured, and the lender could not have any cause of action to sue for the amount covered by the cheque till it was honoured on presentation.[33-a] It makes no difference even if the debtor has made use of the cheque by receiving credit therefor from his own banker, before the cheque is actually paid by the lender's bank.[34]

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[30] *M. K. K. Chetty* v. *Palaniappa Chetty,* (1920) 57 I.C. 908=13 Bur. L. T. 21=10 L.B.R. 161.

[31] *Diyalumal* v. *Nandu Shah,* 1931 Lah. 691=132 I.C. 590.

[32] *Mani Ram* v. *Rup Chand,* (1906) 33 I.A. 165=33 Cal. 1047=16 M.L.J. 300 (P.C.).

[33] (1868) L.R. 3 C.P. 300.

[33-a] *Kamal* v. *Savitri,* 1905 A.W.N. 181.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 59. | For money lent under an agreement that it shall be payable on demand. | Three years. | When the loan is made. |

### SYNOPSIS.

1326. Corresponding provisions.
1327. **Article explained.**
1328. Calcutta view.
1329. Madras cases.
1330. Starting point of limitation.

### NOTES.

1326. **CORRESPONDING PROVISIONS.**—This article corresponds to Art. 59 of the previous Act XV of 1877.

In Act IX of 1871, the corresponding provision was made in Art. 58 of that Act, with limitation of 3 years commencing to run from the time *"when the demand was made"*.

Under Act XIV of 1859, limitation for a suit of this nature started from the date of the loan.[35]

**The previous history** of this article is given in *Balakrishnadu* v. *Narayana,*[36] per Wallis, J., as follows:—

**Previous history.**

> "In English Law under the Act of 1859 time began to run in the case of loans payable on demand from the date of the loan. In the Act of 1871 the Legislature altered this and under Art. 58, 'for money lent under an agreement that it shall be payable on demand' made time run from the date of demand. In 1877, the Legislature changed its mind and decided to go back to the old rule, and by Art. 59 made time run, not from the date of demand, but from the date of the loan. They, however, retained the date of demand as the starting point by a new Art. 60 with regard to a particular class of loans repayable on demand described in the new article as 'money deposited under an agreement, but it shall be repayable on demand." . . .[37]

In the case of such "deposits with banks and other bodies doing similar business", which were really loans re-payable on demand, the legislature treated them "as a special class of loans, which ought to have a special starting point".[38]

"Accordingly, instead of one article dealing with loans payable on demand (Art. 58 in the Act of 1871) they provided two Arts. 59 and 60 with different starting points. . . . The necessity was that otherwise Art. 59 would have been held applicable to such deposits."[39]

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[34] *Garden* v. *Bruce,* (1868) L.R. 3 C.P. 300; Banning on Limitation, p. 25; Mitra's Limitation Act, Vol. II, p. 1197.

[35] *Parbutty Churn* v. *Ram Narain,* 5 B.L.R. 396.

[36] (1912) 37 Mad. 175 (178, 179)=24 I.C. 852.

[37] *Ibid.*

[38] *Ibid.*

**1327. ARTICLE EXPLAINED.**—In view of the history of Art. 60, which is fully discussed in Sir Wallis's judgment in *Balakrishnudu* v. *Narayanaswamy Chetty,*[40] Twomey, C.J., has held in the case of *M. M. K. K. Chetty* v. *Palaniappa Chetty,*[41] that the words "on demand" in Art. 60, are not used in the legal sense of "at once, without demand", but in the popular sense of "on express demand being made". The Bench ruling in *Annamalai Chetty's case,*[42] where the words "on demand" were given their legal sense (*i.e.*, at once or forthwith), was not followed. But, in Arts. 57 and 59, the words "on demand" were held to have been used in the legal sense, and a suit could be filed without any demand being made.[43] Articles 57 and 59 overlap. Both deal with ordinary loans re-payable forthwith from the date on which the loan is made, the former being applicable where there is no special agreement as to repayment and the latter where there is a a special agrement that they shall be repayable forthwith without the necessity of making any prior demand.[44] Art. 59 appears to be superfluous as the cases which come under it are already provided for in Art. 57 of the Act.[45]

**Payable on demand.**

1328. In *Tarinee Pershad Ghose* v. *Pran Kisen Banerjee,*[46] it was held that the doctrine of the Common Law Courts in England under which the cause of action in respect to money lent, with or without interest, accrues the moment the money is lent, does not apply to suits in the *mofussil* in this country. This case was before Act IX of 1871, and is no longer good. In *Brohmo Moyee Dossee* v. *Obhoy Churn,*[47] Phear, J., observed that

**Calcutta cases.**

> "it is settled in English law by the authority of such cases as *Norton* v. *Ellam,*[47-a] that a simple promise to pay money on demand constitutes an obligation to pay the money at once, whether the demand be actually made or not".

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[39] *Balakrishnadu* v. *Narayanasawmy Chetty,* (1912) 37 Mad. 175 (178, 179)=24 I.C. 852.

[40] (1912) 24 I.C. 852=37 Mad. 175. *See* S. 1326, *ante.*

[41] (1920) 57 I.C. 908=13 Bur. L. T. 21=10 L.B.R. 161.

[42] (1916) 36 I.C. 497=10 Bur. L. T. 53=8 L.B.R. 526; *cf. Rameshwar Mandal* v. *Ramchand Roy,* 10 Cal. 1033=5 Ind. Dec. (N.S.) 690.

[43] Per Twomey, C.J., in *M. M. K. K. Chetty* v. *Palaniappa Chetty,* (1920) 57 I.C. 908=13 Bur. L. T. 21=10 L.B.R. 161.

[44] Per Robinson, J., in *ibid.*

[45] Per Twomey, C.J., in *ibid.*

[46] (1870) 14 W.R. 224.

[47] (1872) 16 W.R. 164.

[47-a] 2 M. & W. 461.

No difference was made out if the promise was a promise to pay money *on demand with interest.*

> "But the case is materially altered when any additional element is introduced into the contract."[48]

Accordingly, where it was agreed between the parties that while the money was to be paid on demand, yet until payment, the plaintiff was to receive periodically, namely every month, a specified sum by way of interest, this alternative stipulation was held clearly to involve duration. In this case the promise to pay on demand could not be treated as separate from, and unaffected by the arrangement for periodic payments of money by way of interest.[49] In *Ram Chunder Ghosal* v. *Juggut Monmohiney,*[50] the two meanings of the term "on demand," were given in these words by Sir Richard Garth, C.J.:

> "Are the words '*on demand*' a mere formula meaning that the money was repayable *at once* as in the case of a promissory-note payable on demand,[1] or do they mean that the money was not to be payable, or the remedies to recover it put in force until after an actual demand, as in the case of a bond payable on demand?"[2]

One of the tests to be found in the authorities was laid down thus:—

> "That where a man promises to pay a sum of money, etc., *on demand,* which it is his duty to pay whether a demand be made or no, then the money becomes payable at once, and no demand is necessary before suing him for it; as for instance, in the case of money lent and money due for goods or for work done. But, where a promise is made in consideration of *some collateral thing* being done on demand, there the demand must be made before the promise can be enforced, as in the case of a promise to pay Rs. 100 to *B,* if *A* should go to Dacca, on demand, or, if *A* should pay Rs. 200 to *C,* upon demand."[3]

Markby, J., in the same case was also of opinion that the words "on demand" if taken to mean that the debt and interest is not to be due until demand, were wholly inconsistent with other parts of the deed. And he was in favour of reading in the mortgage-deed and bond the words "on demand" in the same way as they are always read in a promissory note, and not as postponing the date of payment.[4]

**Madras cases.**

**1329.** In *Perumal Ayyan* v. *Alagirisami,*[5] where the hypothecation bond provided for the repayment of the principal sum on a certain date with interest in the meantime payable monthly, and further provided that on default of payment of interest, the principal and interest should become payable on demand, it was held by Sir Arthur Collins, C.J., and Benson, J., that the words "on demand" must be regarded as a technical expression equivalent to "immediately or forthwith". The same view was taken in *Perianna Goundan* v. *Muthuvira.*[6] And this was followed in *Surrayya* v. *Baspirazu.*[7] In the case of *Secretary of State* v. *Radhika Prasad,*[8] Schwabe, C.J., has observed that

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[48] *Brohmo Moyee Dossee* v. *Obhoy Churn,* (1872) 16 W.R. 164.

[49] *Ibid.*

[50] (1878) 4 Cal. 283 (294)=3 C.L.R. 336.

[1] *Rumball* v. *Ball,* 10 Mod. Rep. 38.

[2] *Carter* v. *Ring,* 3 Camp. 459.

[3] *Ram Chunder Ghosal* v. *Juggut Monmohinee,* 4 Cal. 283 (294)=3 C.L.R. 336.

[4] *Ibid.,* 4 Cal. 283 (301)=3 C.L.R. 336.

[5] (1896) 20 Mad. 245=7 M.L.J. 222.

> "according to the law of England when money is payable on demand, and nothing further is said, it is payable at once and without demand, a time under the statute of limitation begins to run *at once*. The most common instances of the application of that principle are of money lent repayable on demand or at request and promissory notes payable on demand." "However, the principle is in terms applied by Arts. 59 and 73 of the Limitation Act to cases of money lent and bills of exchange and promissory notes payable on demand. But it is not extended to any other case."[8]

Similarly, where the bond is not a simple one without any thing said about payment, but by the terms of the agreement, a **request or demand is,** expressly or impliedly, **made a condition precedent,** the starting point of limitation would be the date of the *actual demand,* which alone gives a cause of action for suit. In such a case Art. 59 will not be applicable.

*Illustrations.*

(1) Where in specific performance of an agreement between two brothers *V* and *R* who had divided certain property, and part was enjoyed in common on the terms that if either brother wished to leave the house, he was bound to offer his share to the other at a fixed price, and the party refusing to sell at a fixed price was bound to buy the share of the other brother who wished to purchase, *V* called upon *R* either to pay the fixed price or give up the house; it was held that until demand no cause of action arose, and limitation only began to run from the demand.[9]

(2) In *Nettakaruppa* v. *Kumarasami,*[10] where the hypothecation bond secured the loan repayable with interest at a certain rate *"when the obligee should require it;"* these words were held to imply a condition. This ruling was relied upon by Abdur Rahim, J., in *Karunakaran Nair* v. *Krishna Menon,*[11] as supporting the view that the words "on demand" in a hypothecation bond stipulating for payment of a debt by instalments.

(3) In *Seetharamayyar* v. *Munisami,*[12] where a bond was executed for subscriptions payable to a chit fund in certain specified instalments, and

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[6] (1897) 21 Mad. 139=7 M.L.J. 315.

[7] (1915) 31 I.C. 335=18 M.L.T. 459=1915 M.W.N. 121.

[8] (1923) 74 I.C. 785 (787, 788)=44 M.L.J. 685=46 Mad. 259=18 L.W. 210=1923 Mad. 667.

[9] *Virasami Mudali* v. *Ramasami,* (1880) 3 Mad. 87.

[10] (1897) 22 Mad. 20=8 M.L.J. 167.

[11] (1911) 12 I.C. 57=36 Mad. 66.

[12] (1919) 50 I.C. 87=37 M.L.J. 613; cf. 20 Mad. 245=7 M.L.J. 222; 21 Mad. 139=7 M.L.J. 315 and 31 I.C. 335=18 M.L.T. 459=1915 M.W.N. 121.

for payment of the whole amount remaining due on failure to pay any instalment on demand, Seshagiri Aiyar, J., dissented from the decisions holding that the expression "on demand" is merely a technical one that the money was payable at once, and he was of opinion that these words in the bond in question were intended to be a condition precedent that a demand should be made if the whole amount was to be asked to be paid at once.

**1330. STARTING POINT OF LIMITATION.**—We have seen in the preceding paragraph that a promise to pay money on demand, technically constitutes an obligation to pay money at once, and without demand. The English law has settled this point by the authority of such cases as *Norton* v. *Ellam,*[13] that a simple promise to pay money on demand constitutes a cause of action to sue for money payable at once, whether demand be actually made or not: and, the American rule follows that of the English law. It is interesting to note that the rule of civil law as stated in Domat's Civil Law, para. 186, is similar.

> "If it has been omitted in a covenant to express the term of payment, delivery of any other thing promised, it is a consequence of the covenant that since the term is added only in favour of the person who is obliged, if no time is allowed him for performing what he ought to do or to give, he is bound to give it or do it, immediately and without delay unless it happens that the performance of the covenant implies the necessity of a delay, as if the performance is to be made in another place than that where the parties entered into the covenant."[14]

The Indian law has recognised the principle in Art. 59 and 73, though it has felt the necessity of having a separate Art. 60, applicable to cases of deposits by customers with bankers, distinguishing them from ordinary loans.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 60. | For money deposited under an agreement that it shall be payable on demand, *including money of a customer in the hands of his banker so payable.* | Three years. | When the demand is made. |

### SYNOPSIS.

1331. Previous history.
1332. Conflict of views.
1333. Alteration in language.
1334-1338. **Article explained.**
1334. Loan distinguished from deposit.
1335. Deposit is not a trust.
1336. Banker and customer.
1337. Under an agreement.

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[13] 2 M. & W. 461.

[14] Domat's Civil Law, Part I, Book I, Title I, S. III, para. 186.

1338. Payable on demand.
1339. "Money".
1340. "Demand"—Starting point.

## NOTES.

**1331. PREVIOUS HISTORY.**—*See* S. 1326, ante, in connection with Art. 59. This article corresponds to Art. 60 of Act XV of 1877, but with the addition of last thirteen words in column 1, which are new; and were added to make the meaning of the article, and its scope clearer, owing to a conflict of view as to interpretation of Art. 60 of Act XV of 1877.

It was observed by Sir John Wallis in *Balakrishnudu* v. *Narayanasami*,[15] that in the Limitation Act of 1877, when the Legislature, by Art. 59 made time run, not from the date of demand, but from the date of loan, they had retained the date of demand as a more suitable starting point in the case of a paricular class of loans repayable on demand described in the new article as "money deposited under an agreement that it shall be payable on demand". The repayment in such cases was not contemplated unless expressly demanded, and the new article was inserted to effect this.

**The conflict of views.**

**Calcutta.**

1332. Under Indian Limitation Act, XV of 1877, the word "deposit", as distinguished from *"loan"*, referred to cases where money was lodged with another under an express trust, or under circumstances from which a trust could be implied. The *dictum* of White, J., in *Ram Sukh Bhunjo* v. *Brohmoyi Das*,[16] to this effect, was recognised in *Ayabeg's case*,[17] by the **Calcutta High Court.** But, it was dissented from in *Ishur Chunder* v. *Jibun Kumari*,[18] by Wilson and O'Kineally, JJ., who were of opinion that "deposits" could not have been used to mean "trust", for which there is no sanction in popular usage or legal terminology, or in the context; and there could be little doubt that money paid to a man's credit with his banker is money lent, "though the loan is at least of a very special kind having many peculiarities".[19] The case of *Ishur Chunder* v. *Jibun Kumari*, was relied upon in *Lazarus* v. *Krishna Chunder*.[20]

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[15] (1912) 37 Mad. 175 (178, 179)=24 I.C. 852 (854).

[16] (1880) 6 C.L.R. 470.

[17] (1882) 12 C.L.R. 165.

[18] (1888) 16 Cal. 25.

[19] *Ibid.*

[20] (1901) 28 Cal. 393.

**Madras.**

Where *A,* at the suggestion of *B,* a shop-keeper, deposited with him certain sums of money on the terms that the money should be repaid with interest on demand, a suit by *A's* widow and administratrix against *B,* was held governed by Art. 60, not by Art. 59, Limitation Act.[21] This Madras view in *Perundevittayar* v. *Nammalvar,*[21] agreed with that of the Calcutta High Court in *Ishur Chunder* v. *Jibun Kumari*[22] but differed from the decision of Sargent, C.J., and Nanabhai Haridas, J., in *Ichha Dhanji* v. *Natha.*[23] The ruling in the Bombay case seems almost to imply that money deposited with a banker under an agreement that it shall be payable on demand is in point of law to be treated as money lent, and not as deposited. However, in *Muncherji Bomanji* v. *Dorabji Jehangir,*[24] where a mother paid her son's money into his grandfather's firm, the intention was held to be that it was to be kept as a deposit for her son, and to be ultimately given to him when he demands it (Art. 60).

**Bombay.**

**Allahabad.**

The **Allahabad High Court,** held in the case of *Dharm Das* v. *Ganga Devi,*[25] that a suit to recover money deposited with a banker on a current account was governed as to limitation by Art. 59, and not by Art. 60, of Limitation Act, 1877. The basis of this decision was that the ordinary dealings between a native banker and his customers are in the nature of loans by the latter to the former.

**Alteration of language.**

**1333.** The alteration of language in Art. 60, in the Act of 1908, evidently was with a view to make the meaning of the Legislature in Art. 60, clear, and to remove the doubts which had arisen with reference to the interpretation of Art. 60, in Act XV of 1877. The added words *"including money of a customer in the hands of a banker so payable"* shows that the Legislature while drawing a distinction between an ordinary *loan* covered by Art. 59, and a *"deposit"* when introducing Art. 60 for the first time, seems to have contemplated that a deposit in the nature of a banking deposit is included within the scope of this article.

In *Juggi Lal* v. *Kishen Lal,*[26] the **Allahabad High Court has** observed

> "that every deposit, fixed or otherwise, is in the nature of a loan in a banking concern, but the Legislature clearly wished to draw a distinction

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[21] *Perundevittayar* v. *Nammalvar,* (1895) 18 Mad. 390=5 M.L.J. 203.

[22] (1888) 16 Cal. 25.

[23] (1888) 13 Bom. 338.

[24] (1895) 19 Bom. 775.

[25] (1907) 29 All. 773.

[26] (1915) 28 I.C. 948=37 All. 292.

between the ordinary loan and that class of loans usually known as a deposit when it introduced Art. 60 for the first time."

**Loan distinguished from a deposit.**

**1334. ARTICLE EXPLAINED.**—Under the **English law,** money held by a Bank on **current account** ranks as money lent to the Banker, which can be called for by a cheque, and **as in other cases of money lent,** the statute runs forthwith without demand.[27] But in the case of money held by a bank on **deposit account,** a notice of withdrawal must be given before the customer can claim it. The statute, therefore, does not run till such notice has been given.[28] For money lent, where no time is fixed for repayment, the statute runs from the *date of the loan;* and, even if money is repayable on demand, no demand is necessary under English law,[29] as under Art. 59 of the Indian Limitation Act.

The Indian Limitation Act has provided different starting points of limitation in Arts. 59 and 60; thus showing that it draws a clear "distinction between the ordinary loans, and that class of loans usually known as a deposit when it introduced Art. 60 for the first time" in Act XV of 1877.[30] Where a deposit is in the nature of a banking deposit, the depositee stands in a **fiduciary relation** to the depositor, and a suit to recover such deposits is governed by Art. 60 of Sch. I of the Limitation Act.[31]

In the absence of evidence to the contrary deposits made with Nattukottai Chetties on **thavanai are deposits payable on demand** and come within the definition of deposits under Art. 60 of Sch. I to the Limitation Act. If there is evidence, however, that the money is payable without demand, Art. 57 or Art. 115 would be applicable according as it is payable at any time after it was lent or after a fixed period.[32] Where on the expiry of the term of a *thavanai* contract no fresh contract is made, the money deposited must be deemed to be held on the ordinary terms applicable to a customer's deposit in the hands of a banker.[33] Where the interest due at the end of the '*thavanai*' period is by the agreement between the parties, to be added to the principal, a suit for the recovery of total amount would be governed by this article.[34]

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[27] Lightwood's Limitation Act, p. 216; Pal's Limitation Act, p. 590; cf. *Bradford Old Bank* v. *Sutcliffe,* (1918) 2 K.B. 833 (849); *Joachimson* v. *Swiss Bank Corporation,* (1921) 3 K.B. 110 (Even in the case of current deposits, in the absence of a special agreement, a demand is now held necessary to constitute a cause of action).

[28] *Tidd* v. *Overall,* (1893) 3 Ch. 154; 62 L. J. Ch. 915; Chitty on Contracts.

[29] Lightwood's Limitation Act, p. 237; Pal's Limitation Act, p. 590.

[30] *Juggi Lal* v. *Kishen Lal,* (1915) 37 All. 292=28 I.C. 948; also see *Vellayappa* v. *Unnamalai,* (1917) 6 L.W. 687 and *Lakshmi Ram* v. *Hari Ram,* (1919) 52 I.C. 25; *Annamalai* v. *Annamalai,* (1919) 10 L.W. 67=52 I.C. 456.

[31] *Juggi Lal* v. *Kishen Lal,* (1915) 28 I.C. 948=37 All. 292.

[32] *Annamalai Chetti* v. *Annamalai,* (1915) 52 I.C. 456=10 L.W. 67.

In the case of money entrusted for **safe custody** and by way of deposit, where the depositee is at **liberty**, if he thinks it safe and on his own responsibility and risk, **to lend the money to others**, and, in case he does so, he undertakes to pay a certain sum to the plaintiff as interest on the money so lent; and, this money is payable on demand, the article applicable would be Art. 60 and not Art. 59.[35] A banker in the ordinary course of his trade is entitled to use moneys paid into his bank as his own, unless there is a direction to the contrary.[36] An overdraft in the hands of a banker is a loan and not a deposit.[37] Similarly, a suit by a banker against his customer on an overdraft will not be considered a suit falling under Art. 60, dealing with deposits.[38]

**Deposit is not a trust.**

**1335.** If the banker receives money as trustee, he is not entitled to mix it with his own, and, if having received it as a trustee and spent it as his own, the banker fails, the creditor can recover it out of the banker's general assets.[39] A trust is created where the banker is to collect and remit the money but not where he is to use and repay.[40]

"The word deposit is familiar in banking parlance as describing money held by a banker for his customer on special terms as distinguished from current account in both which cases, however, **the banker is intended to have the use of money and no trust arises.**"[41]

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[33] *M. M. K. K. Chetti* v. *Palaniappa Chetty,* 57 I.C. 908=13 Bur. L.T. 21=10 L.B.R. 161 (Art. 57 applied in the absence of any special agreement such as an agreement for a fixed deposit). The ruling in *Annamalai* v. *Lutchman,* (1916) 36 I.C. 497=10 Bur. L. T. 53 was not followed by one of the Judges responsible for its decision.

[34] *Narayan* v. *Suppiah,* (1920) 43 Mad. 629=38 M.L.J. 437.

[35] *Jogendarnath* v. *Dinkar. Ram,* (1922) 66 I.C. 752=25 C.W.N. 981=1921 Cal. 644.

[36] *The Official Assignee of Madras* v. *G. Smith,* (1909) 32 Mad. 68 =1 I.C. 712=5 M.L.T. 164.

[37] *Motigaori* v. *Naranji,* (1927) 102 I.C. 408=1927 Bom. 362=29 Bom. L. R. 423.

[38] *Bengal National Bank* v. *Jatindra,* 56 Cal. 556=33 C.W.N. 412 (417).

[39] *The Official Assignee of Madras* v. *G. Smith,* (1909) 32 Mad. 68 =1 I.C. 712.

[40] *Ibid.*

[41] Per Napier, J., in *Subramaniam Chettiar* v. *Kadiresan Chettiar,* (1916) 32 I.C. 965=3 L.W. 168=39 Mad. 1081=30 M.L.J. 245=19 M.L.T. 129=1916 M.W.N. 186; also see *The Official Assignee of Madras* v. *G. Smith,* (1909) 1 I.C. 712=5 M.L.T. 164=32 Mad. 68.

The "money of a customer in the hands of a banker so payable", can only mean money paid in the ordinary customary way of business.[42] Where *stridhan* monies belonging to a Nattukottai Chetty woman were converted into a *hundi* for that amount and invested with a firm in the name of her husband, it was held that the transaction amounted to a deposit under this article and not a trust under S. 10 of the Limitation Act.[43]

**Banker and customer.**

**1336.** Napier, J., has pointed out in the leading Madras case of *Subramaniam Chettiar* v. *Kadiresan Chetiar,*[44] that "**the true relation between the banker and his customer is that of a debtor and creditor**[45]; but, a customer who pays the money to his bankers under terms that they are not to use it or who authorises his banker to collect money due to him on the like terms constitutes **a fiduciary relationship** between himself and the bankers and is entitled to recover the amount from the general assets of the bankers if the bankers have committed a breach of trust, on the principle that all other payments must be assumed to have been made out of money in the banker's hands to which no fiduciary character attached.[46] This ruling has been commented upon by the Bombay High Court in *Govind* v. *Kachubhai,*[46-a] on the ground that this broad test gives no distinction between a loan and a deposit: and that there is nothing common between a trader, and a banker. The **Bombay High Court** has observed in *Hirabai Gopaldas* v. *Dhanjibhai Kavarana,*[47] that there is no distinction between a deposit and a loan to the banker because they are both monies lent by the customer to the banker, but it is necessary for the purpose of considering whether Art. 60 of Sch. I to the Limitation Act applies to a case or not to see **whether the relationship of customer and banker arose between the parties.** It will be sufficient to bring a case within Art. 60, although the defendant is not by trade a banker, if he was with reference to the plaintiff in the position of a banker. For the purposes of the application of Art. 60 of the Limitation Act it is not necessary that the defendant should carry on only the trade of a banker. It is sufficient if, with regard to the particular transaction in suit, he was a banker as regards the plaintiff suing him.[48]

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[42] *See* p. 1316, note 41, *supra.*

[43] *Subbiah* v. *Visalakshi,* 1932 Mad. 685=139 I.C. 64=63 M.L.J. 232.

[44] (1916) 32 I.C. 965=30 M.L.J. 245=39 Mad. 1081.

[45] *Foley* v. *Hill,* (1848) 2 H.L.C. 28=9 E.R. 1002=81 R.R. 14.

[46] In re *Hallet's Estate,* 13 Ch. D. 696.

[46-a] (1923) 25 Bom. L. R. 503=1924 B. 28.

[47] (1927) 102 I.C. 145=29 Bom. L. R. 427=1927 Bom. 433.

[48] *Motigauri* v. *Naranji Dwarkadas,* (1927) 102 I.C. 408=29 Bom. L. R. 423=1927 Bom. 362.

*Illustrations.*

(1) In *Bhimanna Kumaji* v. *Veni Chand*,[49] Art. 60 was applied where plaintiff lent money to the defendants at a low rate of interest and the defendants did money-lending business of their own with these deposits.[49-a]

(2) Money in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee was a banker.[50]

(3) A man might become a banker or place himself in the position of a banker, with regard to a particular customer, and if the dealings between the lender and the borrower are such that the Court is satisfied that it could be said that the borrower is in the position of a banker to the lender, then the money so lent could be considered as a deposit.[1]

(4) Where plaintiff's father used to keep and deposit money every now and then with the defendants, and used to withdraw it when necessary through himself or through others or get payment made to others, a suit by plaintiff to recover the money due, was held governed by Art. 60 of the Limitation Act.[2] Where the transaction between parties starts as a deposit, and subsequently there are several items of deposits and withdrawals in the handwriting of the depositee, the transaction is one between customer and banker and to such a case Art. 60 applies: and not Art. 57, Limitation Act.[3]

(5) A partner in a firm opened an account with the firm in the name of his minor daughter in which deposits of small sums were made on many occasions during a long number of years, and on one occasion a sum of money was withdrawn by the depositor. At the end of each year interest on the amount of deposits was drawn and the balance was carried forward to the next year. A suit by the daughter, after the death of her father, to recover the amount standing in her name was held governed by Art. 60.[4]

(6) Whether the transaction is a deposit or a loan is **a question of fact** to be decided upon the particular facts and circumstances of each case.[5] However, in case of doubt, the transaction will be **presumed to be a deposit** rather than a loan.[6]

**Under an agreement.**

**1337.** Where money at the time it was deposited was not deposited on the term that it should be repayable on demand, but was deposited as part of the purchase-money of the property and also as a deposit in the sense that it was capable of being forfeited if the purchaser did not fulfil his part of the contract, Art. 60 of the Limitation Act was held inapplicable.[7] To such a suit

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[49] (1926) 93 I.C. 215=28 Bom. L. R. 73=1926 Bom. 168.

[50] (1916) 32 I.C. 965=30 M.L.J. 245, *supra*.

[1] *Bhimanna Kumaji* v. *Veni Chand*, (1926) 93 I.C. 215=28 Bom. L. R. 73=1926 Bom. 168.

[2] *Suraj Prasad* v. *Bindhyachal Prasad*, 98 I.C. 554=1927 Pat. 91.

[3] *Gulab Rai* v. *Sandhi*, 15 Lah. 242=151 I.C. 712=1934 Lah. 42.

[4] *Hirabai Gopaldas* v. *Dhanjibhai Kavarana*, (1927) 102 I.C. 145=29 Bom. L. R. 427=1927 Bom. 433.

[5] *Perundevi* v. *Nammalvar*, 18 Mad. 390 (394).

[6] *Murugiah* v. *Pakkiria*, 1928 Mad. 499=107 I.C. 290.

[7] *Galstaun* v. *Sahebzadi Mamoodi Begam*, 1929 Cal. 216=33 C.W.N. 115=56 Cal. 455=117 I.C. 700 (Art. 97 applied).

Art. 97 was held applicable, being a suit for money paid under an existing consideration which afterward failed. It was not even a suit falling within Art. 115, as a suit for *compensation* for the breach of any contract express or implied.[8] To bring the transaction under Art. 60, Limitation Act, it is necessary to show not only that there was a deposit, but that the deposit was *under an agreement* that it shall be payable on demand.[9] This article has no application where there is no agreement in the case,[10] *e.g.*, in the case of a suit brought against the Secretary of State, for the residue of the sale-proceeds of an estate sold under the provisions of Act XI of 1859.[11] It is not necessary that the agreement to pay the amount due on demand must be express; this article will apply equally to the case of an agreement implied from a course of dealings between the parties, or other circumstances of the case.[12]

**Payable on demand.**

**1338.** This article is not included to cover the case of deposits other than those which are payable on demand. One of the essential distinctions between a loan and a deposit lies in the fact that there is an implied term of the contract of loan made between a banker and his customer that demand shall be made before any cause of action can arise.[13] The word 'demand' in this article means an actual demand, in the popular sense of the term, and not immediately or forthwith, in the technical sense of the expression.[14]

**Fixed deposits in banks are not payable on demand,** and Art. 60 does not apply to a suit for recovery of money deposited under an agreement that it shall be payable at a specified time.[15] The words *"so payable"* mean payable on demand: and cannot apply to a deposit of money payable by the bank some months from the date of the deposit, taking it to be the date of demand.[16]

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[8] *Galstaun* v. *Sahebzadi Begum,* 56 Cal. 455=33 C.W.N. 115=117 I.C. 700.

[9] *Ammalu Amma* v. *Narayanan Nair,* 1928 Mad. 509=51 Mad. 549=111 I.C. 210 (Money held in deposit under a statutory enactment, *not* held under any *agreement*).

[10] *Secretary of State* v. *Fazal Ali,* (1891) 18 Cal. 234 (Suit to recover surplus sale proceeds of a sale for arrears of Government revenue—Art. 62 applied).

[11] *Secretary of State* v. *Abdul Bari,* 20 Cal. 51 (F.B.) (Art. 120 applied).

[12] *Gulab Rai* v. *Sandhi,* 1934 Lah. 42=151 I.C. 712=15 Lah. 242.

[13] *Bengal National Bank, Ltd.* v. *Jatindra Nath Mazumdar,* (1929) 56 Cal. 536=33 C.W.N. 412; also see *Joachimson* v. *Swiss's Bank Corporation,* (1921) 2 K.B. 110.

[14] *M. M. K. K. Chetty* v. *Palaniappa Chetty,* 57 I.C. 908=13 Bur. L. T. 21.

[15] *Bank of Upper India, Ltd.* v. *Arif Husain,* 1931 All. 59 (2)=1930 A.L.J. 1157=128 I.C. 772.

[16] *Ibid.*

**Money deposited as security** for an office is likewise not payable on demand, and as such this article would not apply to a suit to recover such security deposit.[17] Where money is deposited with a Chetty Firm in the name of a *Maral* B, the question arises for determination whether under the special circumstances of the case the **Maraldar** has authority to change the investment from time to time and to give a valid discharge for its repayment.[18]

**Money.**

1339. The case of deposits of goods to be returned *in specie* is provided for by Art. 145.[19] But Walsh, J., has held in an Allahabad case, that a suit to recover specific coins entrusted to a bailee or their value is, for purposes of limitation, taken as a deposit of money, within the meaning of Art. 60 of Sch. I of the Limitation Act.[20]

**"Demand."**

1340. **The starting point of limitation** is the date of the first complete and unqualified demand for money deposited with defendant.[21] Under this article, the period of limitation for a suit to recover money deposited under an agreement that it shall be payable on demand, is three years from the date when the demand is made. The making of the demand is entirely dependent upon the volition of the plaintiff, and the period of limitation may be indefinitely prolonged and a suit may be instituted without even a demand being made, in which case no question of limitation arises.[22]

*Illustrations.*

(1) Where the person demanding the money asked for the payment of the whole if it suited the convenience of the depositees, but in any case he demanded such money as they might be able to collect, it was held that a qualified demand like this would not cause time to run for the whole amount due.[23]

(2) Where the money was payable on demand; and the plaintiff on several occasions wrote letters to the defendants for payment, and finally addressed a letter through his solicitor demanding the entire amount in deposit with the defendants, it was held that a suit, by the plaintiff brought within three years from the date of the solicitor's letter for recovery of the money due from the defendants, was not barred by limitation under Art. 60 of Sch. I of the Limitation Act.[24]

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[17] *Upendra* v. *Collector of Rajshahi*, (1895) 12 Cal. 113.

[18] *Arunachallam* v. *Vayiravan*, (1929) 57 M.L.J. 628=1929 P.C. 254=30 M.L.W. 1028=119 I.C. 629.

[19] *Ishur Chunder* v. *Jibun*, 16 Cal. 25.

[20] *Kalyan Mal* v. *Kishen Chund*, (1920) 55 I.C. 45=41 All. 643=17 A.L.J. 888.

[21] *Madhavbai* v. *Fatteh Singh*, (1873) 10 Bom.H.C.R. 487.

[22] *Baijnath Soti* v. *Bihari Ram Shamlal*, 1933 Pat. 701.

[23] *Subbiah* v. *Visalakshi*, 1932 Mad. 685 (687)=139 I.C. 164=63 M.L.J. 232.

[24] *Jogendranath* v. *Dinkar Ram*, (1922) 66 I.C. 752=25 C.W.N. 981.

(3) Where the plaintiff sued the defendant alleging that he had deposited certain amounts at various times with the defendant, and had obtained ruggas from the defendant to the effect that the moneys were received as *amanat,* that a year ago he had demanded the same but the defendant had refused to pay: it was held that an implied agreement to pay on demand might be presumed and the suit was governed by Art. 60. In this case the suit itself was taken to constitute a demand for purposes of that article.[25]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 61. | For money payable to the plaintiff for money paid for the defendant. | Three years. | When the money is paid. |

### SYNOPSIS.

1341. Corresponding provisions.
1342. English law.
1343. Instances of debts for money paid.
1344. **Scope and application.**
1345. Suits by persons interested—S. 69, I. C. Act.
1346. Suits for contribution.
1347-1349. Article explained: (*i*) Money paid; (*ii*) Insolvency payment; (*iii*) For the defendant.
1350. Article applied.
1351. Article not applied.
1352. Starting point of limitation.
1353. Appropriation or acceptance by Court.

### NOTES.

**1341. CORRESPONDING PROVISIONS.**—This article is the same as Art. 61 of Act XV of 1877; and Art. 59 in Act IX of 1871. A period of six years was prescribed for the corresponding provision in S. 1, cl. 16 under Act XIV of 1859. According to the rulings of Bombay High Court,[26] suits on implied contracts, not otherwise specifically provided for by Act XIV of 1859, were held to fall within the general provision in cl. 16 of S. 1 of that Act, which prescribed six years' limit, but for many of those (*e.g.,* money paid for the debtor, money received for the creditor, money due upon an account stated , Act IX of 1871 prescribed the three years' limit.[27]

**1342. ENGLISH LAW.**—Under English law, an action known as **"common counts"**, includes such suits as those of debt on simple contract, *viz.,* (1) money lent, (2) **money paid by the plaintiff at the defendant's request,** (3) money received by the defendant to the use of the plaintiff; (4) money due on account stated; (5) goods sold and delivered; (6) goods bargained and sold; (7) interest on money due and forborne at interest at the defendant's request; (8) work done and materials used.[28]

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[25] *Allahditta* v. *Sadhu Shah,* 147 I.C. 338=35 P.L.R. 91=1934 Lah. 179.

[26] *Umed Chand* v. *Shah Bulaqidas,* 5 B.H.C.R.O.C.J. 16; 9 B.H. C.R. 280.

[27] *Ram Chandra* v. *Soma,* 1 Bom. 305-n (307) ; also see *Luvdr Chuni Lal* v. *Luvar Tribhuvandas,* (1881) 5 Bom. 688 (Six years' period under Act XIV of 1859 for a suit in respect of money paid by the plaintiff for the use of the defendant).

"In English law, a suit in the form contemplated by this article is maintainable where there has been payment of money by the plaintiff to a third party at the request or by the authority of the defendant, express or implied, with an undertaking, express or implied, to repay it. A request may be implied from the general course of dealing: it will be implied where the defendant is aware of the payment, and does not dissent: or where the payment is rendered necessary by the wrongful act or omission of the defendant: or where the plaintiff has been compelled by law to pay, or being compelled by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability."[29] "To sustain a claim of this nature English law requires that there must be *actual payment or its equivalent,* by the plaintiff.[30] It has sometimes been held that executing a covenant to pay, or extinguishing a debt by giving a new security is not payment."[31]

"**A debt for money paid arises** where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or promise to pay is then implied in law, without any actual agreement to that effect."[32] "**If there is an express request** to pay the money, this will import a promise to repay the amount. Similar will be the case **if such request can be inferred** as a fact from the circumstances. In such cases the transaction involves an actual agreement and produces a contract in the form of a consideration executed upon request."[33]

"**Where,** however, there is no request in fact, either express or implied, but the **circumstances alone raise the debt,** the request to pay, or the promise to repay, there implied is only a fiction of law."[34] . . . "In English law a **voluntary payment** of the debt of another, without request and under no legal liability or compulsion, gives no claim for the money paid against the person whose debt is discharged."[35] "A debt cannot be charged against a person for money paid on account of a mere obligation or duty on his part, which does not discharge him from a legal duty, unless paid at his express request."[36]

**1343.** As **instances of debts for money paid,** Dr. Pal gives the following cases in his work on limitation at p. 595:

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[28] Halsbury's Laws of England, Vol. I, p. 38 (1st Edn.); Pal's Limitation Act, p. 594.

[29] Leake on Contracts, 7th Edn., p. 45; Pal's Limitation Act, p. 594.

[30] *Power* v. *Butcher,* (1829) 8 L.J.D.S.K.B. 217; 10 B. & C. 329; *Barclay* v. *Gooch,* 2 Ess. 171; Pal's Limitation Act, p. 594.

[31] *Power* v. *Butcher,* (1829) 10 B. & C. 329; *Taylor* v. *Higgins,* (1802) 3 East. 169; *Manwell* v. *Jameson,* (1818) 2 B. & Ald. 51, cited in Pal's Limitation Act, p. 594.

[32] Leake on Contracts, 7th Edn., p. 44; Pal's Limitation Act, p. 594.

[33] *Ibid.*

[34] Pal's Limitation Act, p. 595.

[35] Leake on Contracts, p. 45; Pollock's Indian Contract Act, notes under Ss. 60 and 70; Pal's Limitation Act, p. 595.

[36] *Wennall* v. *Adney,* (1802) 3 Bos., etc., p. 47 cited in Pal's Limitation, p. 595.

"(1) Where an executor has been compelled to pay **legacy duty,** the charge of which falls upon the legatee"; "(2) where a broker has been compelled by the rules of the stock exchange to pay the **price, etc., of the shares**"; "(3) where a lessor has been compelled to pay the **costs of preparing a lease** (which is usually prepared by lessor's solicitor but is paid for by the lessee)"; "(4) where a lessee after assignment of a lease, is compelled to discharge **liabilities under the lease** primarily incumbent upon the assignee in possession"

"(5) where a purchaser of goods has been compelled to pay the **value of goods** to the true owner from whom the vendor obtained possession wrongfully";

"(6) liability of the personal representative of a deceased person for the **funeral expenses** paid by another";

"(7) **if a company raises money** without any borrowing powers or **in excess of its borrowing powers, and applies it in discharge of debts and liabilities,** the lender may recover back so much of the money as has been applied in discharge of its legal liabilities, whether accruing before or after the advance: *that portion of the money will* be deemed as if paid by the lender himself to the creditor of the company to discharge its liability at the request of the company";

"(8) where **a surety** has been compelled to pay the debt of the principal debtor; a drawer or indorser of a bill of exchange is in the position of a surety";

"(9) where several persons are **co-debtors** for the same debt or liability and one is compelled to pay the whole or a part greater than his share";

"(10) where a **co-sharer-tenant** pays the whole rent";

"(11) where of the several **co-sureties,** one is called upon to pay more than his share";

"(12) where several **insurers** insure the same risk to the same person";

"(13) where a person has been compelled to pay the debt of another by a **legal restraint** of his goods for the debt"; or

"(14) where an under-tenant pays the rent due to the superior landlord under a **distress or threatened distress** upon his goods".[37]

**Section 69, Indian Contract Act.**

**1344. SCOPE AND APPLICATION.**—The suits contemplated by this article are suits which are covered by **S. 69 of the Indian Contract Act,** which runs as follows:—

"A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."

As an illustration to this section, is given the case where,

"*B* holds land in Bengal on a lease granted by *A,* the Zemindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B's* lease. *B,* to prevent the sale and consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid."[38]

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[37] Pal's Limitation Act, pp. 595-596.

[38] *See* Indian Contract Act, by Pollock and Mulla, S. 69, pp. 382, 383; also see *Faiyazunnissa* v. *Bajrang Bahadur* ,(1927) 104 I.C. 358=1927 Oudh 609.

**Privy Council cases.**

Under **the principle** of this section, when a proprietor in good faith pending litigation makes the necessary payment for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, their Lordships of the Privy Council have held that it is common justice that he should be recouped, what he has so paid, by the person who ultimately benefits by the payment if he has failed through no fault of his to reimburse himself out of the rent.[39] Thus in *Alayar Khan* v. *Bibi Kunwar*,[40] the **Allahabad High Court** applied Art. 61, to a suit for recovery of revenue paid by the plaintiff while in possession of immoveable property, but of which he subsequently relinquished possession. However,

> "it is not in every case which a man has benefitted by the money of another that an obligation to repay the money arises".[41]

It has been laid down in the same Privy Council Ruling that

> "there must be **an obligation express or implied** to repay,"[42]

and

> "it is well-settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debts".[43]

Thus, a payment made voluntarily, and gratuitously cannot be recovered.[44]

In the case of *Ruabon Steamship Co., Ltd.* v. *London Assurance Co., Ltd.*,[45] the Lord Chancellor observed that

> "the liability of each of the persons held to be bound to contribute is assumed to exist either by contract, or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation".

It does not arise only on some general principle of justice that a man ought not to get an advantage unless he pays for it.[46] In the case of *Abdul Wahid Khan* v. *Shalukha*[46]

> "the proceedings were taken by the defendant for his own benefit and without any authority, express or implied, from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs did not create any implied con-

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[39] *Dakhina Mohan Roy* v. *Saroda*, (1893) 21 Cal. 142 (148)=20 I.A. 160 (P.C.).

[40] 42 All. 61=17 A.L.J. 1025=52 I.C. 632.

[41] *Ram Tuhul Singh* v. *Biseshwar Lal*, (1875) 23 W. R. 305=15 B.L.R. 208=L.R. 2 I.A. 131 (P.C.); also see *Panchkore* v. *Haridas*, (1916) 21 C.W.N. 394 (399)=34 I.C. 341.

[42] 2 I.A. 131 (143) (P.C.).

[43] *Ibid.*

[44] *Sumar Singh* v. *Shib Lal*, 1882 A.W.N. 149; *Ramchandra Atmaram* v. *Damodar Ramchandra*, (1899) 1 Bom. L. R. 371.

[45] 1900 A.C. 6=5 Com. Cas. 71=16 T.L.R. 90.

[46] (1894) 21 Cal. 496=21 I.A. 26 (P.C.).

tract or give the defendant any equity to be paid a share of the cost of the plaintiffs".[47]

This is **a general article,** applicable to all cases of "money payable to plaintiff for money paid for the defendant"; but, there are **special articles** relating to similar matters in Arts. 79, 81, 82, 99, 100 and 107, which where applicable would exclude the application of this general article.

**Suits by persons interested in payment.**

1345. It would be noticed that S. 69 of the Indian Contract Act,

"lays down in one respect a wider rule than appears to be supported by any English authority. The words 'interested in the payment of money which another is bound by law to pay,' might include the apprehension of any kind of loss or inconvenience, or at any rate of any detriment capable of being assessed in money".[48]

The English authorities do not cover a case where a plaintiff has made a payment operating for the defendant's benefit, but was not under any direct legal duty to do so, nor where the defendant was not bound to pay, though the payment was to his advantage.[48-a] As observed by Willes, J., in *Johnson* v. *Royal Mail Steam Packet Co.,*[49] it is a rule of English law that "no man can make himself the creditor of another by paying that other's debts *against* his will or without consent."

Under Indian Law, **the essential ingredients of the claim under S. 69,** of the Indian Contract Act are that the plaintiff must have made the ***payment bona fide*** **for the protection of his own interest.** A mere interest in the payment is not sufficient; the payment must have been actuated by the motive of protecting that interest.[50] **The interest may be remote or indirect.**

*Illustrations.*

(1) **A putnidar** may make payments on account of Government revenue due by his superior landlord who had failed to pay the same;[1] or a *dur-*

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[47] *Abdul Wahid Khan* v. *Shalukha Bibi,* (1894) 21 Cal. 496=21 I.A. 26 (P.C.).

[48] Pollock and Mulla's Contract Act, p. 383; citing *Tulsa Kunwar* v. *Jageshar Prasad,* (1906) 28 All. 563; *Subramania Iyer* v. *Rangappa,* (1909) 33 Mad. 232; *Pankhabati* v. *Nani Lal,* (1914) 18 C.W.N. 778 (781)=21 I.C. 207; *Eastern Mortgage & Co.* v. *Muhammad Fazlul Karim,* (1925) 52 Cal. 914=90 I.C. 851=1926 Cal. 385; *Catya Bhusan* v. *Krishna,* (1914) 18 C.W.N. 1308 (1310, 1311)=24 I.C. 259; *Nagendra Nath Roy* v. *Jugal Kishore Roy,* (1925) 29 C.W.N. 1052 (1055)=90 I.C. 281=1925 Cal. 1097; *Siti Fakir* v. *Chand,* (1928) 32 C.W.N. 1087=108 I.C. 46=1928 Cal. 389; *Muthurakku* v. *Rakkappa,* (1914) 26 M.L.J. 66 (70, 71)=22 I.C. 9.

[48-a] *See* Pollock and Mulla's Contract Act, p. 383.

[49] L.R. 3 C.P. 43.

[50] *Desai Himat Singh* v. *Bhava Bhai,* (1880) 4 Bom. 643 (652); cf. *Secretary of State* v. *Rangaswami,* (1927) 106 I.C. 657=1927 M.W.N. 872.

[1] *Smith* v. *Dinonath,* (1885) 12 Cal. 213; *Bama Sundari* v. *Adhar Chundar,* (1894) 22 Cal. 28; also see *Ram Rattan* v. *Gaura,* (1930) 122 I.C. 765=1930 All. 516.

*patnidar* of a share of a *putni* of the whole rent due on the *putni* may make a payment to save it from being sold in execution of a decree obtained by the landlord in a suit for arrears of rent brought against some only and not all of the *putnidars*.[2]

(2) **A person whose goods are wrongfully attached** in order to realize Government revenue due by another is a person interested to pay the amount, which he is entitled to recover from the person bound by law to pay.[3]

(3) **A Hindu reversioner** paying arrears of Government revenue in respect of property in which the person in possession has a widow's estate[4]; or, a Hindu reversioner making a deposit under O. 21, R. 89 of the Code of Civil Procedure, to have a sale in execution of a decree against a Hindu widow set aside, the sale being of the entire interest in the property sold and not merely the widow's interest, would be a person interested to pay the amount within S. 69, I. C. Act.[5]

(4) Where *A* makes a gift of a portion of land to *B*, himself undertaking to pay the *judi* in respect of it, and then makes a gift of the rest of the land to *C* subject to the condition that *C* shall pay the *judi* in respect of the whole land, *B* is entitled, on failure of *C* to pay the *judi*, to make the payment and to recover it from *C*.[6]

**Suits for contribution.**

**1346.** There is some conflict of authority on the question whether S. 69 of the Indian Contract Act applies to suits for contribution where *both* the plaintiff and the defendant were liable for the money paid by the plaintiff. In an early **Calcutta** case, where portions of a property subject to a mortgage were purchased by the plaintiff and defendant respectively, and the plaintiff alone paid the entire amount of the mortgage debt to prevent the estate from sale, it was held that the plaintiff was a person interested in the payment, and that he was entitled to contribution from the defendant.[7] But, this was doubted in a subsequent case where the view taken was that Ss. 69 or 70 of the Indian Contract Act seems rather to contemplate persons who, not being themselves bound to pay the money or to do the act, did it under circumstances which gave them a right to recover from the person who had allowed the payment to be made and had benefited by it.[8] In a later case, this section was held to contemplate a case in which there are several co-sharers in possession of land and where some of them having neglected to pay what is due from them in respect of the occupation of the land, one of their number pays what is due from all. He may then recover contribution from the rest.[9] More recently, this section has been applied to contribution suits, being general in terms, and not to be restricted in its operation.[10]

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[2] *Rajani Kanta* v. *Haji Lal,* (1917) 41 I.C. 242=21 C.W.N. 628.

[3] *Tulsa Kunwar* v. *Jageshar Prasad,* (1908) 28 All. 563; *Khushal Singh* v. *Khawani,* 1906 All. W. N. 283; also see *Abid Husain* v. *Ganga Sahai,* (1928) 113 I.C. 441=26 A.L.J. 435=1928 All. 353.

[4] *Sambasiva* v. *Seethalakshmi,* (1909) 19 M.L.J. 331.

[5] *Pankhabati* v. *Nani Lal,* (1914) 18 C.W.N. 778.

[6] *Soma Shastri* v. *Swami Rao,* (1918) 42 Bom. 93=43 I.C. 482; *Chandra Deo* v. *Srinivasa,* (1915) 38 Mad. 235 (239)=20 I.C. 445.

[7] *Mothooranath* v. *Kristo Kumar,* (1878) 4 Cal. 369.

[8] *Futteh Ali* v. *Ganganath Roy,* (1881) 8 Cal. 113 (116); also see *Nawab Mir* v. *Partap,* (1880) 6 Bom. 244.

**(i) Money paid.**

1347. **ARTICLE 61 EXPLAINED.**—This article applies to suits "for *money* payable to the plaintiff, for *money* paid for the defendant". Where goods are taken in distress for rent and sold to pay the sum due, the question arises whether this is equivalent to payment of money. An English decision in *Moore* v. *Pyrke*,[10-a] which holds this point in the negative has not been approved in *Rogers* v. *Maw*,[10-b]; and, as noticed in Pal's Limitation, this ruling is opposed to a set of rulings where currency is looked upon as only a convenient method of expressing value.

**(ii) Involuntary payment.**

1348. Where the money is realized in execution, and there is no actual payment of the money by the party, it has been doubted whether it is a payment within the meaning of Art. 61, or Art. 99, Limitation Act.[11] However, it has been held by a **Full Bench of the Allahabad High Court**, in *Ibu Hassan* v. *Brijbhukhan*,[12] that there is no distinction between a case where the payment in respect of which contribution is claimed is made to avert legal process, and a case in which payment has been enforced by sale of the property of the claimant for contribution. And, the **Madras Full Bench** has taken a similar view in the case of *Rajah of Vizianagram* v. *Raja Setrucherla*,[13] where the realisation by the Collector under the Rent Recovery Act from the income of the plaintiff's share after it had been registered as a separate estate was not held to affect plaintiff's right to contribution; though a claim for contribution, it was observed, generally arises in cases where the party himself paid the amount in respect of which contribution is sought. The proposition is thus well established that

> "so far as the right of contribution against the co-sharers is concerned, it does not matter whether the money is actually handed over by the party seeking contribution, or is realised from him by coercive process by the creditor. In either case the right of contribution arises from the fact that

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[9] Cf. *Swarnamoyee* v. *Hari Das*, (1902) 6 C.W.N. 903 (The defendant in this case was wrongfully kept out of possession by the plaintiff).

[10] *Rampal* v. *Khirod Mohini*, (1913) 18 C.W.N. 113; *Prosunno Kumar* v. *Jamaluddin*, (1913) 18 C.W.N. 327; cf. *Jagapatiraju* v. *Sadrusannamma*, (1916) 39 Mad. 795=31 I.C. 255.

[10-a] (1809) 11 East. 52.

[10-b] 15 M. & W. 444.

[11] *Fuckoruddeen* v. *Mahima*, (1879) 4 Cal. 529; also see *Hari Narayan* v. *Iswara Chandra*, (1912) 13 I.C. 457 and *Ramayya* v. *Venkattapiah*, 1910 M.W.N. 839=8 I.C. 1102=9 M.L.T. 212.

[12] (1904) 26 All. 407=1904 A.W.N. 74=1 A.L.J. 148 (F.B.).

[13] 26 Mad. 686 (F.B.).

one of the co-owners has paid in excess of his share and the joint liability of all co-sharers has been discharged".[14]

**(*iii*) For the defendant.**

1349. This article applies only to cases where "money is payable to the plaintiff for money paid *for the defendant*". The language of this article is applicable to suits for money paid for the defendant, but without any request or consent on his part.[15] At any rate, this article will be held to govern a suit where money paid at the request, express or implied of the defendant, is claimed on the ground that it was paid for the use and benefit of the defendant.[16] Art. 61 of the Limitation Act **can be applied to cases under S. 70 of the Contract Act** where the payment made by the plaintiff produced an immediate benefit to the defendant, as in the case of payments of Government revenue, or of decree amounts. But this article will not apply when the benefit will only arise at a subsequent stage.[17] Where a person does an act which is greatly beneficial to himself, and which is sure to benefit another incidentally, the former cannot claim contribution for the latter; as he cannot be said to do the thing for another within the meaning of S. 70, Indian Contract Act.[18] In other words, where a person is bound to do an act, or would do an act, whether another consents to it or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act.[19] Where the plaintiff's cause of action is not complete by the mere payment of money, but is perfected only by the subsequent enjoyment of a benefit by the defendant, this article cannot cover the suit falling under S. 70 of the Contract Act.[20] Where the plaintiff is himself primarily liable to pay the amount, and the liability of the other person arises only after the payment has been made by the plaintiff, the payment is not taken to have been made directly for the defendant, and the case is not covered by the provision in this article.[21] This article will, however, apply where the liability of the defendant arises under any prior agreement or award.[22] Also, where the payment is made either to the defendant or into Court on behalf of such person.[23]

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[14] *Gope Nath* v. *Chandra Nath,* (1920) 57 I.C. 884=26 C.W.N. 340=1921 Cal. 815; cf. *Kumar Nath* v. *Nobo Kumar,* 26 Cal. 241 (244) (Where Art. 120 was applied to a suit for contribution).

[15] *Venkatavaradaraja* v. *Venkatasubbarayudu,* (1918) 52 I.C. 414= 10 L.W. 33; *Kandaswami* v. *Avayambal,* (1910) 34 Mad. 167=20 M.L.J. 989.

[16] *Girraj* v. *Mulchand,* (1907) 29 All. 627; cf. *National Bank* v. *Bansidhar,* (1929) 57 I.A. 1=34 C.W.N. 145 (P.C.).

[17] *Viswanadha* v. *Orr,* (1918) 45 I.C. 786 (Mad.).

[18] *Sundara Aiyar* v. *Anantha Padmanabha,* 1923 Mad. 64=43 M.L.J. 271.

[19] *Ibid.*

[20] *Ibid.*; also see *Viswanatha* v. *Orr.,* (1917) 45 I.C. 786 (Mad.) and *Upendra Krishna* v. *Naba Krishna,* (1920) 62 I.C. 615=25 C.W.N. 813.

[21] *Muthuramalinga* v. *Mahalinga,* (1918) 9 L.W. 287=52 I.C. 468 (O.L.P.A. from 42 I.C. 502=33 M.L.J. 329).

### 1350. ARTICLE APPLIED—ILLUSTRATIVE CASES.—

**Suits for contribution.**

(1) In *Tirupatraju* v. *Rajagopala*,[24] a contribution suit brought by **the managing member of a family** who was compelled to pay the whole family debt was held governed by Art. 61 of the Limitation Act. A suit for contribution **by a partner of a firm** who has paid the whole or more than his share of the amount due from all the partners has been held to be governed by this article.[25] This article has been applied to a suit where the plaintiff who had **a canal common to himself and the defendants,** sued to recover, under an award, a certain share of the costs from the defendant.[26] Similarly, where a plaintiff sued to recover the money which he had **paid in excess of his share of the joint expenses** of a certain temple held by both the plaintiff and the defendant. This was not taken to be a suit for accounts, merely because it involved the examination of certain accounts relative to the excess payment.[27] **A suit to recover excess payment** made by the plaintiff towards a joint-mortgage-bond executed by himself and defendant, is a suit for contribution falling under Art. 61.[28]

(2) In a suit arising out of a claim for contribution between the **co-owners in respect of a debt due** for money raised to pay arrears of rent and other dues, the plaintiff having paid the proportion due from the defendant, under an order on account of decrees for rent and revenue in arrears, the estate being saved from sale, the article applicable was Art. 61, Limitation Act.[29]

(3) A suit to recover a sum of money being the **contribution** claimable from the defendant **in respect of repairs to a jointly owned well,** which had fallen into a state of dilapidation, and which were carried out by the municipality on the plaintiff depositing a certain sum for the expenses, was held to be governed by Art. 61, Sch. I, Limitation Act. Article 116 does not apply where "the claim upon which the action is predicated rests not upon the registered contract but upon the promise which the law implies on the part of the co-obligors to share equally the pecuniary consequences of their venture".[30]

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[22] *Tulsidas* v. *Wadero,* (1920) 60 I.C. 971=14 S.L.R. 219; also see *Seth Ramlal* v. *Narsingdas,* (1914) 28 M.L.J. 448=19 C.W.N. 193 (P.C.).

[23] *Annada Mohan* v. *Manoruddin,* (1916) 36 I.C. 392.

[24] 8 M.L.J. 271.

[25] *Walaiti Ram* v. *Ram Kishen,* (1924) 5 L.L.J. 310=72 I.C. 385=1924 Lah. 112.

[26] *Tulsidas* v. *Wadero,* 60 I.C. 971=14 S.L.R. 219.

[27] *Ramlalji* v. *Gopal Lalji,* 19 All. 244.

[28] *Marudai Muthirian* v. *Chinna Kannu,* (1918) 52 I.C. 243=1919 M.W.N. 429; Relied on *Raja of Vizianagram* v. *Raja Setracherla,* 26 Mad. 686 (F.B.).

[29] *Sukhamoni Chowdhrani* v. *Ishun Chunder Roy,* (1898) 25 Cal. 844 (851) (P.C.).

[30] *Suraj Prasad* v. *Karmali,* (1920) 57 I.C. 532=44 Bom. 591; compare *Upendra Krishna Mandal* v. *Naba Kishore Mandal,* (1921) 62 I.C.

(4) Where a **co-defendant** in a suit makes some payment in Court on behalf of himself and the co-defendant, a suit by him to recover the amount paid in excess of his share is governed by Art. 61, and limitation begins to run from the date of the payment, and not from the date of the termination of litigation.[31]

**Suits for damages.**

(5) Where the mortgagor,[32] or a vendor,[33] leaves a specific portion of the consideration money with the mortgagee, or the vendee, to pay off certain creditors, and the mortgagee or vendee fails to pay the amount, in consequence of which the mortgagor or vendor makes the payment himself, and brings a suit to recover damages against the mortgagee or vendee, the suit is governed by Art. 61, Sch. I, Limitation Act. Similarly, where a vendee undertook to pay the revenue payable on the land and committed default therein, and the vendor in whose name the *patta* continued to stand was compelled to pay, he could recover the last three years' *kist* under Art. 61, in a suit against the vendee.[34] Where the transferor pays charges in respect of property subsequent to date of sale, which the transferee is bound to pay, the suit for its recovery is governed by Art. 61, time commencing to run from date of payment.[35]

**Maintenance expenses.**

(6) A suit by a divorced wife of a Mahomedan for the maintenance expenses of her minor daughter falls within the scope of Art. 61, but the plaintiff is not entitled to recover anything prior to three years before suit.[36]

(7) This article is not limited to cases of legal liabilities, and is the proper article applicable to cases of re-coupment between agent and principal.[37] A suit by an agent to recover from his principal the money spent by the former in the course of the agency,[38] or money paid by agent to principal's creditors though borrowed, by the former without the latter's authority or ratification,[39] is governed by Art. 61, and not Art. 116, because there was no breach of a contract in writing registered.

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615=25 C.W.N. 813=1921 Cal. 93 (Art. 120, applied, where the liability arose when the benefit to defendant accrued on the joint-tank being filled up in shape of rent from tenants settled on the site).

[31] *Jamal* v. *Chand,* (1922) 70 I.C. 289=1922 Cal. 79 (Art. 115 would give the same period).

[32] *Sarju Misra* v. *Ghulam Husain,* (1921) 63 I.C. 87 (89) (All.); also see *Collector Singh* v. *Madari Lal,* (1924) 78 I.C. 738=1925 Oudh 132; cf. *Zartun Aheer* v. *Satram Singh,* 1931 All. 549 (2)=133 I.C. 615=1931 A.L.J. 533.

[33] *Brikant Pande* v. *Jamna Dhar,* (1922) 70 I.C. 582=1922 All. 409; also see *Gulzarimal* v. *Maghimal,* 1933 Lah. 109=141 I.C. 435=14 Lah. 380.

[34] *Puthalath Ukkaran* v. *Pannigari Ukkaran,* (1926) 94 I.C. 1046 =1926 M.W.N. 291=1926 Mad. 633.

[35] *Sinthamoni Chetti* v. *Arunachallam Chettiar,* 1927 Mad. 1060 (2).

[36] *Ali Mahomed* v. *Fatima Mahomed,* (1919) 51 I.C. 968=21 Bom. L.R. 713.

[37] *Kandaswami Pillai* v. *Avayambal,* (1910) M.W.N. 316=7 I.C. 399=34 Mad. 167 (170).

[38] *Ibid.*

[39] *Sobanadhri Row* v. *Subbarayudu,* (1919) 52 I.C. 414=10 M. L.W. 33; Relied on 34 Mad. 167, *supra*; also *Aghorenath* v. *Grish Chunder,* 20 Cal. 18.

(8) Similarly, where a ***de facto* guardian** spends money for the **minor,** and sues for recovery of money alleged to have been spent on **marriage** of the ward, the claim would be governed by Art. 61, and the **cause** of action arises on the date of the marriage, or the expenditure, and not on the termination of the guardianship.[40]

(9) Where a **receiver or manager** is appointed by the Court, he is appointed on behalf of all the persons interested in the property. Hence the expenses incurred by the receiver of an estate in instituting a suit to recover money due to the estate are incurred by him on behalf of and for the person who owns the estate and this is "money payable to the plaintiff for money paid for the defendant" within Art. 61, Limitation Act.[41]

(10) Where a puisne mortgagee pays the amount of the mortgage-decree of the prior mortgagee, his suit to enforce a charge against the property is governed by Art. 132, Limitation Act; but, if the **suit of the puisne mortgagee,** who is entitled to bring his suit **personally against the mortgagors,** is simply to recover money paid by him for the defendants, the period of limitation would be three years, under Art. 61, Limitation Act, from the date of payment.[42] There is a clear distinction between an action for reimbursement, and a suit to enforce security by virtue of **subrogation.**[43] A subsequent mortgagee is, however, not entitled to subrogation in every case where he pays off a prior mortgage: where the subsequent mortgagee himself pays the amount of the prior mortgage which the mortgagor is bound by law to pay, the case is governed by Art. 61, Sch. 1, to the Limitation Act.[44]

(11) Where owing to disputes between *A* and *B*, a *sapurddar C*, was put in charge of property pending the determination of rights of *A* and *B*; and subsequently, *C* having restored possession was sued for the wages of two watchmen whom he had appointed to guard the standing crop, and *C* paid up the decrees, and sued for the recovery of amount against *A* and *B*; it was held that the suit was governed by Art. 61, Limitation Act.[45]

(12) Where defendant had passed a *sham* sale-deed in favour of the plaintiff, and the latter then had redeemed the property sold to him and failing to get possession had brought a suit for recovery of the amount of redemption, it was *held* that under the circumstances neither S. 65, Contract Act, nor Art. 97, Limitation Act could apply, but that the suit came under Art. 61.[46]

(13) Where a widow in possession of the estate of her step-son, borrowed moneys to discharge her husband's debts and to perform the

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40. *Piarelal* v. *Lajja Ram,* 1935 Lah. 437=37 P.L.R. 246; also see *Mt. Malkulnissa* v. *Mt. Piyari,* (1919) 50 I.C. 306 (308).

41. *Cheerath Veetil Karnavan* v. *Narayanan,* 1935 Mad. 594=1935 M.W.N. 598=69 M.L.J. 539.

42. *Shib Lal* v. *Munni Lal,* (1922) 63 I.C. 604=44 All. 67=1922 All. 153 (2)=19 A.L.J. 840.

43. *Kotappa* v. *Raghuvayya,* (1927) 50 Mad. 626=102 I.C. 316=1927 Mad. 631; Followed *Sibanand* v. *Jagamohan,* 1 Pat. 780 (788)=1922 Pat. 499=68 I.C. 707.

44. *Mahomed Shafiqullah* v. *Samiullah,* 1929 All. 943=1930 A.L.J. 57=52 All. 139=123 I.C. 101.

45. *Lachmi Narayan* v. *Putti Lal,* 1930 Oudh 420=7 O.W.N. 760=128 I.C. 66.

46. *Raghunath Abaji* v. *Lahanu,* 1931 Bom. 39=32 Bom.L.R. 1376=128 I.C. 907; cf. 11 All. 47=15 I.A. 211 (P.C.); 25 All. 618=1903 A.W.N. 117; and 28 All. 466=3 A.L.J. 228=1906 A.W.N. 88 (Art. 97 applied).

marriage of her daughters, she was held entitled to be re-imbursed for the same. A suit by her against the reversionary heirs was governed by Art. 61, and not Art. 120, and time began to run from the date she made payments.[47]

## 1351. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

(1) Where the plaintiff and defendants were **joint-owners of a tank** in an insanitary condition, which the plaintiff filled up at his private expense on receiving an order from the Municipal Committee, and the plaintiff then demanded a proportionate share of such expenses from the defendants who were in enjoyment of the benefit of the act, as they were in receipts of rent from the tenants who had been settled on the filled up tank, it was held that the liability arose when the tank was filled up, and the contemplated benefit conferred. Article 120, and not Art. 61 was held applicable, time running against the plaintiff from date of completion of the work.[48]

(2) A **landlord** is primarily liable to Government under S. 73 of the Madras Local Board's Act (V of 1884), **and a tenant** is liable only to the landlord in respect of the portion of the cess which the latter has actually paid, and contingently on his having made the payment. A suit by landlord to recover from the tenant the cess actually paid by him, would be governed by Art. 120, and Art. 61 could not apply to such payments, not being a payment of money by the plaintiff on behalf of the defendants.[49]

(3) Where a **partner** who pays his share of the loss incurred in partnership **sues his sub-partner** for portion of such a loss by virtue of contract as between them, the suit is not governed by Art. 61, nor by Art. 106, and falls under Art. 120.[50]

(4) The mere execution of a **bond for a joint debt** does not constitute payment of the debt so as to entitle the executant to maintain a suit for contribution against his co-contractor.[1]

(5) Where certain properties were sold under a mortgage-decree, and the auction-purchaser of a portion of the said properties deposited the decretal amount under O. XXI, R. 89, Civil Procedure Code to avoid confirmation, it was *held* that a suit to recover the amount deposited from the mortgagor was a payment saving the right of redemption, *for the plaintiff* and Art. 61, Limitation Act was not applicable.[2]

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[47] *Muthuswami Kavundan* v. *Pannayya,* (1928) 110 I.C. 613=1928 Mad. 820=51 Mad. 815=51 M.L.J. 436=28 L.W. 182=1928 M.W.N. 398.

[48] *Upendra Krishna Mondal* v. *Naba Kishore,* 1921 Cal. 93=25 C. W.N. 813=62 I.C. 615.

[49] *Rajeswara Muthuramalinga* v. *Mahalinga Raju,* (1919) 52 I.C. 468=9 L.W. 287=1919 M.W.N. 365 [On appeal from (1917) 42 I.C. 502].

[50] *Sennayya* v. *Ramalingayya,* (1933) 148 I.C. 204=57 Mad. 347 =65 M.L.J. 789=1933 M.W.N. 1382=38 M.L.W. 858.

[1] *Bhabhuti* v. *Gurdass,* (1927) 99 I.C. 271=3 Oudh W.N. 968; Relied on *Jagannath Kuar* v. *Sheo Singh,* 35 I.C. 439=3 Oudh.L.J. 441 =19 Oudh Cas. 44.

[2] *Nanbat Lal* v. *Mahadeo Prasad,* (1929) 51 All. 606=116 I.C. 297 =1929 All. 309=1929 A.L.J. 419.

(6) Where a person interested in a mortgaged property makes *partial* payments of the mortgage-debt to save the property, the doctrine of subrogation by redemption is not applicable. But, the payment constitutes a charge on the property enforceable under Art. 132, and not Art. 61, Limitation Act.[3]

(7) Where the mortgagors left certain moneys with the mortgagee for payment to the prior creditors of the mortgagors; but the mortgagees did not pay this sum, and the mortgagors were forced to pay the money to the creditors, a suit by the mortgagors to recover the amount with interest by way of damages from the mortgagees, was held not covered by Art. 61, as the payment was made by the mortgagors for themselves.[4] [Cf. *Sarju Misra* v. *Ghulam Husain*,[5] and *Collector Singh* v. *Madarilal*,[6] which were not noticed in the judgment].

(8) Where the plaintiff succeeded defendant who was a trustee of a temple, and a suit was brought to recover money belonging to the temple which the defendant had taken from the temple funds for the expenses of a litigation concerning his removal from the trusteeship, *held* that the suit was not governed by S. 10, nor did it fall under Arts. 61 or 62, and that the proper article applicable to such a suit was Art. 120, Limitation Act.[7]

(9) Article 61 is the general article and Art. 81 one of the subsequent series of particular articles specifying various situations in which money is paid by a plaintiff for a defendant, must be applied in preference to the general article wherever possible.[8]

**1352. STARTING POINT OF LIMITATION.**— Article 61, gives a period of three years, for money payable to the plaintiff for money paid for the defendant and time begins to run from the day *when the money is paid.*[8-a] As the cause of action will arise only on actual payment, a suit brought before making the payment, will be premature.[9] The right of contribution itself does not arise unless and until the payment is made.[10]

*Illustrations.*

(1) In *Alayar Khan* v. *Bibi Kunwar*,[11] limitation began to run from the date of payment by plaintiff of revenue for certain properties, then in his possession which the defendant was ultimately found entitled to.

(2) In *Muthuswami* v. *Ponnayya*,[12] where a Hindu widow in possession of the estate of her deceased step-son made certain payments and incurred

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[3] *Ma Lon* v. *Ma Nyo*, (1924) 79 I.C. 766=1924 Rang. 204.

[4] *Zaitun Aheer* v. *Satram Singh*, 1931 All. 549 (2)=133 I.C. 615 =1931 A.L.J. 533.

[5] (1921) 63 I.C. 87 (89) (All.).

[6] (1924) 78 I.C. 738 (Oudh).

[7] *Krishna Kudwa* v. *Venkataramana*, (1934) 152 I.C. 345=1934 Mad. 542=40 M.L.W. 275=1934 M.W.N. 1032.

[8] *Kunj Lal* v. *Gulab Ram*, (1922) 67 I.C. 365=55 P.L.R. 1922.

[8-a] *Torab Ali* v. *Nilrutton*, 13 Cal. 155.

[9] *Desraj* v. *Lachi Ram*, 1933 Lah. 404=147 I.C. 57.

[10] *Narayana Murthi* v. *Marimuthu*, (1902) 26 Mad. 322.

[11] (1919) 42 All. 61.

[12] (1928) 51 Mad. 815=55 M.L.J. 436.

certain expenses binding on the estate, the limitation started from date of payment or at any rate from the time when the rightful owner *claimed* the estate.

(3) Where a vendor or mortgagor sues his vendee or mortgagee for damages for amounts which the latter being directed to pay for the vendor or mortgagor had failed to pay, limitation commences to run from the date of actual payments by the vendor or mortgagor.[13] Where a vendee required to pay off the vendor's incumbrances defaults in paying and the vendor sustains loss thereby a suit by the vendor for relief against the vendee is governed by Art. 61 (or by Art. 116, read with Art. 83) and the starting point of limitation is the date when the vendor is actually damnified.[14]

(4) A cause of action for contribution in respect of money paid by manager of a joint family in respect of a joint debt.[15]

(5) Limitation under Art. 61, runs from the date of payment and not from the date of the termination of litigation in which a co-defendant in a suit made some payment into Court on behalf of himself and the co-defendant.[16]

(6) Where a suit for contribution is brought by the plaintiff against the defendant under Art. 61, Limitation Act, the period of limitation counts from the date of the last payment made by the plaintiff; and, any payment by the defendant subsequently thereto does not extend plaintiff's limitation under S. 20 of the Limitation Act.[17]

**Appropriation or acceptance by Court.**

**1353.** There is nothing in Art. 61, Limitation Act, which requires that the payments on behalf of another should be accepted or adopted by the person on whose behalf they are made.[18] However, where one of two brothers, borrowing money in his own name, applies it in payment of a joint debt, the limitation for a suit for contribution runs from the date of the application of the money for that purpose, and not from the date of the payment of the loans incurred by the plaintiff to pay off the loan.[19] Where it was agreed between the parties to an appeal that the cost of printing and preparing the record should be shared equally between them, and, in consequence of this arrangement, the plaintiffs made a deposit in Court of a certain sum, out of which the Court subsequently appropriated the actual cost of printing and preparing the record; it was held that in a suit for contribution by the plaintiffs against the defendants the period of limitation for the suit began to run not from the date of the deposit, but **from the date of the appropriation.**[20] Under Art. 61, Limitation Act, payment means payment either to the person to whom it is to be made or into Court on behalf of such person, and in the latter case limitation runs **from the date on which the amount is accepted by the Court,** and not from the date on which it is deposited in Court.[21] When the payment is involuntary, *e.g.*, where the sale proceeds of plaintiff's property attached and sold in execution are deposited in Court for the decree-holder, limitation starts not from the date of sale, but from the date when the decree-holder withdraws the money from Court.[22]

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[13] *Sayer* v. *Ghulam,* (1920) 63 I.C. 87 (All.); *Hakim Ali* v. *Dalip Singh,* (1913) 19 I.C. 676=11 A.L.J. 478; *Brikant Pande* v. *Jamna Dhar,* (1922) 70 I.C. 582 (All.); cf. *Raghubar Rai* v. *Jaij Raj,* (1919) 34 All. 429 (Date of deed by which the vendee was directed to pay); also see and cf. *Zaitun Aheer* v. *Sat Ram,* 1931 A.L.J. 533 (Art. 120 applied).

[14] *Gulzari Mal* v. *Maghi Mal,* 14 Lah. 380=141 I.C. 435=34 P.L.R. 156=1933 Lah. 109.

[15] *Tirupathi Raju* v. *Rajagopala,* (1898) 8 M.L.J. 271; also see *Sukhamoni* v. *Ishan,* (1898) 25 I.A. 95=25 Cal. 844 (P.C.).

[16] *Jamal* v. *Chand,* (1922) 70 I.C. 289=1922 Cal. 79.

[17] *Marudai Muthirian* v. *Chinnakannu,* (1919) 52 I.C. 243=1919 M.W.N. 429.

[18] *Shahbaz Khan* v. *Bhangi,* 1931 Lah. 344 (2).

[19] *Ramkisto Roy* v. *Mudden Gopal,* (1869) 12 W.R. 194; *Sunkur* v. *Goury,* (1879) 5 Cal. 321; *Aghore Nath* v. *Grish Chunder,* (1892) 20 Cal. 18.

| Article. | Desription of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 62. | For money payable by the defendant to the plaintiff for money received by the defendant for the planitiff's use. | Three years. | When the money is received. |

## SYNOPSIS.

1354. Corresponding provisions.
1355. English law.
1356. Common law form of action.
1357. True nature of suits under Art. 62.
1358. Privity of a legally recognizable nature.
1359. Solicitor and client.
1360. Principal and agent.
1361. Guardian and ward.
1362. Benamidar.
1363. Suit to recover share of family debts.
1364. Suits between co-sharers.
**1365-1368. Article explained.**
1366. For plaintiff's use.
1367. For defendant's own use.
1368. By the defendant.
**1369-1370. Application of article.**
1369. Article applied—Illustrative cases.
1370. **Article not applied**—Illustrative cases.
**1371. Starting point of limitation.**

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[20] *Iqbal Narain* v. *Suraj Narain,* (1918) 48 I.C. 336 (Oudh); Folld. in *Murlidhar* v. *Naunihal Singh,* 1932 Oudh 222=133 I.C. 137=9 Oudh W. N. 414.

[21] *Annada Mohan Roy* v. *Maniruddin,* (1916) 36 I.C. 392 (Cal.); Folld. in *Murlidhar* v. *Naunihal Singh,* supra.

[22] *Pattabhiramayya* v. *Ramayya,* 20 Mad. 23; Folld. *Fuckroodeen* v. *Mahima Chunder,* 4 Cal. 529.

## NOTES.

**1354. CORRESPONDING PROVISIONS.**—This article corresponds to Art. 60 of Sch. II of Act IX of 1871, and to Art. 62 of Sch. II of Act XV of 1877.

In the Act of 1859, suits of this nature were covered by the general provision in S. 1, cl. 16, relating to suits on implied contracts.

**1355. ENGLISH LAW.**—In English law, a form of action, known as an action for money had and received, covered a large number of claims of the nature contemplated by this clause. This form is no longer in use. Statements of claim must now be more specific and must contain a statement in a summary form of the material facts on which the plaintiff relies. The old common count of money received by the defendant for the use of the plaintiff was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered receipt of it a receipt by the defendant to the use of the plaintiff.[23]

**(i) Action for money had and received.**

"It was a form of suit which was adopted when a plaintiff's money had been wrongfully obtained by the defendant, as for example, when money was exacted by extortion or oppression or by abuse of legal process or when overcharges were paid to a carrier to induce him to carry goods or when money was paid by the plaintiff in discharge of a demand illegally made under colour of an office. It was a form of claim which was applicable when the plaintiff's money had been wrongfully obtained by the defendant, the plaintiff in adopting it waiving the wrong and claiming the money as money received to his use."[24]

**Lord Mansfield** held in *Moses* v. *Macferlan*,[25] that this equitable action lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, or extortion or oppression, or an undue advantage taken of the parties' situation, under circumstances which disentitle him to retain it, and which *ex aequo et bono* the defendant ought to refund. According to a definition of Lord Mansfield, this action was to be used,

**(ii) Scope of action.**

"where a defendant has received money which in justice and equity belongs to the plaintiff under circumstances which render the receipt a receipt by the defendant for the use of the plaintiff".

These circumstances were well-defined. *Firstly*, an action for money had and received would lie where the money had been **wrongfully or fraudulently obtained**, where waiving the wrong, the money might be claimed from the wrong-doer as an implied debt standing against him.[26] Examples of this class of cases were to be found in suits for money feloniously stolen by a thief, or money obtained by the defendant by false pretences, or money paid under contract induced by fraud. *Secondly,* this form of action covered cases in which **money** was **paid under** such a **mistake of fact** as creates a belief that a legal liability rests on the payer to make the payment[27]; for example, goods mistakenly seized and sold under a writ of execution on the belief that they belonged to the judgment-debtor; or money payments made under mistake or ignorance of fact, which entitled a person so paying to recover as money had and received for use. Money obtained by **compulsion under colour of office** may be recovered back; **but not** money obtained by **compulsion of a legal process,** unless the compulsion be not justified by the existing process. This form was **not available where the payment was made** ***voluntarily*** *and with full knowledge of all the facts;* and without any compulsion or undue influence. But, **it applied to cases where money** of the rightful owner had been **obtained wrongfully from a third party.** Therefore the action could be resorted to against a perfect stranger, to obtain the plaintiff's money wrongfully withheld by the defendant, or to recover money paid under a void authority.

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[23] *Rajputana Malwa Railway* v. *Ajmere Municipal Board*, (1910) 32 All. 491=7 A.L.J. 496=6 I.C. 401.

[24] *Ibid.*

[25] (1760) 2 Bur. 1005.

[26] Leake, on Contracts, 7th Edn., p. 57.

**(*iii*) Nature of the common law action.**

In *Sinclair* v. *Brougham,*[28] it was observed that this action was in its nature really one of *assumpsit* founded on a fiction of an implied or imputed contract and it depended on the waiver of tort committed and on the correlative affirmance of a contractual relation.

**Prof. Ames** has described this action by saying that

> "in its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded debt, became concurrent with account, with case upon a bailment, a warranty, and bills of exchange, and competed with equity in the case of the essentially equitable *quasi*-contracts growing out of ***the principle of unjust enrichment***".

## 1356-1364. SCOPE OF THE ARTICLE.

**Common law form of action.**

1356. The language of Art. 62 is borrowed from the form of count in use in England under the Common Law Procedure Act of 1852.[29] This common law count was applicable where a defendant received money which in justice and equity belonged to the plaintiff under circumstances which rendered the receipt by the defendant to the use of the plaintiff.[30] **Markby, J.**, observed in *Raghumani* v. *Nilmoni*,[31] that a suit for "money received by the defendant for the plaintiff's use," evidently points to the well-known English action in that form. But, **Sir Barnes Peacock**, has observed in *Goga Ram* v. *Kartick Chunder*,[32] that

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[27] *See* Anson, on Contracts, 17th Edn., p. 446.

[28] 1914 A.C. 398.

[29] *Rajputana Malwa Railway* v. *Ajmere Municipal Board,* (1910) 32 All. 491=7 A.L.J. 496=6 I.C. 401.

> "there is nothing more likely to mislead or confuse than by converting a suit brought in the Courts of justice in the *mofussil* in this country to the forms adopted according to the English Procedure".

**The Judicial Committee** of the Privy **Council**, in *Juscurn* v. *Pirthi Chand*,[33] take the formula of "money had and received by the defendant for the plaintiff's use" read as a description and apart from the technical qualification imported in English Law and procedure. Therefore, the plain meaning of the words in Art. 62 of Sch. I to the Limitation Act should be given effect to without having recourse to any technical rules of English Law regarding forms of action.[34]

> "In India, law and equity are administered by the same Courts, which are untramelled by any technical rules as to the form of an action in giving relief to the plaintiff where the defendant has received money which according to the justice of the case he ought to refund."[35]

The observations of the Judicial Committee in the case of *John* v. *Dodwell*,[36] furnish an illustration of this view. Accordingly, where the plaintiff and defendant were owners of two contiguous villages and there being a dispute between them as to the ownership of some lands, they were attached by the Magistrate under S. 146, Criminal Procedure Code, and the profits thereto were deposited in Court. But, the defendant withdrew some of the amount deposited from Court as representing his share of the profits of the land attached, it was held that the plaintiff's suit for declaration of his right to the land and for recovery of the sum withdrawn was not governed by Art. 62, but by Art. 120, Sch. I to the Limitation Act.[37]

**True nature of suits under Art. 62.**

**1357.** The true nature of the class of suits described in Art. 62 of the Limitation Act has been considered by the **Calcutta High Court** in *Mahomed Wahib* v. *Mahomed Ameer*[38]; and the **Madras** decision in *Shanmuga* v. *Govindasami,*[39] agrees with this view. In *Sankunni Menon* v. *Govinda Menon,*[40] it is held that

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[30] *Rajputana Malwa Railway* v. *Ajmere Municipal Board*, (1910) 32 All. 491=6 I.C. 401.

[31] (1877) 2 Cal. 393.

[32] (1868) 9 W.R. 514 (516) (F.B.).

[33] (1918) 46 I.A. 52=1918 P.C. 151=46 Cal. 470=36 M.L.J. 557 (P.C.).

[34] *Anantaram Bhattacharjee* v. *Hem Chandra Kar*, (1923) 72 I.C. 1041=50 Cal. 475=1923 Cal. 379.

[35] *Ibid.*

[36] 1918 A.C. 563.

[37] *Anantaram Bhattacharjee* v. *Hem Chandra Kar*, (1923) 72 I.C. 1041=50 Cal. 475=1923 Cal. 379.

[38] 32 Cal. 527=1 C.L.J. 167; also see *Janakinath* v. *Bejoy Chand*, (1921) 60 I.C. 698 (Cal.); 64 I.C. 315=1921 Cal. 599=33 C.L.J. 366=

> "this species of action lies when one has had and received money belonging to another without any valuable consideration given on the Receiver's part; for the law construes this to be money had and received for the use of the owner only".

The **Allahabad High Court** has followed the same view in *Bhagwan Dass* v. *Karam Husain*[41]; also see, the **Calcutta** case of *Binian Chandra* v. *Promothanath Ghose,*[42] followed by the **Lahore High Court** in *Nihal Singh* v. *Secretary, Gurdwara.*[43] **The conclusion** arrived at in these cases is that the description of suits mentioned in Art. 62 as suits for money received by the defendant for the plaintiff's use pointed to the well-known action in that form and that consequently the article ought to apply wherever the defendant has received money, which in justice and equity belongs to the plaintiff, in circumstances which in law render the receipt of it by the defendant a receipt for the use of the plaintiff. In the **Privy Council** case of ***Juscurn* v. *Prithichand,***[44] where a *Patni Taluq* was sold under the Regulation of 1879 for arrears of rent, and a *Darpatnidar* had the sale set aside, a suit by the purchaser under the sale against the Zemindar to recover the money paid by him under the sale with interest was held more nearly to approach the formula of "money had and received by the defendant for the plaintiff's use" within Art. 62, rather than a suit "for money paid upon an existing consideration which afterwards fails", within Art. 97, if at all such a suit lay. Where a suit was brought against a railway company to recover the **surplus sale proceeds** of a sale held by it under S. 56 of the Railways Act, it was held that Art. 62 and not Art. 31, Limitation Act applied to the case, the sale proceeds held by the railway company being received for the plaintiff's use.[45] Where the plaintiff claimed a decree for the payment of specific sums representing amounts illegally taken by the defendant municipality, in disregard of certain lawful orders of the Government of India, levied upon the plaintiff company trading within the municipal limits, octroi duty over and above what they were legally entitled to levy, the suit by the company to recover from the Board the sums so

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26 C.W.N. 271; Relied on *Hukm Chand Boid* v. *Pirthichand,* 50 I.C. 444=46 Cal. 670=46 I.A. 52 (P.C.); and *Secretary of State* v. *Zamindarani of Vegayammapeta Estate,* (1921) 59 I.C. 98 (102)=12 L.W. 334.

[39] 30 Mad. 459=17 M.L.J. 452.

[40] 37 Mad. 381=14 I.C. 254=22 M.L.J. 485.

[41] 33 All. 708 (719)=8 A.L.J. 854=11 I.C. 145.

[42] 49 Cal. 886=68 I.C. 94=36 C.L.J. 295=1922 Cal. 157.

[43] 1926 Lah. 228=92 I.C. 731.

[44] 1918 P.C. 151=46 I.A. 52=46 Cal. 670=36 M.L.J. 557=50 I.C. 444 (P.C.).

[45] *Tarab Chand* v. *The Madras & Southern Maharatta Railway Company,* (1921) 62 I.C. 742=44 Mad. 823=1921 Mad. 362=41 M.L.J. 205.

levied was maintainable as a suit for money had and received to the use of the defendant within the meaning of Art. 62 of the Limitation Act.[46]

**Privity of a legally recognizable nature.**

1358. The action for money had and received is still to be regarded, as it was originally, as **based on an implied or fictional promise.** But, the authorities which settle the scope of the action at the present time negative the possibility of such a promise being deduced from the *aequum et bonum,* at it may appeal to the sympathy of the Court in the particular case, or from circumstances, in which the defendant having no privity with the plaintiff, when the money was received, need not be supposed to have given and had no duty to give any promise.[47] Sadasiva Aiyar, J., has observed in *Ramasami* v. *Muthusami,*[48] that

> "while privity of contract between the parties is, of course, not necessary to sustain such action, there must be what might be called **some privity of a legally recognizable nature,** such as some knowledge of particular facts in the man who received the money, and some mistake or ignorance of fact on the part of the man who paid the money, or some relation of trust, and confidence between the person who received the money and the person claiming the money or a portion thereof, on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and the defendant".

It is necessary, in order to maintain an action for "money had and received" that the money sought to be recovered should have been received by the defendant under such circumstances as to create a privity of contract between him and plaintiff,[49] without a privity of contract, the fact that the defendant is wrongfully in possession of money held for plaintiff's benefit or even in possession of plaintiff's own money, does not enable this form of action to be maintained.[50]

*Illustrations.*

(1) Where by the wrongful act of the defendant the plaintiff is deprived of money which was actually making interest, the case was held to resemble a

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[46] *Rajputana Malwa Railway Company* v. *Ajmere Municipality,* (1910) 32 All. 491=7 A.L.J. 496=6 I.C. 401; Relied in *Ram Narain* v. *Brij Bankey Lal,* (1917) 39 I.C. 532=39 All. 322=15 A.L.J. 295; also see *Taluk Board* v. *Chokalingam,* 1932 M.W.N. 1089 (A suit for refund of money illegally collected as profession tax is not a suit for compensation or damages, but is virtually one for money had and received within Art. 62, Limitation Act).

[47] *Ramasami Naidu* v. *Muthusami Pillai,* 48 I.C. 756 (761)=41 Mad. 923—Per Oldfield, J.

[48] *Ibid.,* Per Sadasiva Aiyar, J., 41 Mad. 923=48 I.C. 756 (765); Followed in *Mt. Sewi Bai* v. *Wasu Ram,* (1929) 118 I.C. 444=1929 Lah. 290.

[49] Chitty, p. 56; Rustomji, p. 423.

[50] Halsbury' Vol. VII, p. 474; Rustomji, p. 423.

constructive trust, there was certainly the required privity between the plaintiff and defendant.[1]

(2) In a suit for recovery of offerings of a shrine from a person who has wrongfully appropriated them, there is privity of a legally recognizable nature between the plaintiff and defendant.[2]

(3) Where the plaintiff granted a *kanom* to the second defendant, and a *melacharth* to the first defendant, a stipulation by the 1st defendant to redeem the *kanom* and pay rent to the *jenmi* was only a personal covenant and could not be said to run with the land so as to be enforceable against the *kanomdar,* 2nd defendant. The sum due for rent cannot be said to be money had and received by the mortgagee to the use of the mortgagor.[3]

**Solicitor and client.**

**1359.** A solicitor is not as a rule, an express trustee for his client. In a suit against a solictor for money received by him on his client's behalf, a suit would lie for money had and received, with a starting point of limitation from the date when money was received, except when knowledge of this receipt was fraudulently concealed, when the cause of action would arise from the date of discovery of fraud.[4] A suit to recover from the son and legal representative of the plaintiff's late pleader a sum of money alleged to have been received by the latter out of Court for payment to the plaintiff, falls under Art. 62 of Sch. I to Limitation Act.[5]

**Principal and agent.**

**1360.** A suit "by a principal against his agent for moveable property received by the latter and not accounted for" is specially provided for by **Art.** 89 of Sch. I, Limitation Act,[6] and this would exclude the applicability of the general Art. 62, Limitation Act. Where two brothers divided their joint properties with the exception of certain outstandings which were allowed to remain joint, and one of them realised those outstandings, it was held that there must be an implied contract of agency between one brother and the other[7] and similar view was taken by their Lordships of the **Privy Council** in *Asghar Ali* v. *Khurshed Ali,*[8] where it was observed that

> "given the relation between these two brothers as regards their joint property and it is apparent that they were agents one of the other in dealing with the joint-estate".

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[1] *Arunachallam Chettiar* v. *Rajeswara,* (1923) 71 I.C. 257=1922 Mad. 55=42 M.L.J. 74.

[2] *Nihal Singh* v. *Secretary, Gurdwara,* (1926) 92 I.C. 731=1926 Lah. 228.

[3] *Mannath Veetil* v. *Dharman Achan,* (1918) 43 I.C. 625=41 Mad. 488=34 M.L.J. 193=8 L.W. 118=1918 M.W.N. 98=22 M.L.T. 543.

[4] Wood, 4th Edn., p. 88; Rustomji, p. 432.

[5] *Ram Hari Kapali* v. *Rohini Kanta,* (1922) 67 I.C. 943=35 C.L.J. 330.

[6] *Bur Chand* v. *Ganpat Rai,* (1929) 116 I.C. 327=1929 Lah. 407.

[7] *Ibid.*

[8] 24 All. 27=28 I.A. 227 (P.C.).

In *Banoo Tewary* v. *Doona Tewary,*[9] one co-sharer was held to be acting on behalf of the other co-sharers merely as their agent in the realisation of their shares in certain moneys. Where two divided families have joint dealings managed by the eldest member, **a suit for account** against the manager is governed by Art. 89 and not by Art. 62.[10] In *Shib Chandra Roy* v. *Chandra Narain,*[11] the amount had been received by an agent on behalf of his principal, for his principal and in the name of his principal, and adopting the view that money was moveable property, a Bench of the High Court of Calcutta applied Art. 89, Limitation Act. The **Allahabad High Court** (Richards, C.J. and Banerji, J.), has applied Art. 62 in a suit by an heir of a deceased against a person appointed to realize assets of a deceased for distribution amongst the co-sharers.[12] But, the **Madras High Court,** has held in *Subba Row* v. *Rama Row,*[13] that Art. 62 of the Limitation Act has no application to a suit by a co-sharer for recovery of his share of profits, where an *account* had to be taken of what was received by defendant and what he lawfully spent.

**The rule** to be deduced from the authorities is that Art. 62 does not apply where the suit by principal against the agent involves the rendition of accounts on the basis of an allegation of misconduct, mismanagement or defalcation; (*see* Arts. 89 and 90, Sch. I, Limitation Act): but Art. 62 would apply where without the necessity of any accounts being taken, an agent is sued for any specific sum which he has realized for his principal, and for which he is liable to repay the amount as money had and received on behalf of the principal for his use.[14]

*Illustrations.*

(1) Where an agent receives money due to the principal after the termination of his agency, a suit to recover the same must be brought within three years from the time of the receipt as money had and received.[15]

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[9] 24 Cal. 309 (315) (Article 127 not applied, but Art. 89 was not suggested); also see *Gabu* v. *Zipru,* 59 I.C. 357=45 Bom. 313=22 Bom.L.R. 1239 (Article 89 applied).

[10] *Venkanna* v. *Agasthiah,* 1923 P.C. 31=32 M.L.T. 86.

[11] 32 Cal. 719=1 C.L.J. 232; cf. *Puran Mal* v. *Ford Macdonald & Co.,* (1919) 52 I.C. 373=41 All. 635=17 A.L.J. 805 (The profits of a business held not moveable property within Art. 89, but Art. 62 or Art. 90 might apply).

[12] *Masih-ud-din* v. *Imtiazunnissa,* (1915) 27 I.C. 533=37 All. 40.

[13] (1916) 32 I.C. 899=40 Mad. 291 (Article 120, applied); [*See* S. 1371; suits for rendition of account; *Yerukola* v. *Rerukola,* (1923) 71 I.C. 177=45 Mad. 648=1922 Mad. 150 (F.B.)].

[14] *Puran Mal* v. *Ford,* 41 All. 635=17 A.L.J. 805=52 I.C. 373; also see S. 1364; "Co-sharers: Madras Full Bench"; *Yerukola* v. *Yerukola,* 45 Mad. 648=71 I.C. 177 (F.B.).

[15] *Hansraj* v. *Ratni,* (1915) 29 I.C. 986 (987)=13 A.L.J. 494.

(2) Where a Zemindar employed a *naib,* and an under-*naib* for collection of amounts due to him, and it was the *naib's* duty to hand over collections to the Zemindar, the under-*naib's* duty being merely to deliver them to the *naib,* it was held that the *Zamindar* had a cause of action against the under-*naib* not paying over the collections to the *naib,* and the moneys received by the defendant were in law had and received for the plaintiff's use.[16]

(3) A suit against the representatives of a deceased agent to recover monies received by the latter on behalf of the plaintiff and not accounted for is governed by Art. 62 of Sch. I, read with S. 2 of the Limitation Act.[17]

(4) Where money belonging to a company was taken from their coffers by their managing agents and applied for the benefit of another company which was under the same managing agents, but it was no part of the business of either company to lend money or to act as bankers, it was held that either the defendant company had received the money and applied it to their own purposes rightfully, in which case a promise to repay it must be implied against them, or they had received it wrongfully by the secret and deceitful misapplication by their own agent of the plaintiff's money, in which case the money would be recoverable from them as "money had and received" to the use of the true owner.[18]

**Guardian and ward.**

**1361.** The guardian of a minor is not a trustee for the purposes of S. 10 of the Limitation Act: and, the legal relation between a minor and his guardian is not that of a principal and agent. Where the plaintiff sought relief in respect of specific sums said to have been received by the defendant as his guardian, but in substance the suit was one by a ward, after he had attained majority, to call his guardian to *account* for the profits made by him while he was guardian and the plaintiff was a minor, it was held by the **Punjab Chief Court** that Art. 62 did not apply, and the suit was governed by Art. 120, Limitation Act.[19] But, where a nephew sued his uncle for the proceeds of certain moveable property sold by him and for the amount of debts and rent collected by him on plaintiff's account, during his minority, it was held that, though the uncle was sued as having managed his nephew's affairs during his minority, the suit as framed could not be held to be one for an account; and that it fell under Art. 62 of the Limitation Act as it was for specific sums received by him to the other's use.[20]

In India, suits between a *cestui que trust* and a trustee for an account are governed solely by the Limitation Act; to claim the benefit of S. 10, a suit against a trustee must be for the purpose of following trust-propery in his hands. If the object of the suit is not to recover any property in *specie,* but to have an *account* of the defendant's stewardship, which means an account of the moneys received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, the suit falls not under Art. 62, but under Art. 120, Limitation Act.[21] An administrator in whom no special trust is vested for a specific purpose is not a trustee within the meaning of S. 10 of the Limitation Act; and Art. 120 applies to a prayer for an account against him.[22]

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[16] *Rajendranath Mitra* v. *Nagendrakumar Bose,* (1927) 104 I.C. 704 (Cal.).

[17] *Rameshwar Singh* v. *Narendranath,* (1923) 71 I.C. 916=1923 Pat. 259=5 P.L.T. 355; cf. *Lal Singh* v. *Jiwan Ram,* 112 I.C. 126=1928 Nag. 256 (Article 89 applied).

[18] *Upper India Rice Mills* v. *Jaunpur Sugar Factory,* 1927 All. 161=49 All. 520 (F.B.).

[19] *Sher Ali Khan* v. *Khwaja Muhd.,* 84 P.R. 1891; Referred in *Mt. Fazal Nishan* v. *Muhammadji,* 33 P.R. 1897.

[20] *Surjan Singh* v. *Charn Das,* (1882) 56 P.R. 1883.

**Benamidar.**

**1362.** The period of limitation for an action by the real owner against a *benamidar* to recover money received by the latter for the use of the former is that prescribed in Sch. I of the Limitation Act. Art. 120 does not apply to such a case.[23] Art. 62 has been applied to the case of a *benamidar* in *Sundar Lal* v. *Fakir Chand,*[24] where a benamidar realized upon a bond standing in his own name money to which other parties were beneficially entitled, and paid over the money so obtained in the course of a transaction apparently *bona fide* and not collusive to a third party who had no knowledge of the beneficiaries' interest therein. Where the plaintiff's predecessor obtained a mortgage in name of benamidar, and the latter was to hold the amounts collected at the former's disposal, and act according to his directions, and the plaintiff sued to recover an amount received by the defendant from the Court, held that the suit was governed by Art. 62, Limitation Act.[25]

**Suit to recover share of family debts.**

**1363.** The principle has been recognized in several cases that a suit to recover share of family property, by a separated member from another member who has received the same without any authority or right to collect the share falls under Art. 62, Sch. I to the Limitation Act.

**Madras cases.**

In *Arunachala Pillai* v. *Ramasami,*[26] where a debt had been collected by one of two brothers each of whom was entitled to a specific share of the debt, which had been divided on partition, and the collecting brother had no authority or right to collect his brother's share, it was held that a suit for the specific sum which the plaintiff alone was entitled to, would lie as an action for money had and received. A suit by the plaintiff for his share of rent realised by the defendant *after* partition has been held to fall under Art. 62, which is intended to apply to all cases where the plaintiff claims money which *ex aequo et bono* the defendant ought to refund to plaintiffs.[27] A similar view was taken in *Lakshminarasamma* v. *Lakshamma,*[28] where the share of rent was realized by the defendant *before* partition. In *Ramalagu* v. *Solai,*[29] the case-law has been reviewed, and the proposition is supported by authority that Art. 62, and not Art. 95, applies where one member of a family which has become divided collects a debt due to the family and keeps the amount.

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[21] *Saroda Pershad* v. *Brojo Nath,* (1880) 5 Cal. 910.

[22] *Janardhan Prasad* v. *Jankibati,* (1917) 40 I.C. 860 (Pat.); s.c. 45 I.C. 182; also see *Ma Thein May* v. *U Po Kin,* 3 Rang. 206=1925 Rang. 289.

[23] *Subanna* v. *Kunhanna,* (1907) 30 Mad. 298; Followed *Mahabala* v. *Kunhanna,* 21 Mad. 373.

[24] *Sundar Lal* v. *Fakir Chand,* (1902) 25 All. 62.

[25] *Narayanan* v. *Rangasami,* (1915) 28 I.C. 495=1915 M.W.N. 215.

[26] 6 Mad. 402.

**Calcutta.**

In *Banoo Tewary* v. *Doona Tewary,*[30] where at the separation of members of a joint family governed by the Benares School of Hindu Law, the unrealised debts of the family were left undivided, and these debts were subsequently realized by some only of the members of the separated family, it was held that a suit brought by the other members to recover their shares in the debts so realized could only be treated as coming under Art. 62, Limitation Act. This ruling is parallel to the Madras decision in *Vaidyanatha* v. *Aiyasami,*[31] to the effect that where the members of a family become divided in status, managing their own shares separately themselves, no member has a right on behalf of the others to recover any debt due to the family, and if it is so recovered, it is not joint family property, so as to enable another member to recover his share by partition within the period provided by Art. 127 of the Limitation Act. The Madras ruling was followed by the **Oudh Judicial Commissioner's Court** in *Gajraj Singh* v. *Sadho Singh.*[32]

**Allahabad.**

The **Allahabad High Court** has held in *Thakur Prasad* v. *Partap,*[33] that, where, after the separation of two members of a joint Hindu family, certain bonds continued to be held by them jointly and subsequently one member of the family obtained a decree in respect of those bonds and realised its amount, a suit brought by the other members of the family claiming to be entitled to a share in the money realised was governed by Art. 62, and not by Art. 127, Limitation Act. The same principle was recognised in *Amme Raham* v. *Zia Ahmed.*[34] In *Kundan Lal* v. *Bansidhar,*[35] where plaintiff brought a suit to recover his share of a certain sum of money left in deposit by a deceased, as one of his heirs, which the defendant had realised from the bankers, *held,* that Art. 62 governed the suit as one for money payable by the defendant to the plaintiff for money received by the defendant for plaintiff's use.

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[27] *Segu Chidambarama* v. *Segu Balama,* (1911) 2 M.W.N. 467=12 I.C. 704; and *Vaidyanatha* v. *Aiyasami,* (1909) 1 I.C. 408=32 Mad. 191=19 M.L.J. 94=5 M.L.T. 49.

[28] (1913) 21 I.C. 394=14 M.L.T. 325=29 M.L.J. 531=1913 M.W.N. 836; Follows 32 Mad. 191=19 M.L.J. 94 (But Art. 62 seems to be appropriate under the circumstances).

[29] (1922) 69 I.C. 274=1921 M.W.N. 539=41 M.L.J. 274; Relied on 6 Mad. 402; 32 Mad. 191; 37 Mad. 381; 12 I.C. 704=(1911) 2 M.W.N. 467; and 21 I.C. 394=25 M.L.J. 531.

[30] (1896) 24 Cal. 309; cf. 45 Mad. 648 (F.B.).

[31] (1909) 32 Mad. 191=19 M.L.J. 94=1 I.C. 408=5 M.L.T. 49; Followed in 12 I.C. 704=(1911) 2 M.W.N. 467; but cf. 45 Mad. 648 (F.B.).

[32] (1912) 16 I.C. 882=15 Oudh Cas. 397 [N. F. in 45 Mad. 648 (F.B.)].

[33] 6 All. 442.

**Co-sharers—Madras Full Bench.**

1364. A Full Bench of the Madras High Court, in *Yerukola* v. *Yerukola,*[36] has held on a review of the case-law, that where the family is joint,

> "it being quite impossible to say that any particular debt or rent or profits or any part of either was received for the use of any particular tenant-in-common. Indeed on partition any of the debts or rents or profits might be awarded in toto to any of the tenants-in-common".

It has been further held by the Full Bench, following an earlier Division Bench ruling in *Subba Row* v. *Rama Row,*[37] that where a claim made by a co-sharer involves an account being taken of the collections made by another co-sharer, the suit cannot fall under Art. 62, but may be governed either by Art. 89, if the facts establish an agency, or Art. 120 would apply as a residuary article, limitation commencing to run from the date of demand and refusal.[38] This view is fully supported by a number of decisions against the application of Art. 62, and in favour of Art. 120, in suits between tenants-in-common involving rendition of account. See *Sarakhi Abdul Rahiman* v. *Muhaidin Pathummal,*[39] following *Marian Beeviammal* v. *Kadir Meera,*[40] *Umardaraz* v. *Wilayat Ali,*[41] *Parsotam Rao* v. *Radha Bai*[42] and *Venkata Reddi* v. *Kuppu Reddi*[43]; also see and cf.

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[34] 13 All. 282=A.W.N. (1891) 88.

[35] (1880) 3 All. 171.

[36] 45 Mad. 648=42 M.L.J. 507=71 I.C. 177 (F.B.).

[37] 32 I.C. 899=40 Mad. 291=30 M.L.J. 341; also see *Kishen Devi* v. *Banwari,* 1928 Lah. 688=111 I.C. 635.

[38] Cf. *Ahidannissa* v. *Isufali Khan,* (1923) 50 Cal. 610 (613); also see *Parsotam* v. *Radha Bai,* (1915) 37 All. 318; *Mahomed Bhai* v. *Ismail,* (1911) 12 I.C. 586=13 Bom. L. R. 1014; *Bhubaneswar* v. *Dwarakeshwar,* (1921) 66 I.C. 876=34 C.L.J. 508 and *Muhammad Hamid* v. *Muhammad Majid,* (1917) 40 I.C. 374=92 P.R. 1917.

[39] 32 I.C. 83=30 M.L.J. 104=19 M.L.T. 88.

[40] 29 I.C. 275.

[41] (1897) 19 All. 169=A.W.N. (1897) 34.

[42] 28 I.C. 953=13 A.L.J. 407=37 All. 318.

[43] 61 I.C. 762=13 L.W. 260.

*Gabu* v. *Zipru.*[44] The **Oudh Chief Court** in *Suraj Narain Singh* **v.** *Narbada Prasad,*[45] has followed the view taken by the Madras Full Bench as conclusive and has applied Art. 120 to the case of tenants-in-common. Moreover the recent decision of their Lordships of the Privy Council in *Viraya* v. *Adenna,*[46] supports the view taken by Schwabe, C.J., in the Madras Full Bench case. In this case, where a junior member of a joint Hindu family had alleged a division of status between the family members, and a partition between them of certain immoveable property, and a suit was brought for partition and allotment to plaintiff of his share of the suit property, and there was a further claim in respect of certain family outstandings alleged to have been collected and misappropriated by the defendant-manager of the joint property, it was held that Art. 89 applied to this portion of the claim.

**The conclusion** to be reached is that the case of receipt of moneys or income belonging to a joint Hindu family by its manager or any of the co-parceners, does not fall under Art. 62, Limitation Act, but would come in under Art. 127, Limitation Act, in a suit for a share of joint family property.[47] The position of the collecting co-sharer would be that of an implied agent of the other co-sharers.[48] Where the claim made by a co-sharer involves the taking of an account, as if between a principal and agent, Art. 89 may apply,[49] otherwise Art. 120 would apply.[50] Art. 62 would not apply where the receiving co-sharer has powers and duties in respect of the receipt other than the mere duty of handing over the sums received for the plaintiff's use.[1] But Art. 62 will apply where the claim of the plaintiff does not involve the taking of accounts between the parties, and the circumstances connected with the receipt by the defendant amount to its receipt by him for the plaintiff's use.[2] This article is the appropriate article where a specific debt due to a family has been divided in certain shares, or even if kept joint between the members, a separated member without express or implied authority of the other members, has no right to collect more than his share of the amount.[3] As Devadoss, J., has held in *Yerukola* v. *Yerukola*,[4]

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[44] 45 Bom. 313=59 I.C. 357.

[45] 4 Luck. 265=1929 Oudh 83=115 I.C. 99.

[46] (1929) 58 M.L.J. 245=1930 P.C. 18.

[47] *Yerukola* v. *Yerukola,* (1922) 45 Mad. 648=42 M.L.J. 507 (F.B.). *See* notes under Art. 127.

[48] *Gabu* v. *Zipru,* (1920) 45 Bom. 313; *Kishen Devi* v. *Banwari Lal,* (1928) 111 I.C. 635=1928 Lah. 688=10 L.L.J. 355; cf. *Vaidyanatha* v. *Appasamy,* (1908) 32 Mad. 191=19 M.L.J. 94.

[49] *Virayya* v. *Adenna,* (1929) 58 M.L.J. 245=1930 P.C. 18; also see *Bur Chand* v. *Ganpat,* 30 P.L.R. 275=1929 Lah. 407=116 I.C. 327 (*Implied* contract of agency—Art. 89 applied, not 62 or 120).

[50] *Subba Row* v. *Rama Row,* (1916) 40 Mad. 291=30 M.L.J. 341.

[1] *Venkata* v. *Kuppu,* (1920) 13 L.W. 260=61 I.C. 762; also see *Maung Po Nyun* v. *Ma Saw Tin,* 1931 Rang. 150.

[2] *Subba Row* v. *Rama Row,* (1916) 40 Mad. 291=30 M.L.J. 341; *Ramaswami* v. *Muthuswami,* (1918) 41 Mad. 923=35 M.L.J. 581; *Mahomed Wahib* v. *Mahomed Ameer,* (1905) 32 Cal. 527; *Gopal Rao* v. *Amba Bai,* 59 I.C. 455=16 N.L.R. 182; *Kundan Lal* v. *Bansidhar,* (1880) 3 All. 170.

> "if *A* collects what belongs to *B* knowing that it belongs to *B*, he is absolutely liable to *B* for the amount collected without any deduction for expenses, charges, etc. *A* has no duty to collect *B's* money and being a volunteer cannot claim an account. Where *A* and *B* are jointly entitled to a specific sum, if *A* collects the whole without being *B's* agent implied or express, there is a presumption that he does so for *B's* use and Art. 62 would apply. Where *A* and *B* are entitled to several outstandings and *A* collects some and *B* collects others before they are allocated to *A* or *B*, neither can be said to collect for the other's use and a suit for account is the proper form of action to which Art. 62 will not apply. In the case of income from immoveable property the proper article is Art. 120".

## 1365-1368. ARTICLE EXPLAINED.

**Receipt of money by defendant.**

1365. In an action for money had and received by the defendant, the first essential requisite is to prove the *actual* receipt of money by the defendant, under circumstances from which the law will presume or imply a promise to repay money which in justice and equity belongs to the plaintiff.[5] Chitty says that the plaintiff in such an action must prove that defendant himself, or his agent, has actually received the money which is sought to be recovered, or that something has occurred which is *equivalent to a receipt thereof* by defendant. It has been observed by Abdul Rahim, J., in *Subba Row* v. *Rama Row*,[6]

> "that Art. 62, lays down three years for recovery of money had and received for the plaintiff's use and the starting point of limitation is *when the money is received*. That is a well known form of action, and it applies in cases where a definite sum of money has been *received* by the defendant and which the law says, he must hold for the plaintiff's use".

Accordingly, this article is not applicable unless it can be said that the money which is due to the plaintiff was received at any particular point of time that is put down in Art. 62 as the starting point of limitation.[7]

**For the plaintiff's use.**

1366. The second essential for a proper application of this article is that the money claimed must have been received by the defendant for the plaintiff's use. When the defendant receives the money on his own account, this action does not lie.[8] But, it is doubtful if this statement of the English Law will hold good in India, where an action in form of money had and received is free from the technicalities of English Law.[9] In the Privy Council case of *Juscurn* v. *Pirthichand*, where a *patni* taluk was sold for arrears of rent and a *darpatnidar* had the sale set aside, the purchaser under the sale when suing the Zemindar to recover the money paid by him under the sale was held to have sued "for money had and received by the defendant for the plaintiff's use", and not "for money paid upon an existing consideration which afterwards fails".[10] Similarly, money paid to a decree-holder on the understanding that it should be credited towards a decree debt, can, if the decree-holder refuses to apply it towards that debt, be recovered on the ground of failure of consideration as money received by the defendant to the use of the plaintiff.[11] In *Mahomed Wahib* v. *Mahomed Ameer*,[12] the **Calcutta High Court,** quotes Blackstone, in support of the observation that where the defendant has received monies belonging to the plaintiff which *ex aequo et bono* he ought to refund, the plaintiff's cause of action is for money had and received to the use of the plaintiff, because the defendant unjustly detains it for his own benefit. Article 62, applies whenever one person, **actually or constructively** receives money for another person's use, or, in other words, whenever the receipt by the defendant is in law a receipt to the use of such other person to whom the money at the time of receipt lawfully belongs.[13] Article 62, applies to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use, *even where the defendant at the time when he received the money did not intend to pay it to the plaintiff*.[14] The operation of the article is attracted, if it is established that the money received by the defendant is money which belongs to the plaintiff, and is repayable to him in justice, equity, and good conscience.[15]

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[3] *Ramalagu* v. *Solai*, (1921) 41 M.L.J. 274=69 I.C. 274; *Arunachala* v. *Ramaswami*, (1883) 6 Mad. 402; *Thakur* v. *Partap*, (1884) 6 All. 442; *Bhagwan* v. *Sukhdeo*, (1923) 75 I.C. 953=1924 All. 812; *Lakhpat* v. *Jung Bahadur*, (1916) 40 I.C. 37.

[4] (1922) 45 Mad. 648=42 M.L.J. 507=71 I.C. 177 (F.B.).

[5] *Biman Chandra* v. *Promotha Nath*, 49 Cal. 886.

[6] (1916) 32 I.C. 899=40 Mad. 291=30 M.L.J. 341.

[7] *Ibid.*

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[8] Pal's Limitation Act, p. 612, citing *Thomas* v. *Thomas*, (1850) 5 Ex. 28; also Chitty on Contracts, p. 59.

[9] Refer and cf. *Goga Ram* v. *Kartick Chunder*, (1868) 9 W.R. 514 (516) (F.B.).

[10] *Juscurn* v. *Pirthi Chand*, (1918) 46 I.A. 52=1918 P.C. 151.

[11] *Mahbub Ali* v. *Syed Mohammad Husain*, (1927) 104 I.C. 419=1927 All. 710=25 A.L.J. 823.

[12] (1905) 32 Cal. 527; cf. *Thomas* v. *Thomas*, (1850) 5 Exch. 28 (Where the tenant-in-common could not maintain an action for money had and received against his co-tenant, because he was bound to pursue his statutory remedy).

[13] *Chand Mal* v. *Sansar Chand*, 36 P.R. 1913 (Reid and Rattigan, JJ.); also see *Ramasawmy Chettiar* v. *Hari Krishna*, (1911) 10 I.C. 658 =2 M.W.N. 220=9 M.L.T. 465.

[14] *Bionde Lal Chakraburthi* v. *Preo Nath*, (1917) 40 I.C. 173 (Cal.) (Sir Asutosh Mookerjee and Beachcroft, JJ.); Refd. to in 45 Mad. 648 (676, 677) (F.B.).

[15] *Ibid.*

**Received by the defendant.**

1368. It was held by the **Allahabad** High Court in *Bindraban Behari* v. *Jamuna,*[30] that a suit to recover from the son of a deceased pleader, as representative of his father, money which had been received by the pleader in his professional capacity on behalf of a client, was governed as regards limitation not by Art. 62 but by Art. 120, Limitation Act. It was observed that "*the defendant* is not the deceased pleader, but his representative, and the money was not received by him until after the pleader's death". In this case, as pointed out, in *Rambari* v. *Rohini Kanta,*[31] the learned Judges there seem to have taken no account of the definition of defendant appearing in S. 2, Cl. (4) of the Limitation Act. Accordingly, a different view was taken as to the scope of Art. 62, in the Calcutta case, holding that this article applied to a suit by plaintiffs to recover from the defendant's son and legal representatives a certain sum of money received or alleged to have been received by the plaintiff's pleader out of Court for payment to the plaintiffs. The **Nagpur Judicial Commissioner's Court** has held that a suit against the legal representative of an agent for property not accounted for is governed by Art. 89 of the Limitation Act. It is not necessary for the application of Art. 89 that the person sued must be actually a contracting party.[32]

## 1369-1372. APPLICATION OF ARTICLE.

### 1369. ARTICLE APPLIED—ILLUSTRATIVE CASES.

**Rateable distribution.**

(1) A suit under S. 73, Civil Procedure Code, 1908 (old S. 295, Act XIV of 1882), has been held to fall under Art. 62 of the Limitation Act.[33] A suit of this nature is not a suit to set aside the order of Court passed under S. 73, Civil Procedure Code, and therefore Art. 13 of the Limitation Act would not apply.[34] If two properties are mortgaged to secure one debt and both properties are sold in execution in execution of a mortgage decree, the owner of the property which has contributed more than its rateable share has a *right to a personal decree* against the owner of the latter property, which he may sue for under Art. 62, Limitation Act.[35] Where *B* received from *C* money due from him on two

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[30] (1902) 25 All. 55.

[31] 1922 Cal. 499=67 I.C. 943=35 C.L.J. 330; Folld. in *Rameshwar* v. *Narendra,* 1923 Pat. 259=71 I.C. 916=5 P.L.T. 355; cf. *Rao Girraj Singh* v. *Raghubir,* 31 All. 429; also see and cf. *Fatima* v. *Imtiazi,* 1 P.R. 1912=13 I.C. 930 (Art. 89 applied to case of rendition of accounts against heir of deceased agent).

[32] *Lal Singh* v. *Jiwan Ram,* 112 I.C. 126=1928 Nag. 256; cf. *Rameshwar Singh* v. *Narendra Nath,* (1923) 71 I.C. 916=1923 Pat. 259.

[33] *Vishnu Bhikaji* v. *Achut Jagannath,* 15 Bom. 438; Approved in *Baijnath* v. *Ram Doss,* (1915) 26 I.C. 219 (222)=27 M.L.J. 640=39 Mad. 62.

[34] *Shankar Sarup* v. *Mejomal,* 23 All. 213=28 I.A. 203 (P.C.).

[35] *Bhagwan Das* v. *Karam Hussain,* (1911) 11 I.C. 145=33 All. 708 (726) (F.B.).

deeds of mortgage, and *A*, who was entitled to a share of the money, instituted a suit for recovering his share from *B*, the suit was held to fall under Art. 62, and not Art. 120, Limitation Act.[36]

**Surplus sale proceeds.**

(2) A claim for surplus sale-proceeds of a *patni* tenure is governed by Art. 68, Limitation Act, and is barred if it is not brought more than three years after the money was withdrawn from Court by defendant.[37] A suit against a Railway company to recover the surplus proceeds of a sale held by it under S. 56 of the Railways Act is not governed by Art. 31, but by Art. 62 of Sch. I to the Limitation Act, the proceeds held by it being received for the plaintiff's use.[38] Where in execution of a mortgage-decree, the plaintiff purchased one of the *mouzahs* within an estate sold for arrears of revenue, and after pyment of the arrears, a surplus left with the Collector was paid to the registered owner, a suit by the plaintiff for recovery of the money as representing the mortgaged property purchased by him was held to have been received by the defendant "for plaintiff's use" within the meaning of Art. 62, Limitation Act.[39]

**Void sales.**

(3) Art. 62, Limitation Act, applies where a sale is *void ab initio*[40]; either because the sale is in favour of a minor,[41] or because the property sold did not belong to the vendor[42]; or because there is no consideration at all for the contract[43]; or, the sale is for an unlawful consideration[44]; or the vendor had no right to make the sale[45]; or where money has been paid twice over as the result of a sale.[46] In all these cases, a suit by the purchaser, to recover the sale consideration paid, is really a suit for money had and received by the defendant to the plaintiff's use within the meaning of Art. 62. Similarly, a suit by a company to recover the amount paid under a *void agreement* would have to be instituted within the period prescribed by Art. 62, Sch. I, Limitation Act.[47] Where a sale is *void ab initio*, and possession is not given to the purchaser, a suit to recover the purchase-money

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[36] *Mahomed Wahib* v. *Mahomed Ameer,* (1905) 32 Cal. 527.

[37] *Niranka Chandra Basu* v. *Atul Krishna,* (1924) 83 I.C. 110=1925 Cal. 67=28 C.W.N. 1009=41 C.L.J. 149; also see *Shiba Kumari* v. *Daksha Bala,* (1928) 110 I.C. 49=1928 Cal. 296=47 C.L.J. 369.

[38] *Tarab Chand* v. *The M. & S. M. Ry. Co.,* (1921) 62 I.C. 742=44 Mad. 823=41 M.L.J. 205=1921 Mad. 362.

[39] *Lachmi Narain* v. *Dhanukhdhari,* (1912) 17 I.C. 351 (Cal.); cf. *Secretary of State* v. *Guru Prosad Dhur,* (1892) 20 Cal. 51 (F.B.) (Art. 62 not applied to suit for residue of sale proceeds of an estate sold under Act XI of 1859); also see and cf. *Kamala Kanta* v. *Abdul Barkat,* 27 Cal. 180.

[40] *Venkata Narasimhulu* v. *Peramma,* 18 Mad. 173=5 M.L.J. 32; Reld. in *Dharm Chand* v. *Gore Lal,* (1918) 47 I.C. 886 (890) (Nag.).

[41] *Mt. Munni* v. *Madan Gopal,* (1915) 27 I.C. 733=13 A.L.J. 185.

[42] *Buta Ram* v. *Gur Das,* 44 P.R. 1918=46 I.C. 26.

[43] *Jagannath* v. *Giridhari,* 29 I.C. 429 (433)=19 C.W.N. 102 (s.c. *Biswanath* v. *Surendra*).

[44] *Bai Diwali* v. *Umed Bhai,* (1916) 36 I.C. 564=40 Bom. 614=18 Bom. L. R. 773.

[45] *Juscurn Boid* v. *Prithi Chand,* 46 Cal. 670=23 C.W.N. 721=50 I.C. 444.

[46] *Basivi Reddy* v. *Nagamma,* (1910) 8 I.C. 1087 (Mad.).

[47] *Hans Raj* v. *Debra Dun, M. E. T. Co.,* 1933 P.C. 63 (65) (P.C.).

would be governed by Art. 62, Limitation Act.[48] Similarly, Art. 62, governs a suit for refund of consideration for the mortgage of occupancy land because the contract is *ab initio* void[49]; but where the sale-deed is *voidable* at the instance of a third party, the article applicable would be Art. 97, Limitation Act.[50]

**Badni, or wagering contract.**

(4) Where a suit was brought to recover advances of money made to defendant on a *Badni,* or wagering contract in grain, which remained unperformed, it was held that the contract may be treated as void, and any money paid under it may be recovered back "as received to the use of the person who so paid it". Art. 62, and not Art. 120 was applied.[1]

**Fraud and collusion.**

(5) A suit for recovery of money obtained by fraud and collusion is a suit for money *received* by a defendant for the plaintiff's use.[2]

**Wrongful appropriation.**

(6) A suit for the recovery of offerings of a shrine from a person who has wrongfully appropriated them is governed by Art. 62, Limitation Act.[3]

**Money paid, but not due.**

(7) A suit for the recovery of money paid but not due, and paid under compulsion to prevent a Court-sale of certain property in execution of a decree, is not a voluntary payment and can be recovered back as money had and received.[4] Money paid under a void authority or under a void judgment to a person not entitled to receive it can be recovered from him by the rightful owner in an action for money had and received.[5] Where a Municipal Board has realised excessive taxation on plaintiff's goods, a suit for refund of the amount paid over and above the rate sanctioned by Government, would be governed by Art. 62, Limitation Act.[6] Where the price of a consignment of goods was paid by plaintiff in advance, but the goods were short delivered, a suit for the recovery of the sum overpaid was held to come under this article.[7]

**Assignment of mortgage.**

(8) Where the mortgage assignment executed by the defendant to the plaintiff, being unregistered, could not affect the mortgaged property, but it was operative as an assignment of the debt itself, the defendant acting in fraud of the plaintiff's right having received the money from the mortgagor, was held to have received it for the plaintiff's

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[48] *Hanuman Kamat* v. *Hanuman Mandur,* (1891) 19 Cal. 123=18 I.A. 158 (P.C.); *Ratanbai* v. *Ghasi Ram,* (1932) 134 I.C. 1157=55 Bom. 565=1932 Bom. 36; Relied on *Ardeshir* v. *Vijesing,* (1901) 25 Bom. 593=8 B.L.R. 190; also see *Abdul Rahim* v. *Kadu,* 1930 Sind 12=118 I.C. 203.

[49] *Omrao* v. *Ramdhar,* 81 I.C. 873=1925 Nag. 130.

[50] *See* F. N. (39) above; also see *Jagannath* v. *Giridhari,* 29 I.C. 429 (433)=19 C.W.N. 102.

[1] *Gangaram* v. *Baldewa,* 194 P.R. 1882.

[2] *Raghumoni* v. *Nilmoni,* (1877) 2 Cal. 393.

[3] *Nihal Singh* v. *Secretary of Gurdwara,* (1926) 92 I.C. 731=1926 Lah. 228.

[4] *Jagdeo Narain Singh* v. *Rajah Singh,* (1888) 15 Cal. 656=13 Ind. Jur. 217.

[5] *Ram Narain* v. *Brij Banke,* 39 All. 322 (331).

[6] *Rajputana Malwa Railway* v. *Ajmere Municipal Board,* 32 All. 491.

[7] *Atul Kristo* v. *Lyon,* 14 Cal. 457 (460).

**use, within the meaning of Art. 62 of the Limitation Act.**[8] A suit by *A*, to recover from *B*, money which *B*, had recovered from a debtor of *A*, under colour of a void assignment of such debt by *A* to *B* is an action for money had and received and must be brought within three years of the payment by the debtor to *B*, under Art. 62, Limitation Act. Article 120 does not apply to such a case.[9] Article 62 applies whenever one person, actually or constructively, receives money for another person's use, and in the case of an assignment of Government Promissory Note, the defendant who never disputed plaintiff's ownership, when receiving the interest must be taken to have received it for the use of the assignee, and a suit for money realized by the previous holder was governed by Art. 62.[10] But Art. 62 will not apply where plaintiff had no right to sue on the date of the assignment, and money received by the assignor, as *karta* of the joint-family was not received on behalf of the member to whom a mortgage was assigned, this being merely a case of conversion.[11]

**Irregular Court-sale.**

(9) An auction-purchaser, whose sale is set aside on some ground of irregularity, may sue the decree-holder for return of the amount paid to decree-holder, within the period prescribed by Art. 62 for money had and received.[12]

**Failure of consideration.**

(10) Where plaintiff deposited some money with the defendant pending negotiations for a new lease, but the said negotiations having failed, the money was no longer required to be given for the due performance of the lease, a suit for the money was held to be governed by Art. 62, such money being money received by the defendant for the use of the plaintiff from the time of the failure of such negotiations.[13] It is only on the failure of the consideration that money paid under a contract may be said to have been received for the use of the plaintiff.[14] *Also see* cases under (3) "*void sales*".

(11) Where a certificate under Act XXVII of 1860 is cancelled, the holder of the fresh certificate may recover from the holder of the former certificate money received by him as money received to the use of the plaintiff.[15]

**Want of consideration.**

(12) A suit for the recovery of money paid as *patni* rent at a time where there was no consideration for the payment is governed by Art. 62, Limitation Act.[16] Similarly, a claim for the refund of premium paid by the tenant in addition to rent is governed by this article, and not Art. 120, Limitation Act.[17]

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[8] *Sriramulu* v. *Chinna Venkatasami,* (1901) 25 Mad. 396.

[9] *Shanmuga Pillai* v. *Govindasami,* (1907) 30 Mad. 459.

[10] *Chand Mal* v. *Sansar Chand,* 36 P.R. 1913=17 I.C. 311.

[11] *Pt. Narsingh* v. *Mathura Nath,* 1935 Pat. 159.

[12] *Dandu Sivaramaraju* v. *Secretary of State,* 1935 Mad. 354=41 M.L.W. 305=1935 M.W.N. 338.

[13] *Johuri Mahton* v. *Thakoornath,* (1880) 5 Cal. 830.

[14] *Atul Kristo* v. *Lyon,* (1887) 14 Cal. 457.

[15] *Gangia* v. *Rangi Singh,* 9 All. 173.

[16] *Janakinath Singh* v. *Bejoy Chand,* (1921) 60 I.C. 698=26 C.W.N. 271.

[17] *Abasbhai* v. *Bhimji,* 135 I.C. 801=33 Bom.L.R. 1563=1932 Bom. 86.

(13) Where a decree held by the plaintiff *A*, against *B*, was caused to be sold in execution by *C* and purchased by *D*, who recovered a certain sum of money under the decree, but the sale of *A's* decree being afterwards set aside, *A* then brought a suit against *D* for the recovery of the money realised by the latter, it was held that the suit was not one for damages, but one which fell within Art. 62, Limitation Act.[18]

(14) Where in execution of a decree against *A*, certain money due to *A* was attached, but before that date *A* had transferred his property to *B*, and the money though legally due to *B*, was paid by debtor of *A* to the bailiff who deposited it into Court, and it was paid to *A's* decree-holder, it was held that *B's* suit to recover this money from *A's* decree-holder was one falling under Art. 62 and not Art. 29, Limitation Act.[19]

(15) Where there is a mortgage decree, a payment made out of Court after the preliminary decree and before the final decree should be brought into account when the final decree is passed. But if this is not done that money becomes money in the hands of the mortgagee to the use of the mortgagor.[20]

**Overpayment.**

(16) Where a mortgagee who is bound to pay off a prior incumbrancer fails to do so and the mortgagor is compelled to pay off the amount, and then sues the mortgagee for re-imbursement, the suit is governed by Art. 62 and not by Art. 116, Limitation Act.[21]

## 1370. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

**General article excluded by special articles.**

(1) Article 62, is a general article applicable to all cases of money had and received by the defendant for the plaintiff's use whether under a mistake of fact, or wrongfully detained by the defendant or originally received by the defendant upon a consideration which subsequently failed. But, the *general* article must of course give way when the case is specially provided for in some other article, *e.g.*, Art. 87, 96, 97, or 116, etc. Where the relief claimed in a suit falls within one of these special articles, Art. 62, can have no application.[22]

**Voidable agreements.**

(2) Where a sale valid at its date, fails subsequently by reason of dispossession, the proper article will be Art. 97.[23] Where the consideration does not fail *ab initio*, but the transaction valid at its date, under which the purchaser took possession, fails subsequently, a suit by purchaser to recover the whole or a portion of the purchase-money falls under **Art. 97**, Limitation Act.[24] Where the plaintiff had immediately on attaining majority repudiated a mortgage executed in his favour during his minority and subsequently brought a suit for refund of the mortgage-amount

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[18] *Bhawani* v. *Rikhi Ram*, 2 All. 354.

[19] *Niadar* v. *Ganga*, 38 All. 676.

[20] *Mahbubali* v. *Mahammad Husain*, 1927 All. 710=50 All. 111.

[21] *Prag* v. *Mohan Lal*, (1918) 47 I.C. 161=5 Oudh L. J. 263.

[22] *Tofalal Das* v. *Moin-ud-din*, (1926) 93 I.C. 129=4 Pat. 448=1925 Pat. 765 (Article 96, applied to money paid under mistake of facts).

[23] *Venkatanarasimhulu* v. *Peramma*, 18 Mad. 173; also see *Hanuman* v. *Hanuman*, (1891) 19 Cal. 23 (P.C.); and *Premsukhdas* v. *Namdeo*, (1920) 55 I.C. 93 (Nag.).

[24] *Munni* v. *Kunwar*, 45 All. 378 (379)=21 A.L.J. 265=1923 All. 321; *Tulsiram* v. *Murlidhar*, 26 Bom. 750; *Narsing* v. *Pachu*, 37 Bom. 538=20 I.C. 254 (*See* notes under Arts. 97 and 116).

paid out of his estate, the suit was held to be governed by three years' period of limitation under Art. 62 or Art. 97 according as to whether the contract was void or voidable.[25] A suit for the recovery of an advance paid under a contract for sale of land on the Court's refusal to decree specific performance is governed by Art. 97 and *not* by Art. 62, Limitation Act.[26]

**Art. 116.**

(3) In ***Dharmchand*** v. ***Gorelal***,[27] it was held that it is only where a sale is void *ab initio* that Art. 62 can apply to a suit by the vendee for refund of purchase-money. If, however, the vendee has actually obtained and held possession of the property, Art. 97 may be applied, even if the sale turns out to be void. The same article is applicable where there is a subsequent failure of consideration. Where the vendor has no title to convey, the article applicable to a suit for refund of purchase-money is Art. 116, Limitation Act.[28] Where a mortgage decree became infructuous, because the property could not be sold in execution of the decree, Art. 116 was applied to the plaintiff's suit for damages for breach of a contract of indemnity.[29] An action for breach of duty under S. 108, Transfer of Property Act is also governed by Art. 116, where the lease is registered.[30] But where on the failure of consideration, a suit was brought on the original liability, it was held governed by Art. 97 and not by Art. 62.[31] In *Chanan Mal* v. *Maharaj*,[32] where on receipt of money from the mortgagor's representatives, the mortgagee had executed a redemption deed, but possession was not delivered, and certain third persons asserted title as donees from the mortgagee, a suit by the plaintiffs to recover the amount paid to the mortgagee with interest, etc., was held governed by Art. 97 and not by Art. 62, because the suit was based on failure of consideration of an existing contract; and plaintiff's suit for compensation was governed by Art. 116.

**Arts. 95, 96.**

(4) In all cases where something turns upon a mistake or concealment of fact by the fraud or deceit of the other side, Art. 95 or Art. 96 is more applicable than Art. 62.[33] Where relief is sought for on ground of fraud, the special Art. 95 excludes the general Art. 62, Limitation Act.[34]

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25. *Milkha Singh* v. *Fazl Din,* 145 I.C. 186=1933 Lah. 581=34 P.L.R. 96.

26. *Bommanaboyina* v. *Ramaraju,* (1917) 40 I.C. 893 (Mad.).

27. (1918) 47 I.C. 886 (Nag.); Relied on *Nagoba* v. *Madhola,* 4 N.L.R. 49; *Hanuman* v. *Hanuman,* 19 Cal. 123=18 I.A. 158 (P.C.); and *Bhadur Lal* v. *Jadha,* 2 N.L.R. 174.

28. (1918) 47 I.C. 886 (Nag.); Relied on *Arunachala Aiyar* v. *Ramasami,* 38 Mad. 1171=25 I.C. 618; and *Pirbhu* v. *Wazirbi,* 31 I.C. 877; also see *Chandrawati Bai* v. *Valabdas,* 1931 Sind 141=133 I.C. 76.

29. *Zia-ud-din Ahmad* v. *Akbar Ali,* (1932) 136 I.C. 829=1932 All. 358=1932 A.L.J. 317.

30. *Nabin Chandra* v. *Munshi Mander,* 1927 Pat. 248=6 Pat. 606=101 I.C. 707.

31. *Lal Ditta* v. *Dost Mahomed,* 13 Lah. 188=137 I.C. 828=1932 Lah. 382=33 P.L.R. 440.

32. 32 P.L.R. 457=1931 Lah. 448.

33. *Ramiah & Co.* v. *Sadasiva Mudaliar,* (1925) 91 I.C. 151=1925 Mad. 1255=48 Mad. 925; also see *Tafalal* v. *Moin-ud-din,* (1926) 93 I.C. 129=4 Pat. 448=1925 Pat. 765.

34. *Punnayil Kuttu* v. *Raman Nair,* (1907) 31 Mad. 230=18 M.L.J. 19=4 M.L.T. 80.

**Residuary Art. 120.**

(5) Article 62, Sch. I, Limitation Act was not intended to cover all cases of money had and received. Where money is payable under a liability created by statute, the case is not covered by this article. In the case of *Secretary of State* v. *Guru Prosad Dhur,*[35] a **Full Bench of the Calcutta High Court,** held that a suit brought to recover money held in deposit by the Collector, under S. 31 of Revenue Sale Law is not governed by Art. 62 of the Limitation Act, and such a case not having been specially provided for by the Limitation Act, it was held to be governed by Art. 120, Limitation Act.

(6) A suit to enforce an equitable claim against a trustee liable to account is not governed by Art. 62, or 89, but the residuary Art. 120 would apply.[36]

**Tenants-in-common.**

(7) A **Full Bench of the Madras High Court** has held in *Yerukola* v. *Yerukola,*[37] that Art. 62 has no application to the cases of tenants-in-common "it being quite impossible to say that any particular debt or rent or profit or any part of either was received for the use of any particular tenant-in-common". "Indeed on partition any of the debts or rents or profits might be awarded in toto to any of the tenants-in-common". Further, where each of the tenants-in-common was collecting part of the common properties or the income from it and no doubt incurring expense in so doing, an action for account would be appropriate, and an action for money had and received would be quite inappropriate. This judgment is supported by a number of decisions against the application of Art. 62 and in favour of Art. 120, in suits between tenants-in-common involving rendition of account.[38] The Punjab Chief Court has held that Art. 62 is not applicable to a claim for a share of the cash forming part of the estate to be divided between **co-heirs.**[39]

**Assigment of bond on partition.**

(8) Where a member of Hindu family had assigned to him a mortgage-bond by the *karta* of the family at a partition, but this mortgage-bond however purported to be paid off by a collusive receipt of earlier date, it was held that an action brought by the member on the mortgage against the mortgagors and against the *karta* was not governed by Art. 62, this

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[35] (1892) 20 Cal. 51 (F.B.) (O.R. 18 Cal. 234).

[36] *Annamalai* v. *Muthukaruppan,* 1931 P.C. 9=130 I.C. 609=8 Rang. 645; *Guru Das* v. *Ram Narain,* 10 Cal. 860 (P.C.); also see *Habibullah* v. *Sardar Hussain,* 7 All. 25 (28).

[37] (1923) 71 I.C. 177 (183)=45 Mad. 648=1922 Mad. 150 (F.B.); Relied on *Subba Row* v. *Rama Row,* 32 I.C. 899=40 Mad. 291=30 M.L.J. 341.

[38] *Sarakai Abdul Rahiman* v. *Muhaidin Pathummal,* 32 I.C. 83=30 M.L.J. 104=19 M.L.T. 88; *Marian Beeviammal* v. *Kadir Meera,* 29 I.C. 275; *Umar Daraz* v. *Wilayat Ali,* (1897) 19 All. 169=A.W.N. (1897) 34; *Parsotam Rao* v. *Radha Bai,* 28 I.C. 953=13 A.L.J. 407=37 All. 318; *Venkata Reddi* v. *Kuppu,* 61 I.C. 762=13 L.W. 260; also see and cf. *Gapu* v. *Zipru,* 45 Bom. 313=59 I.C. 357; also see *Suraj Narain* v. *Narbada Prasad,* 1929 Oudh 83=4 Luck. 265=115 I.C. 99 and *Maung Po Nyun* v. *Ma Saw Tin,* 1931 Rang. 150=131 I.C. 511 (Claim between co-owners to share mesne profits); cf. 24 Cal. 309; 32 Cal. 527; 3 All. 170; 6 All. 442; 37 All. 40; 37 All. 233; 37 All. 434; which have not been followed.

[39] *Muhammad Hamid* v. *Muhammad Majid,* 40 I.C. 374=92 P.R. 1917.

**being merely** a case of conversion by the *karta,* or a case where having held **the** money, for many years, from the date of partition for the plaintiffs **Art. 120** would apply.[40] A suit for return of subscription from an unregistered association after conversion of property of the association is governed by Art. 120, and not by Art. 62. [41]

(9) Where in a **partition** suit decree declaring right of parties to share according to defined shares, is passed, the **income accruing between preliminary decree to final decree** is joint-family property, and a suit for share in such income is governed by **Art. 127,** and not by Art. 62.[42]

**Principal and Agent.**

(10) A suit by principal against the agent for recovery of certain sums misappropriated by him is governed by Art. 89 and not Art. 62. Article 89 is not confinel to suits for account only.[43] A suit for accounts between principal and agent is not governed by Art. 62, as that article applies to cases where a definite sum of money had been received by the defendant and which he was to hold for the use of the plaintiff.[44]

**Land Acquisition Money.**

(11) Where the Government has acquired the land and has paid the money to one who was apparently entitled to it, a suit by a person who has also got interest in the land and claims the money paid by the Government is governed by **Art. 120,** and not by Art. 17, or Art. 62, Limitation Act.[45] But a suit for a share of compensation money for the house acquired by Government within three years of the final award is within Art. 62, Limitation Act.[46] A suit by the mortgagor against his mortgagee to recover his share of the compensation awarded to the latter in respect of the mortgaged land under the Land Acquisition Act is governed by Art. 120, Limitation Act.[47]

**Agreement of partnership.**

(12) Where on an agreement of partnership to finance certain litigations, and to share the profits, the defendant has realised the amounts so advanced partly in cash and partly in the shape of properties, a suit by the plaintiff to recover his share and for accounts of the partnership was not governed by Art. 62, or Art. 106, but that **Art. 113 or Art. 120** could both apply.[48]

**Breach of covenant of title. Art. 116.**

(13) Where the plaintiff entered into a contract for the purchase of land but was unable to get possession of some of them, and he had sued the person in possession but his suit was dismissed, and afterwards his suit for damages against his vendor for breach of the implied covenant of title, the suit was held to fall

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[40] *Narsingh Pande* v. *Mathura Nath,* 1935 Pat. 159.

[41] *U Sein Po* v. *U Phyu,* (1929) 120 I.C. 902=7 Rang. 540=1930 Rang. 21.

[42] *Mansa Ram* v. *Champa Lal,* 1935 Nag. 137.

[43] *Khondkar Mahomed Amirul Islam* v. *Mahomed Abdul Hamid,* 60 Cal. 1347=149 I.C. 996=1934 Cal. 238=38 C.W.N. 211.

[44] *Moti Lal* v. *Radhey Lal,* 1933 All. 642=1933 A.L.J. 1009.

[45] *Soma Singh* v. *Jai Gobind Pande,* 1935 Pat. 42.

[46] *Abdul Hamid* v. *Muhammad Sharif,* 2 L.L.J. 353.

[47] *Ladli Prasad* v. *Nizamuddin Khan,* (1920) 54 I.C. 535=22 O.C. 342.

[48] *Kastur Chand* v. *Hari Govind,* 1934 Bom. 491=36 Bom. L. R. 1068.

under Art. 116, and not Art. 97 or Art. 62.[49] If there is covenant, express or implied, indemnifying party suffering against loss caused by defect in title of executant of document, Art. 116 applies, otherwise Art. 62 or Art. 97, Limitation Act.[50]

**Art. 131.** (14) A claim to establish **periodically recurring right** falls under Art. 131; but claim for arrears of revenue falls under Art. 62, and not under Art. 131.[1]

**Art. 85.** (15) An account taken between two parties mutual, open and current is governed by Art. 85 and not Art. 62 applies.[2]

**Arts. 48, 49.** (16) An action for the value of goods delivered is one in detinue or conversion and is governed by Art. 48, or Art. 49, and not by Art. 62.[3]

**Art. 123.** (17) Where the amount of maintenance granted under a will is to come out of income of particular property and the defendants are in possession of the property under the will, the proper article to apply to the suit for arrears of such maintenance against the defendants is Art. 123, and not Art. 62.[4]

**1371. STARTING POINT OF LIMITATION.**—The period of limitation for the recovery of money payable by the defendant to the plaintiff for money received for his use is three years from the date when the money was received.[5] But if the knowledge of the plaintiff's right to institute the suit has been kept from him by the **fraud of the defendant,** under S. 18 of the Limitation Act, the period of limitation runs from the date when the fraud first becomes known to the plaintiff.[6] Where plaintiffs were defendants' tenants holding at a fixed rate of rent, but a notice was issued by the Collector under S. 153 of the Bombay Land Revenue Act claiming a certain sum as arrears from the plaintiffs, and plaintiffs paid the amount of demand under protest to avoid a forfeiture of their land, it was held that although the fact that the demand for increased payment so made might have given rise to a cause of action to enable the plaintiffs to seek for a declaration that the particular demand was unauthorized, it would not affect their right to sue for refund of the amount paid under protest, under Art. 62, Limitation Act.[7]

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[49] *Thillai Kanna* v. *Abdul Kadir,* (1933) 140 I.C. 805=1933 Mad. 126=64 M.L.J. 336.

[50] *Bageswar Tewari* v. *Bikramajit Singh,* 1930 All. 785=128 I.C. 767.

[1] *Janardhan Trimbak* v. *Dinkar Hari,* 1931 Bom. 189=33 Bom. L. R. 127.

[2] *Appa* v. *Ramakrishna,* 1930 Bom. 5=53 Bom. 652=121 I.C. 581 =31 Bom. L. R. 1187.

[3] *Chami* v. *Pattar,* 33 I.C. 661.

[4] *Hari Charan* v. *Kamal Kumari,* (1931) 132 I.C. 684=1931 Cal. 670 =35 C.W.N. 307.

[5] *Raghumoni* v. *Nilmoni,* (1877) 2 Cal. 393.

[6] *Lakhpat Pandey* v. *Jang Bahadur,* (1917) 40 I.C. 37 (All.).

Where money has been wrongfully received, for example, mortgagor has taken the rents due to the mortgagee some distance away, there is a cause of action both in tort or for breach of contract. However, damages for a wrong can be claimed only once, and the cause of action accrues at the date of the wrong. But if another person receives money which really belongs to a third person, that third person has a right to sue him each time it occurs as it is not damages at all but money had and received within the meaning of Art. 62 of the Limitation Act.[8] Where a mortgage is void *ab initio,* being a mortgage in respect of an unrecognised share of a *bhag,* contrary to the provisions of the *Bhagdari Act,* the mortgagee's right to claim repayment of money advanced by the mortgagor within three years of the date of the mortgage-deed is within time under Art. 62, Limitation Act.[9] Similarly, where defendant who was in possession of certain *karnam* service *inams* agreed to sell the *inam* lands to the plaintiffs after they had been enfranchised, a suit for return of purchase-money in respect of the void agreement had to be brought within 3 years from the date of the agreement.[10] However, it has been held recently, by the Lahore High Court that where in a compromise one party agrees to pay off certain creditor and on the failure of fulfilment of the term the other party pays off the creditor then limitation runs not from the date of the breach of the agreement but from the date of the payment by the other party to creditor.[11]

The word *"received"* in third column must be understood to mean "received by the defendant for the plaintiff's use". See *ante.* Where money is paid as the price of goods to be delivered hereafter, it is not, at the time he parts with it, received by the defendants for his use but for their own. It is only when the consideration fails that, by operation of law, the money becomes money received to his use, and that is the date from which in such a case limitation runs.[12] The period of limitation for a suit to recover money deposited by the plaintiff with the defendant, upon the understanding that it will be returned in a certain event, should be calculated not under Art. 115, but under Art. 62, and such period begins to run on the happening of the event.[13] Under Art. 62, time runs from the date when the money is received, which clearly means, received for the plaintiff's use,[14] *i.e.,* when plaintiff's right accrued to receive the amount, or when the defendant held the money constructively for the use of the plaintiff.[15]

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[7] *Suryajirao Ganpatrao* v. *Sidhanath Dhondeo,* (1925) 89 I.C. 65=1925 Bom. 435=27 Bom. L. R. 645.

[8] *Harpal* v. *Ram Sarup,* (1916) 34 I.C. 173 (All.).

[9] *Bai Diwali* v. *Umed Bhai,* (1916) 36 I.C. 564=18 Bom. L. R. 773 =40 Bom. 614.

[10] *Aumanchi* v. *Gummudu,* (1925) 88 I.C. 557=1925 Mad. 885=48 M.L.J. 598=1925 M.W.N. 400.

[11] *Aijaz Hussain* v. *Maqbul Hussain,* 1935 Lah. 307=37 P.L.R. 53.

[12] *Atul Kristo* v. *Lyon & Co.,* (1887) 14 Cal. 457.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 63. | For money payable for interest upon money due from the defendant to the plaintiff. | Three years. | When the interest becomes due. |

## SYNOPSIS.

- 1372. Corresponding provisions.
- 1373. *Article explained*—"Interest".
- 1374. *Article explained*—"money due".
- 1375. Interest whether accessory to principal.
- 1376. *Article applied*—Illustrative cases.
- 1377. Article not applied—Illustrative cases.

## NOTES.

**1372. CORRESPONDING PROVISIONS.**—This article corresponds to Art. 61 of Act IX of 1871; and, Art. 63 of the previous Act XV of 1877. A corresponding provision in Act XIV of 1859 was to be found in S. 1, Cl. (9) of that Act.

Under English Common Law, "interest on money due and forborne at interest at the defendant's request," was one of the actions known as "*Common Counts*".

Six years is the period of limitation prescribed under S. 8 of R. P. L. A., 1874, in respect of arrears of interest charged upon or payable out of any land, or in respect of any legacy. The claim to interest depends on the right to recover the principal, and is barred with it.[16] But the six years' period of limitation would apply to a claim of interest, although the principal is excluded from the statute of limitations.[17]

**1373. ARTICLE EXPLAINED.**—This article is applicable only to suits for *interest* upon money due from the defendant to the plaintiff, upon the *principal* amount overdue. A debt not due cannot carry interest and

**"Interest."**

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[13] *Johuri Mahton* v. *Thakoor Nath,* (1880) 5 Cal. 830=6 C.L.R. 355.

[14] *Secretary of State* v. *Zemindarini,* (1921) 59 I.C. 98 (102)=12 L.W. 334.

[15] *Ibid.,* 59 I.C. 98 (102); also see *Mukhi Singh* v. *Kishun Singh,* (1919) 51 I.C. 320 (Pat.); cf. *Guru Das* v. *Ram Narain,* (1884) 10 Cal. 860 (P.C.) and *Hanuman* v. *Hanuman,* (1891) 19 Cal. 123=18 I.A. 158 (P.C.).

[16] Lightwood, p. 179; Pal's Limitation Act, p. 621.

[17] Pal's Limitation Act, p. 621; *Thompson* v. *Eastwood,* (1877) 2 A. C. 215.

compound interest.[18] "Interest" in its ordinary sense means something paid for money overdue. And *prima facie* a debt which carries interest appears to import a debt already due.[19]

Interest is payable on the principal amount advanced, (1) on the basis of contract, or (2) under the provisions of the Interest Act, or (3) by way of equitable relief in a proper case where justice, equity and good conscience require it.[20] The Interest Act is not exhaustive of all cases in which interest is allowable.[21] Interest may, in cases of breach of contract, be awarded to the plaintiff, as damages under S. 73 of the Contract Act, where it is proved that loss has been caused to him owing to the defendant's default in not making the payment on the due date.[22] But, interest when awardable as damages by the Court, cannot be said to become due under a contract express or implied.[23]

**"Money."**

**1374.** The word "money" is comprehensive enough to include not merely money which has been advanced or will be advanced by way of loan, or money which is due on account of an existing debt or will become due on a future debt, but also money which has or will become due on account of non-performance of an engagement that might give rise to a pecuniary liability."[24]

**"Money due."**

The words "money due" are understood to cover both money owing or payable; the word "owing" means not yet payable.[25]

**Interest whether accessory to principal.**

**1375.** It is well settled that no interest can be recovered if the suit for the principal amount is barred by limitation.[26] The reason for the rule is thus stated by Savigny in a passage quoted by Holloway, J., in *Valia Tamburatti* v. *Vira Rayan,*[27]

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[18] *Ramchunder* v. *Juggut Monmohany,* (1878) 4 Cal. 283 (301).

[19] *Ibid.*

[20] *Arunachellam Chettiar* v. *Rajeswara Setupati,* 71 I.C. 257=42 M.L.J. 74=1922 Mad. 55.

[21] *Venkatachalam* v. *Ponnusami,* 82 I.C. 536=1925 Mad. 46=47 M.L.J. 312; Relied on *Muhammad Abdul Gaffur Rowther* v. *Hamida Beevi Ammal,* (1919) 52 I.C. 505=42 Mad. 661=36 M.L.J. 456.

[22] *Shakoor & Co.* v. *Finlay Fleming & Co.,* 79 I.C. 291=1923 Rang. 265=1 Rang. 339.

[23] *Narindra* v. *Khadin,* (1895) 17 All. 581 (587, 588).

[24] Per Sir Asutosh Mookherjee, A.C.J., in *Ramchand Sur* v. *Iswar Chandra Giri,* (1921) 61 I.C. 539=1921 Cal. 172=48 Cal. 625 (F.B.).

[25] *Subramanian* v. *Arunachallam* (1902) 25 Mad. 603 (612)=12 M.L.J. 479 (P.C.).

[26] *Hajee Syud Mahomed* v. *Mt. Ashraf-ul-nessa,* 5 Cal. 759 (765); Relied in *Nilmoney Simha* v. *Hardhan Das,* (1909) 2 I.C. 111 (112) (Cal.).

[27] 1 Mad. 228 (231).

> "When the principal demand is lost by prescription, action for all sums of interest in arrears are barred with the principal, even when these would primarily arise at a very recent time. The ground of this apparent anomaly is to be found in the accessory nature of these liabilities which would render the pursuit of them after the loss of the main action a contradiction in terms."[28]

The same view taken by Tindal, C.J., in *Hallis* v. *Palmer,*[29] where it was ruled

> "that interest has always been deemed a mere accessory of the loan and when the demand for principal is barred the accessory falls along with it".[30]

But it was further observed

> "that in cases where there is an express contract to pay interest independently of the principal, there may be room for the argument that you may sever the contract to pay interest from the contract to pay principal".[30]

**Special independent contract to pay interest.**

Their Lordships of the Privy Council have held in *Cheang Thye Phin* v. *Lam Kin Sang,*[31] that where there is a special contract to pay interest at a specified rate, the principle, that where interest is a mere accessory to the principal and a claim to latter is barred by statute, the interest thereon cannot be recovered does not apply. It would depend upon the construction of a document whether the covenant as to interest was separable from the stipulation as to payment of principal.[32] For instance, the payment of interest may be provided for from year to year, as a personal liability.[33] The breach of contract in a mortgage-bond to pay interest each year which covenant is not confined to the fixed period of the mortgage and is distinct from and independent of the claim of the mortgagee to recover the principal sum, and the performance of which is secured in a different manner, gives rise to a distinct cause of action which can be sued upon without suing for the principal, and a decree obtained on such bond for overdue interest does not, under O. 2, R. 2, Civil Procedure Code, 1908 (S. 43 of the Civil Procedure Code, 1882), bar a subsequent suit to recover the principal and interest by the sale of mortgaged property.[34] Where a mortgage-deed contains a personal covenant to pay interest independently of the principal, a suit for the recovery of interest will lie although the personal remedy for the principal is barred by limitation.[35] The rule laid down by their Lordships of the **Privy Council** applicable to such cases is to see whether under terms of the bond the causes of action and the remedies in respect of the principal amount, and the interest due are distinct.[36] If a mortgage provides for an **independent obligation to pay the principal and the interest,** in a suit brought to obtain a personal judgment in respect of the interest alone, O. 2, R. 2, Civil Procedure Code, would not prevent a subsequent claim for payment of the principal, as in such a case the cause of action is distinct. The matter is, however, different if the non-payment of the interest causes the principal money to become due, as in that case the cause of action—the non-payment of interest—gives rise to two forms of relief which the Code of Civil Procedure provides, shall not be split.[37] This may be illustrated by the **Madras** decision in *Sawmy Row* v. *Wilson,*[38] where under a mortgage-deed, interest was payable every month, while the deed also provided for payment of principal and interest whenever demanded, enforceable by proceeding in default against the mortgaged property. A suit brought for interest and a decree obtained, at a time when no demand had been made for the principal, could not occasion the application of bar arising out of O. 2, R. 2, Civil Procedure Code, to the separate claim for principal amount. But, as held in the Bombay case of *Dhondiram* v. *Taba Savadan,*[39] interest is not allowable on time-barred debts, when not claimed by virtue of an independent contract for its payment.

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[28] Savigny, Vol. V, S. 311.

[29] 2 Bing. N. C. 713 (717)=132 E.R. 275.

[30] Cited in *Nilmoney Sinha* v. *Hardhan Das,* (1909) 2 I.C. 111 at 112 (Cal.).

[31] 1929 P.C. 240=58 M.L.J. 477=1929 A.C. 670 (P.C.).

[32] *Raja Setrucherla* v. *Maharaja of Jeypore,* 1919 P.C. 150=42 Mad. 813=46 I.A. 151 (P.C.).

[33] *Madappa Hedge* v. *Ramkrishna,* (1911) 12 I.C. 42=35 Bom. 327 =13 Bom.L.R. 698.

[34] *Yashvant* v. *Vithal,* (1895) 21 Bom. 267.

## 1376. ARTICLE APPLIED — ILLUSTRATIVE CASES.—

**Recurring cause of action.**

**1376.** (1) In a suit for balance of money payable for interest upon money due from the defendants to the plaintiff, each successive instalment of interest, as it fell due and remained in the hands of the defendants, impliedly became a separate and specific loan, and Art. 63 was applicable to the relations between the parties.[40]

(2) Where an agreement contained in a mortgage-deed provided for payment of the principal within a year, and interest thereon at a stated rate, and it further provided that property would not be transferred until payment in full of the amount due for principal and interest, and any money paid should be first credited to the latter, it was held that the creditor was entitled

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[35] *Thair Maistry* v. *Chetty Firm,* (1917) 41 I.C. 72 (L.B.); cf. *Dhondiram* v. *Taba Savadan,* 27 Bom. 330=5 Bom.L.R. 198.

[36] *Muhammad Hafiz* v. *Muhammad Zakariya,* (1921) 44 All. 121=49 I.A. 9=1922 P.C. 23=65 I.C. 79=42 M.L.J. 248 (P.C.).

[37] *Kishen Narain* v. *Pal Mal,* (1923) 72 I.C. 187=1922 P.C. 412=50 I.A. 115=4 Lah. 32 (36)=44 M.L.J. 123 (P.C.).

[38] (1925) 91 I.C. 403=1925 Mad. 1120=48 Mad. 703=49 M.L.J. 474.

[39] 27 Bom. 330=5 Bom.L.R. 198.

[40] *Makundi Kuar* v. *Balkishan,* 3 A. 328; cf. *Thair Maistry* v. *Chetty Firm,* (1917) 41 I.C. 72 (L.B.), *supra.*

to payment of the principal with interest at the rate stated in the deed for the entire period of non-payment, but that even if money was held recoverable by way of damages for a breach of the contract, the creditor still might have recovered six years' arrears of interest by way of damages, notwithstanding limitation. There had been a breach of contract daily while the principal remained unpaid and unbarred by time.[41]

(3) Where an unregistered bond covenanted to pay interest yearly at a specified rate per mensem, and it agreed to pay the principal sum within a period of six years from the date on which the bond was executed, and the creditor was given the authority in case of default to realize the amount due from the property of the debtor, it was held that the suit for interest which had not been paid for more than 3 years was barred; but that the plaintiff had a cause of action for a suit for the principal sum if brought within three years from the date of the period fixed for payment.[42]

(4) The claim for interest which was to be paid year by year was not barred where the mortgagee had the option to realise interest every year by suit, but if he so preferred, the amount of interest added to principal was to be recoverable at redemption or foreclosure from the person or other property of the mortgagors.[43]

## 1377. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

**(i) Interest charged on immoveable property.**

(i) This article is not applicable to cases of interest charged upon immoveable property to which **Art. 132, Limitation Act,** would apply.[44]

*Illustrations.*

(1) Where a usufructuary mortgage-deed expressly made the mortgaged properties liable not only for the repayment of the principal but also for interest, it was held that the claim for interest being also a charge on mortgaged properties, the suit was governed by Art. 132, Limitation Act.[45]

(2) Where an equitable mortgage by deposit of title-deeds was created in favour of plaintiff by the defendant, a suit for foreclosure was held to be governed by either the rule of twelve years under Art. 132, or sixty years under Art. 149 of Sch. I, Limitation Act.[46]

**(ii) Interest under a registered contract.**

(ii) This article is not applicable to cases of interest under a registered contract, which would be governed by six years' rule of limitation under Art. 116 of Sch. I to the Limitation Act.[47]

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[41] *Mathura Das* v. *Raja Narendar Bahadur,* (1896) 19 All. 39=23 I.A. 138=1 C.W.N. 52=6 M.L.J. 214 (P.C.); also see *Jogeshur* v. *Ghanasham,* 5 C.W.N. 356.

[42] *Amir Haidar Khan* v. *Ramdutt,* (1917) 40 I.C. 229=20 Oudh Cas. 52.

[43] *Mahraj Prag Din* v. *Bhagwati Sahai,* 1921 Oudh 193=8 O.L.J. 418 =66 I.C. 687.

[44] *See* notes under Art. 132, Limitation Act.

[45] *Vasudevan Attisseripad* v. *Govinda Menon,* (1915) 30 I.C. 818 =2 L.W. 853.

[46] *Ganpat Pandurang* v. *Adarji Dadabhai,* (1879) 3 Bom. 312.

[47] *See* notes under Art. 116, Limitation Act.

*Illustrations.*

(1) Where a suit to recover a specific sum of money due upon a registered bond or other written contract is brought, it is regarded as a suit for compensation for breach of contract in writing registered, within the meaning of Art. 116.[48]

(2) Where a mortgage bond contains no stipulation for the payment of interest after the due date, interest is payable by virtue of the Interest Act (XXXII of 1839); and Art. 116, Sch. I of the Limitation Act prescribes the period of limitation in such a case; and, though the mortgagor cannot redeem until he has repaid the principal sum with interest and costs, the mortgagee can *recover* by suit only six years' interest after the due date at six per cent. per annum.[49]

**(*iii*) Interest added to principal deposit.**

(*iii*) The period of limitation applicable to a suit to recover a "*thavanai*" deposit with a Nattukottai Chetty Firm, was held to be that prescribed by Art. 60 of Sch. I to the Limitation Act. A *thavanai* deposit means an understanding between the parties that at the time of each *thavanai* period, the interest for that period, instead of being payable in cash to the creditors, should be added to the deposit, so that both should be treated as fresh deposits.[50]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run |
|---|---|---|---|
| 64. | For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them. | Three years. | When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing singed as aforesaid, made payable at a future time, and then when that time arrives. |

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48. *Ganesh Krishen* v. *Madhavrav,* (1881) 6 Bom. 75.

49. *Moti Singh* v. *Ramdhari Singh,* (1897) 24 Cal. 699=1 C.W.N. 437 (F.B.); also see *Gudri Koer* v. *Bhubaneswari,* (1891) 19 Cal. 19 [Approved in 24 Cal. 699 (F. B.)]; also see *Mathura Das* v. *Narinder Bahadur,* 19 All. 39=23 I.A. 138 (P.C.) and *Bikramajit* v. *Durga Dyal,* 21 Cal. 274.

50. *Narayanan Chetty* v. *Supiah Chetty,* (1920) 58 I.C. 639=43 Mad. 629=38 M.L.J. 437.

## SYNOPSIS.

1378. Corresponding provisions.
1379. Previous history.
1380. English law.
1381. **Scope of Art. 64.**
1382. Punjab view.
—**Acknowledgment, or new contract.**
1383. Calcutta view.
1384. Madras decisions.
1385. Bombay.
1386. Patna.
1387. Allahabad.
1388. Privy Council.
1389. **Conclusion.**
1390. **Starting point of limitation.**

## NOTES.

1378. **CORRESPONDING PROVISIONS.**—This article corresponds to Art. 64 of the previous Act XV of 1877.

Art. 62 of Act IX of 1871 made the period of limitation begin to run from the time when the accounts were stated, unless where the debt was made payable at a subsequent time, and then when that time arrived.

The corresponding provision in Act XIV of 1859 was made in S. 1, cl. 9 or S. 1, cl. 16.

1379. **PREVIOUS HISTORY.**—In some cases, under **Act XIV of 1859**, it was held that when the cause of action as laid in the plaint arose upon a statement and settlement of accounts, the suit must be brought within three years, a suit on account stated being an action upon a breach of conract under cl. 9, S. 1, Act XIV of 1859.[1] But, in other cases suits for money due upon an account stated were held to fall within the general provision in cl. 16 of S. 1 of that Act, which prescribed the six year's limit.[2]

An account-stated within the meaning of Art. 62, Sch. II of Act IX of 1871, was not required to be signed by the debtor.[3] Where, a balance struck in favour of one of the parties on an examination of accounts, was orally approved and admitted by the other, a suit brought for such balance "on the basis of the account book" was held to be a **suit on accounts stated** within the meaning of Art. 62, Sch. II of the Limitation Act, IX of 1871.[4] The debts on both sides when agreed to be set-off as cross-demands, leaving a balance stated, which need not be signed by the debtor, operated as a payment of the items to which it applied.[5] The expression "account stated", not being restricted, however, to cases of adjustment of cross-demands between the parties, enabled the creditors to evade the law relating to written acknowledgments of debts; **and, the law was changed by Art. 64 of Act XV of 1877,** introducing the words *"in writing signed* by the defendant or his agent duly authorized in this behalf" and "by a simultaneous agreement in writing signed as aforesaid", in the third column. Since 1877, a statement of accounts is required to be in writing and signed by the defendant or his agent duly authorized in this behalf.[6]

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[1] *Nobin Chunder* v. *Suroop Chunder,* (1865) 6 W.R. 328; also see *Bisseswar Gir* v. *Sree Kishen Shaha,* (1875) 24 W.R. 440.

[2] *Ram Chandra* v. *Soma,* (1876) 1 Bom. 305 Note and *Umed Chand* v. *Sha Bulakidas Lalchand,* 5 Bom. H. C. R. O. C. 16.

[3] *Tarinee Churn* v. *Abdur Rohoman,* (1878) 2 C.L.R. 346.

[4] *Nand Ram* v. *Ram Prasad,* (1880) 2 All. 641.

**1380. ENGLISH LAW.**—Under English law, an account **stated** is either an adjustment and acknowledgment of the amount due in respect of a debt, or it is an agreed set off of cross-demands, by stating a balance in favour of one of the parties where there are debts on both sides.

> "An account stated is nothing more than the **admission of a balance due** from one party to another, and that balance being due, there is a debt. The statement of the account, and admission of the balance implies a promise **in law to pay it.**"[7]

It is an amount due to the plaintiff in his own right, and not in his representative character, from the defendant admitting his indebtedness of certain amount of money being due from him, which **implies an unqualified liability to pay** the same, and in some cases constitutes in law a new cause of action.[8] As Chitty, says,

> "There are some cases in which the settlement of an account and the admitting of a balance to be due will, to a certain extent, afford **a new cause of action,** and confer a legal right which did not before exist in regard to the original debt."[9]

An account stated, under English law, is an admission or acknowledgment not only of a debt but also of a **definite fixed amount** for which there is a **subsisting liability.**[10] This amount may be arrived at (1) by adding up several items of debt, or

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[5] *Mulchand Gulabchand* v. *Girdhar Madhav,* 8 Bom. H. C. R. 6 and *Hargopal* v. *Abdul Khan,* 9 Bom. H. C. R. 429.

[6] *Dukhi* v. *Mahomed,* 10 Cal. 284 (F.B.); O.R. *Sheikh Akbar* v. *Sheikh Khan,* 7 Cal. 256; *Murugappa* v. *Vyapuri,* 32 M.L.J. 536=38 I.C. 227; *Thakurya* v. *Sheo Singh,* 2 All. 872; *Zulfikar Hussein* v. *Munna,* 3 All. 148 (F.B.) (The article does not apply unless the account stated is in writing and signed); cf. *Manjunatha* v. *Devamma,* 26 Mad. 186 (An account stated which is signed by one of several partners is binding on all).

[7] *See* Leake on Contracts, 7th Edn., p. 79; Pal's Limitation Act, p. 624 citing Abinger, C.B., in *Irving* v. *Veitch,* (1837) 7 L. J. Ex. 25.

[8] *Petch* v. *Lyon,* (1846) 9 Q.B. 147; *Hugh* v. *Thorpe,* (1839) 5 M. & W. 656 (667); *Calvert* v. *Baker,* (1838) 4 M. & W. 417.

[9] Chitty on Contracts, p. 81; Pal's Limitation, p. 624.

[10] *Burgh* v. *Legge,* (1839) 8 L.J.Ex. 258.

(2) there may be a balance struck of several items of cross-demands. In an action of the former class, the defendant may rebut the claim by disputing the debts charged in the account.[11] But an account stated, which is not a mere open account, but is the result of the balancing of cross-demands, is not to be challenged on the ground of some items taken as paid not being recoverable under the law, or representing a barred debt.[12] An account may be stated **in writing or orally**[13]; but an account stated as a cause of action must be made **to the plaintiff himself or his agents**[14]; and **by the defendant himself or agent,** in the same relative rights in which the debt is charged.[15]

**The effect of stating account** and promise to pay balance on the question of law, as stated by Chitty, is as follows:—

> "Where *A* has an account against *B,* some of the items of which are more than six years old; and *B* has a cross account against *A,* and they meet and go through both accounts, and a balance is struck in favour of *A;* this amounts to an agreement to set off *B's* claim against the earlier items of *A's;* and out of this agreement, a new consideration arises for the payment of the balance."[15-a]

Where there are no mutual or cross-accounts between the parties, an action will not lie on mere account stated to recover the balance.[16] But, where there are accounts with items on both sides, the going through them and striking a balance converts the set-off into a **payment,** as as to take the case out of the statute of limitation.[17]

**1381. SCOPE OF ART. 64.**—The phrase "account stated" has not been defined in the Act, and there has been a considerable **conflict of view** on the question where Art. 64 contemplates suits for the recovery of debts on the basis of account stated as a substantive cause of action, or whether it will embrace suits on basis of acknowledgments implying a promise to pay.

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[11] *Wilson* v. *Wilson,* (1854) 23 L.J.C.P. 137; Re *Binakina,* (1912) 81 L.J.C. 674.

[12] *Commercial Bank of Scotland* v. *Rhind,* (1860) 3 Mac. Q. H. L. 643; *Kepitigalla Rubber Estates* v. *National Bank of India,* (1909) 78 L.J. K.B. 964; Pal's Limitation Act, p. 625; also see *Laycock* v. *Pickles,* (1863) 4 B. & S. 497.

[13] *Singleton* v. *Barrett,* (1832) 1 L. J. Ex. 134.

[14] *Tarback* v. *Bispham,* (1836) 6 L. J. Ex. 49; *Bates* v. *Townby,* (1848) 19 L. J. Ex. 399.

[15] Pal's Limitation Act, p. 625.

[15-a] Chitty on Contracts, p. 913; *Ashby* v. *James,* (1843) 11 M. & W. 542.

[16] Lightwood, Time Limit to Actions, p. 343; *Jones* v. *Ryder,* (1838) 4 M. & W. 32.

[17] *Worthington* v. *Grimsditch,* (1845) 7 Q.B. 479; Pal's Limitation Act, p. 627.

**Punjab.**

1382. It was held by a **Full Bench** of the Punjab Chief Court in *Ratta Ram* v. *Mt. Nano*,[18] that no suit to recover money found to be due upon a balance being struck between the parties is a suit within the meaning of Art. 62 of Sch. II of Act IX of 1871, unless it appears that the particular transaction is recognized by the law prevailing as constituting a cause of action upon which a suit to recover the amount of the balance may be maintained. It has been noticed that a **distinction** was drawn by the Punjab Chief Court **between an acknowledgment** which if available, could only extend the time for a suit based on the original cause of action, and an account **stated** amounting actually to a fresh contract on which the plaintiff could sue.[19] Whether a statement of accounts did or did not amount to a fresh contract depended to a great extent on the nature of the accounts, the mode in which the statement was made, and the other circumstances of each particular case.[20] This view prevailed in *Ganpat* v. *Daulat Ram*,[21] *Mahbubjan* v. *Nuruddin*[22] and *Palamal* v. *Tula Ram*[23]; also in *Jas Ram* v. *Attar Chand*[24] and *Nand Lal* b. *Partab Singh*.[25]

In *Ishar Das* v. *Harkishen Das*,[26] the **Punjab Chief Court** took the view, that an account stated is said to be stated only when there have been cross-demands between the partis as the balance struck then becomes the consideration for the discharge on either side. Such an account stated amounts to a new contract, and is a substantive cause of action. However, in *Nand Lal* v. *Partab Singh*,[27] where the parties who were partners in certain business had gone into the account of partnership and as a result of that scrutiny the defendants had admitted in writing in the plaintiff's book a debit balance, it was held that the entry in question was an account rendered, and that it adjusted the relation of the parties and was a promise to pay. This was followed in *Jairam Singh Bhag Mal* v. *Sardari Mal*,[28] which was a parallel case, in which there was no proof of any cross-demands or of the creation of a new contract, and Art. 64 was applied. Most of the earlier authorities have been re-considered in the light of the **Privy Council** ruling in *Mani Ram Seth* v. *Seth Rup Chand,*[29] and the view now taken in several recent rulings by the **Lahore High Court** is that an unconditional acknowledgment can form the basis of a suit, on an account stated in form of a balance of accounts, as it implies a promise to pay.[30] Accordingly, a suit brought to recover the amount secured by a balance struck after going into accounts, is governed by Art. 64, Sch. I to the Limitation Act.[31] This view is supportable by the fact that "there is nothing in the language of the article which will restrict its operation only to those cases of accounts stated where such statement in itself constitutes a substantive cause of action. The words "for money *found to be* due on accounts stated" seem rather to suggest the inclusion of those cases also where the claim is still to be based on the old original promise. Had the language been 'for money due on accounts stated,' the other view might have been supported".[32] The recent **Privy Council** decision in *Bishun Chand* v. *Girdhari Lal*[33] gives the same indication. However Art. 64 can apply only where the money found to be due is a definite sum entered in the account-books of the plaintiff. Where a suit is based on an account which is kept throughout in terms of grain, the article applicable is Art. 65 or Art. 115, and not Art. 64, Sch. I, Limitation Act.[34]

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[18] 3 P.R. 1878 (F.B.).

[19] *See* notes under S. 19, Limitation Act.

[20] 3 P.R. 1878 (F.B.).

[21] 68 P.R. 1904.

[22] 102 P.R. 1905.

[23] 119 P.R. 1908.

[24] 30 I.C. 491=16 P.R. 1916=178 P.L.R. 1915=118 P.W.R. 1915.

[25] 69 I.C. 502=3 Lah. 326=1922 Lah. 425.

[26] (1916) 35 I.C. 577=7 P.L.R. 1917; also see *Gulzari Mal* v. *Kishan Chand*, 132 P.R. 1907.

[27] 69 I.C. 502=3 Lah. 326=1922 Lah. 425.

[28] 108 I.C. 600=1928 Lah. 59.

**Calcutta.**

1383. In *Shaikh Aubar* v. *Sheikh Khan,*[35] Garth, C.J., held that Art. 64 prescribed a limitation of three years in suits upon account stated in writing; but it could not have been contemplated by an omission to include verbal statements of account, that Art. 120, Limitation Act should govern such cases giving a period of six years, which would be absurd. His view was **overruled** by a **Full Bench of the Calcutta High Court,** in *Dukhi Sahu* v. *Mahomed Bikhu,*[36] where it was held that the article only applies to cases where the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf. Mitter, J., in this Full Bench case, did not accept the view that a statement of account would be a substantive cause of action, suprseding and extinguishing the debts of which it is a statement. He was of opinion that if the account stated was not a new contract, it was only an evidence of an existing debt.[37] In *Kesho Prosad Singh* v. *Sarwan Lal,*[38] it was held that where accounts have been taken, and adjusted, and a specific sum has been found due from the agent to the principal, the principal becomes entitled to sue forthwith for recovery of that money. It was observed that

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[29] 33 Cal. 1047=33 I.A. 165 (P.C.).

[30] *Fateh Mahomed* v. *Ganga Singh,* 1929 Lah. 264=115 I.C. 853=10 Lah. 748; *Kahan Chand Daulat Ram* v. *Dayaram-Amritlal,* 115 I.C. 764=1929 Lah. 263=10 Lah. 745; *Milkhi Ram Hemraj* v. *Rupchand Lachmandas,* 1931 Lah. 233=131 I.C. 292=32 P.L.R. 65; *Dalip Singh* v. *Jowahir,* 1921 Lah. 421=116 I.C. 464; *Jesa Ram Diwan Chand* v. *Lachman Das,* 130 I.C. 570; *Barumal* v. *Daulat Ram,* 137 I.C. 155=33 P.L.R. 517 (2)=1932 Lah. 400.

[31] *Ganeshdas Govind Ram* v. *Harbhagwan,* 1932 Lah. 273=33 P.L.R. 213=138 I.C. 542.

[32] Dr. Pal's Limitation Act, p. 631.

[33] 1934 P.C. 147 (151)=150 I.C. 6=56 All. 376 (P.C.); Folld. in 1935 Lah. 877; also see *Siqueira* v. *Noronha,* 1934 P.C. 144=151 I.C. 90=67 M.L.J. 103=38 C.W.N. 813 (P.C.).

[34] *Ram* v. *Gaman Ram,* (1924) 82 I.C. 91=1923 Lah. 645.

[35] (1881) 7 Cal. 256; O.R. in 10 Cal. 284 (F.B.).

[36] (1884) 10 Cal. 284 (F.B.).

> "Art. 64 applies to a suit for money payable to the plaintiff as money found to be due from the defendant to the plaintiff on accounts settled between them. Such a suit has to be instituted within three years from the date when the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf. There is, however, an important exception to this rule, namely, in the case where the debt is, by a simultaneous agreement in writing signed by the defendant or his duly authorized agent, made payable at a future time, the period runs from the date when such time arrives".[39]

It was observed in this case that if it was held as has been done in some cases,[40] that the expression "account stated" applies only where there are reciprocal demands, though a more popular signification was accepted in *Dukhi Sahu* v. *Mahomed Bikhu*[41] and *Manjunatha Kamti* v. *Devamma,*[42] then according to this view Art. 115 was applicable.[43]

**Madras.**

**1384.** In *Hirada Karibasappah* v. *Godiji Mudappa,*[44] the Madras High Court observed that where there were no cross-demands which were adjusted between the parties, the arrangement was to be seen whether it involved any new consideration for the promise to pay the balance.

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37. *Dukhi Sahu* v. *Mahomed Bikhu,* (1884) 10 Cal. 284 (F.B.).

38. (1917) 40 I.C. 359=25 C.L.J. 335=21 C.W.N. 591; Reld. on *Nobin Chunder* v. *Suroop Chunder,* 6 W.R. 328; *Bisesshur Gir* v. *Sree Kishen,* 24 W.R. 840; *Umedchand Hukamchand* v. *Sha Bulakidas Lalchand,* 5 B.H.C.R.O.C.J. 16 and *Dukhi Sahu* v. *Mahomed Bikhu,* 10 Cal. 284=13 C.L.R. 445.

39. *Ibid.,* 40 I.C. 359=25 C.L.J. 335=21 C.W.N. 591.

40. *Laycock* v. *Pickles,* (1863) 4 B. & S. 497=33 L.J.Q.B. 43; *Nahani Bai* v. *Nathu Bhan,* 7 Bom. 414; *Tribhovan Gangaram* v. *Amina,* 9 Bom. 516; *Zulfikar* v. *Munna Lal,* 3 All. 148 (F.B.); *Amuthu* v. *Muthayya,* 16 Mad. 339; cf. *Jalim Singh* v. *Chooni Lal,* 11 I.C. 540=15 C.W.N. 882; also see and cf. *Madhowdas Ramdas* v. *Santramdas Dharmadas,* 1933 Sind 324 (Oral adjustment reduced to writing but not signed).

41. 10 Cal. 284=13 C.L.R. 445 (F.B.).

42. 26 Mad. 186.

43. *Kesho Prasad Singh* v. *Sarwan Lal,* 40 I.C. 359=25 C.L.J. 335 =21 C.W.N. 591; also see 1923 Cal. 578=76 I.C. 603 (Art. 115 applied).

44. 6 M.H.C. 197 (Scotland, C.J. and Innes, J.).

> "Now, where there are **cross-demands** and **on a settlement of accounts,** items agreed to on one side, are wiped out by an appropriation to their discharge of admitted items of claim on the other side, and thereupon a balance is struck and payment promised, the mutual agreement to set off *pro tanto* one set of items against the other constitutes a new consideration for the promise to pay the settled balance, and **both make a new contract**. For this, *Ashby* v. *James,*[44-a] is a direct authority. But, **where there is no cross-claim** to be set off, and no new agreement of appropriation, **a settlement of the balance due** on the examination of accounts is merely a settlement of an antecedent debt. The parties simply agree as to how much of the debt remains due. In such a case there is **plainly no new contract**."[45]

This view was followed in *Amuthu* v. *Muthayya,*[46] where an *oral* promise to pay the balance struck between principal and agent, was not held to amount to a new contract extinguishing the old cause of action. But, where the defendant in a suit had within three years of the date on which the plaint was filed, *signed* a *written* acknowledgment that a sum of money was due by himself and his partner to plaintiff, Art. 64 was held applicable although there were no reciprocal demands between plaintiff and defendants.[47]

**Bombay.**

1385. The **Bombay High Court** took the view in *Ramji* v. *Dharma,*[48] that the "Ruzu" or adjustment of an account can operate either as a revival of an original promise, or as evidence of a new contract. If it is to be used as an acknowledgment giving a fresh starting point for computing a new period of limitation it must be made in writing and signed before the expiration of the period of limitation prescribed. If it is to be used as evidence of a new contract furnishing a basis for a new cause of action, it must contain a promise in writing duly signed as required by the Contract Act, S. 25, cl. 3, a bare statement of an account not being such a promise. Also see *Mul Chand* v. *Girdhar,*[49] and *Chowksi Himut Lal* v. *Chowksi Acrut Lal*[50] and *Tribhowan* v. *Amina,*[1] which drew the distinction between an acknowledgment not implying a promise

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[44-a] 11 M. & W. 542.

[45] *Hirada Karibasappah* v. *Godiji Mudappa,* 6 M.H.C. 197; also see and cf. *Murugappa Chetty* v. *Vyapuri Chetty,* (1917) 38 I.C. 227=32 M.L.J. 536 (*Held,* that a mere striking of the balance not signed by the debtor, is not a settlement of account, and does not furnish a cause of action as on an account stated under Art. 64, Limitation Act).

[46] (1893) 16 Mad. 339=3 M.L.J. 169; Not Folld. in *Aiyasami Chetty* v. *Chinnia Nainar,* (1916) 34 I.C. 431=3 L.W. 338 (Mad.) (*Held,* that in cases of mutual dealings an oral settlement of accounts may give rise to a substantive cause of action).

[47] *Manju Natha* v. *Devamma,* (1902) 26 Mad. 186; Not Folld. *Ganga Prasad* v. *Ram Dayal,* 23 All. 502 and *Shanker* v. *Mukta,* 22 Bom. 513.

[48] (1882) 6 Bom. 683.

[49] 8 Bom. H. C. R. A. C. J. 6.

[50] 8 Bom. 194.

[1] 9 Bom. 516.

to pay, and a new contract affording a fresh cause of action. Similarly, in *Shankar* v. *Mukta,*[2] the account *ruzukhata* was held to be merely an acknowledgment of the debt, only evidencing an existing debt, not itself a fresh contract on which a suit may be brought. But, a later ruling of the Bombay High Court in *Chuni Lal Rattanchandra* v. *Laxman Govind Dube,*[3] allowed the acknowledgment then in question to form the basis of a suit on the ground that the Privy Council judgment in *Mani Ram Seth* v. *Seth Rupchand,*[4] virtually overruled *Shanker* v. *Mukta,*[5] by holding that an unconditional acknowledgment implies a promise to pay.

**Patna.**

**1386.** The **Patna High Court** took the view in *Bhatu Das* v. *Mt. Bibi,*[6] that the adjustment of the account together with the implied or express promise to pay the balance, cannot be regarded as the extinguishment of the original debt. The transaction is one of payment, and not the creation of a fresh contract. Therefore,

> "the plaintiff is undoubtedly entitled to maintain a suit on an account stated; and where he exercises that right, Art. 64 must apply".

But this article does not prohibit a suit on the original contract when an adjustment of account has taken place. In *Deoraj Tewari* v. *Indrasan,*[7] it was held that chittas having no reciprocal debits and credits but consisting only of one-sided debits taken by the defendants from the plaintiff cannot be said to be "account-stated" within Art. 64. Each of the items is a separate debt in itself, and each of them will be barred on different debts.

**Allahabad.**

**1387.** The **Allahabad High Court** held in *Thakurya* v. *Sheo Singh,*[8] that where accounts are not signed by the defendant, Art. 64 does not apply, and the suit must be regarded as one for money lent, in which case limitation for each item of debt shall be computed from its due date. Similarly, in the **Full Bench** case of *Zulfikar* v. *Munna Lal,*[9] where the suit was brought on an **unsigned statement of account,** Art. 64 was not applied, as under Act XV of 1877, a new condition had been attached to the suit that the statement of account should be in writing and signed by the defendant or his agent duly authorised in that behalf. This Full Bench ruling seems to limit the operation of Art. 64, only to statements of account which are evidence of a new contract; that is which would in themselves constitute a substantive cause of action, and which must be in writing signed by the defendant, etc. In *Jamun* v. *Nand Lal,*[10] following the Bombay view, it was held that the striking of a balance in an account, the items of which are all on one side does not amount to an "account stated" in the proper sense of the term. Another Division Bench has held in *Ganga Prasad* v. *Ram Diyal,*[11] that a mere acknowledgment signed by a debtor in the account-book of his creditor showing a balance standing against the debtor on an account, which is not a mutual account, is neither an account stated, to which Art. 64 of the Limitation Act applies, nor is it evidence of a new contract which can be the basis of a suit. The view taken in this case was that

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[2] (1898) 22 Bom. 513.

[3] 1922 Bom. 183=46 Bom. 24.

[4] (1906) 33 Cal. 1047=33 I.A. 165=4 C.L.J. 94 (P.C.).

[5] (1898) 22 Bom. 513; also see *Madhow Das* v. *Santram Das,* 1933 Sind 324 (*Held,* that Art. 64 is no bar to suit on an oral adjustment reduced to writing but not signed. Art. 115 or Art. 120 applicable).

[6] (1921) 63 I.C. 280 (Pat.); also see *Ram Bahadur Singh* v. *Damodar Pershad Singh,* 60 I.C. 514=6 P.L.J. 121 [Where a distinction was drawn between an acknowledgment of liability extending time under S. 19, Limitation Act, and a new contract giving a fresh cause of action under S. 25 (3) of the Contract Act].

[7] 1929 Pat. 258 (2)=120 I.C. 470=8 706; Relied on *Suraj Prasad* v. *Bourke,* (1920) 56 I.C. 379=5 P.L.J. 371 (*Held,* that no suit can be maintained upon a mere acknowledgment of debt and an "account-stated" is one where several cross items are set off one against the other and the balance is struck off in favour of one of the parties); cf. *Bishun Chand* v. *Girdharilal,* 1934 P.C. 147=61 I.A. 273=56 All. 376 (P.C.) per contra.

[8] (1880) 2 All. 872.

> "an **account stated in the true sense** is where several cross-claims are brought into account on either side, and are set-off against each other and a balance is struck. The consideration for the payment of the balance is the discharge on each side. Such an account stated certainly evidences a new contract on which a suit can be based".

This ruling notices the conflict of view. In *Ganesh* v. *Mallu Mal,*[12] is given the technical meaning of account-stated, as consisting of reciprocal demands on a bilateral contract. It was said that the signing of a balance after going into the accounts cannot amount to an "account-stated" where there are not sufficient materials on the record to show that the items for which credit was given to the defendant were due to the defendant from the plaintiff.[13] But compare the view taken by the Privy Council on appeal from *Girdhari Lal* v. *Bishun Chand,*[14] where the Allahabad view was reversed by their Lordships of the Privy Council.

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[9] (1880) 3 All. 148 (F.B.).

[10] (1892) 15 All. 1=12 A.W.N. (1892) 215; Following 7 Bom. 414.

[11] (1901) 23 All. 502; Followed 15 All. 1; and 22 Bom. 513; cf. *Nand Ram* v. *Ram Prasad,* 2 All. 641; *Thakurya* v. *Sheo Singh,* 2 All. 872; *Zulfikar* v. *Munnalal,* 3 All. 148 (F.B.); and *Sital Prasad* v. *Imam Baksh,* A.W.N. (1883), p. 47 (Where it was held that a mere acknowledgment of a balance struck in the plaintiff's books was an account stated); (The Allahabad case is followed by **Oudh Judicial Commissioner's Court in 52** I.C. 262).

[12] 1931 All. 375=131 I.C. 867.

[13] *Ibid.*

[14] (1932) 54 All. 506=140 I.C. 783=1932 All. 461=1932 A.L.J. 279.

**Privy Council.**

**1388.** In *Girdhari Lal* v. *Bishun Chand*,[15] the **Allahabad High Court** held that Art. 64 contemplates an account stated by one party and an account stated by the other party, that is two accounts, and not merely an account stated by a single party. In other words, there must be reciprocal demands.

This decision has been **reversed by the Privy Council.** Their Lordships have, in view of the conflict of views in India, considered the question as a matter of principle, referring to the decisions on the point in the English Courts.

A recent decision of the Board in the case of *Siqueira* v. *Noronha*,[16] was noticed in favour of the view that an account stated involves a promise to pay the balance for good consideration. And that there is a second kind of account-stated, where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance struck. Following the observation of Lord Blackburn in defining the "real account stated" in *Laycock* v. *Pickles*,[16-a] their Lordships of the Privy Council observe in *Bishun Chand* v. *Girdhari Lal*,[17] that

> "Indeed, the essence of an account stated is not the character of the items on one side or the other, but the fact that there are **cross items of account** and that **the parties** mutually agree that the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side *pro tanto*, go on to **agree that the balance only is payable**. Such a transaction is in truth bilateral, and creates a new debt and **a new cause of action.** There are mutual promises,......Hence, there is **mutual consideration to support** the promises on either side and to constitute **the new cause of action**. The account stated is accordingly binding, save that it may be re-opened on any ground—for instance, fraud or mistake which would justify setting aside any other agreement. In *Ashby* v. *Jones*,[17-a].........Baron Alderson thus summed up the position. "Here **the striking of a balance** between the parties **is evidence of an agreement** that the items of the defendant's account should be set-off against the earlier items of the plaintiffs, leaving the case unaffected either by the statute of limitations or the set-off."[18]

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[15] (1932) 54 All. 506=140 I.C. 783=1932 All. 461=1932 A.L.J. 279; also see *Sitaramasa* v. *Amirbax*, 106 I.C. 53=1928 Nag. 127 (Where the Nagpur Judicial Commissioner's Court took the same view).

[16] 1934 P.C. 144=151 I.C. 90=67 M.L.J. 103=38 C.W.N. 813 (P.C.); Relied on *Camilla Tank S. Co.* v. *Alexandria Engineering Works*, (1921) 38 T.L.R. 134.

[16-a] (1863) 33 L.J.Q.B. 43.

[17] 1934 P.C. 147=61 I.A. 273=56 All. 376=67 M.L.J. 110=150 I.C. 6=38 C.W.N. 961 (P.C.); Followed in *Sohanlal* v. *Arya Meghudhar Sabha*, 1935 Lah. 877.

[17-a] (1843) 11 M. and W. 542=12 L.J. Ex. 295.

[18] *Bishun Chand* v. *Girdharilal*, 1934 P.C. 147=61 I.A. 273=56 All. 376=67 M.L.J. 110=150 I.C. 6=38 C.W.N. 961 (P.C.); See *Foster* v. *Allanson*, 2 T.R. 479.

Their Lordships have explained, by illustrative cases, that

> "this rule does not depend on the character or the origin of the debts or credits on either side"......"Indeed, it follows from the idea of an account stated that **whatever the consideration** for each item, **every item must appear in terms of money,** since what is being agreed is matter of account; it is also clear that in that great class of cases, where the whole dealings between the parties are **financial,** the **items of account** can only be in terms of money and **can only consist of payments** of one to the other and *vice versa'*..........**Nor can it be material** as it seems, in determining whether' there can be an account stated, **whether the balance** of indebtedness **is throughout,** as it must be at the end, **in favour of one side.** Equally it seems irrelevant whether the debt in favour of the final creditor was created at the outset by one large payment or consisted of several sums of principal and several sums of interest; nor can it matter in this connexion, whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments made in respect of other dealings. In any event, items must in the same way be ascertained and agreed on each side before the balance can be struck and settled".[19]

The authorities referred to by their Lordships, show "that where an account has been settled, it is **immaterial that some of the items were statute barred".**[20] This has been followed by the **Lahore High Court** in *Sohanlal* v. *Arya M. U. Sabha.*[21]

Where certain items of plaintiff's claim are barred by the statute, and defendant has a cross claim and on going through the account a balance is struck in plaintiff's favour, this final account amounts to an agreement to set off the statute-barred items against the items due to the defendant, and a new consideration having arisen by virtue of the set-off and agreement as to the balance due, plaintiff can sue upon the account-stated though he could not have recovered the whole original debt.[22]

**1389. CONCLUSION.**—The expression account-stated is not defined in the Limitation Act. But, in English Law, there are two kinds of accounts-stated,[23] one is only the adjustment and adding up of several items of debts which may be acknowledged to be due in respect of the old debt. An acknowledgment of debt is effective as extending the period of limitation if made under conditions prescribed by S. 19 of the Limitation Act.[24] But an acknowledgment of debt also may imply a promise to pay, in which case, it can be made the basis of a suit as on a fresh cause of action.[25]

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[19] *Bishun Chand* v. *Girdhari Lal,* 1934 P.C. 147 (151)=150 I.C. 6=56 All. 376 (P.C.); see *Williamson* v. *Barbour,* (1878) 9 Ch.D. 529=50 L.J.Ch. 147=37 L.T. 698.

[20] *Ibid.,* 1934 P.C. 147 (152) (P.C.); Relied on *Ashby* v. *James,* (1843) 11 M. and W. 542=12 L.J.Ex. 295; also see *Suraj Prasad Pandey* v. *Boucke,* (1920) 56 I.C. 379=5 P.L.J. 371 (Statement of account need not be within the period of limitation for the recovery of several cross items); and *Sitaramsa* v. *Amirbax,* 106 I.C. 53=1928 Nag. 127 (Where the Nagpur Court has held that the adjusted balance of cross-demands on each side, whether barred or not, which represents the liability of the debtor for the future, is recoverable within 3 years from the statement of account although some of the earlier items in the account may have been already time-barred).

[21] 1935 Lah. 877; also see and cf. *Shamlal* v. *Gulabchand,* 1935 Nag. 221.

[22] *See* Halsbury, (Hailsham Edn.), Vol. 7, para. 411, p. 297.

[23] *Bishun Chand* v. *Girdhari Lal,* 1934 P.C. 147=61 I.A. 273=56

The other kind of account-stated, which is described as "a real account stated" in the leading English case of *Laycock* v. *Pickles*,[25-a] is constituted "when several items of claims are brought into account on either side, and being set against one another a balance is struck and the consideration for the payment of the balance is the discharge on each side". An adjustment of cross-demands operates as a payment of adjusted items on both sides, leaving a balance in favour of one party, for which there is a fresh consideration in the mutual agreement constituting a new contract.[26] There is nothing in Art. 64, to limit it to this latter kind of account-stated. Accordingly this article will apply to account-stated of either class, if it fulfils the condition of this article as regards the requirements of writing and signature.[27] An unsigned or oral statement is not within the operation of Art. 64,[28] but may be made the basis of a suit to which Art. 115, and not Art. 120 will be applicable.[29] Article 85 will apply to cases of mutual, open and current accounts as between banker and customer.[30] An oral statement of an account which is

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All. 376=150 I.C. 6 (P.C.); also see *Siqueira* v. *Noronha*, 1934 P.C. 144=151 I.C. 90=67 M.L.J. 103 (P.C.).

[24] *See* Comments under S. 19, Limitation Act.

[25] *Mani Ram Seth* v. *Seth Rupchand*, 33 Cal. 1047=33 I.A. 165 (P.C.); also see *Chunilal Rattanchandra* v. *Laxman Govind Dube*, 1922 Bom. 183=46 Bom. 24; *Kesho Prasad Singh* v. *Sarwanlal*, (1915) 40 I.C. 359=25 C.L.J. 335=21 C.W.N. 591; and *Barumal* v. *Daulat Ram*, 137 I.C. 155=1932 Lah. 400=33 P.L.R. 517 (2).

[25-a] 33 L.J.Q.B. 43.

[26] *Bishun Chand* v. *Girdhari Lal*, 1934 P.C. 147=61 I.A. 273=56 All. 376=150 I.C. 6 (P.C.).

[27] *Kesho Prosad Singh* v. *Sarwan Lal*, (1915) 40 I.C. 359=25 C.L.J. 335=21 C.W.N. 591; *Ganeshdas Govindram* v. *Harbhagwan*, 1932 Lah. 273=138 I.C. 542=33 P.L.R. 213; *Manjunatha* v. *Devamma*, (1902) 26 Mad. 186 (The Allahabad: Bombay: Oudh and Patna cases per contra are no longer authoritative).

[28] *Thakurya* v. *Sheo Singh*, (1880) 2 All. 872; and *Zulfikar* v. *Mannalal*, (1880) 3 All. 148 (F.B.); also see *Murugappa* v. *Vyapuri*, (1917) 38 I.C. 227 (Mad.).

[29] *Kesho Prosad Singh* v. *Sarwanlal*, (1915) 40 I.C. 359=25 C.L.J. 335=21 C.W.N. 591; *Aiyasami Chetti* v. *Chinnia*, (1916) 34 I.C. 431 (Mad.); also see *Ashby* v. *James*, 11 M. and W. 542; *Ishar Das* v. *Harkishen Das*, (1916) 35 I.C. 577=7 P.L.R. 1917; *Madhow Das* v. *Santram Das*, 1933 Sind 324.

[30] *See* notes under Art. 85, *post.*; *Laljee Sahoo* v. *Raghoonandan*, (1880) 6 Cal. 447; *Milkhi Ram Hemraj* v. *Rupchand Lachmandas*, 131 I.C. 292=32 P.L.R. 65.

not a mutual, open and current account, made after the amount due under the account has become barred by time, does not furnish the promisee with a fresh cause of action so as to enable him to bring a suit on the basis of the settlement.[31]

**1390. STARTING POINT OF LIMITATION.**—Article 64 applies to a suit for money payable to the plaintiff as money found to be due from the defendant to the plaintiff on accounts settled between them. Such a suit has to be instituted within three years from the date when the accounts are stated in writing, signed by the defendant or his agent duly authorised in this behalf. There is, however, an important exception to this rule, namely, in the case where the debt is, by a simultaneous agreement in writing signed by the defendant or his duly authorised agent, made payable at a future time, the period runs from the date when such time arrives.[32]

In *Farrington* v. *Lee*,[32-a] it was held that the period of limitation runs when the accounts are stated and balance struck. But if the balance becomes an item in a new account, that is, if after an account stated the balance appearing due on it to either of the parties is not paid but is afterwards thrown into a new account between the same parties, it passes out of the operation of the statute of limitation.[33]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 65. | For compensation for breach of a promise to do anything at a specified time or upon the happening of a specified contingency. | Three years. | When the time specified arrives, or the the contingency happens. |

**SYNOPSIS.**

1391. Corresponding provisions.
1392. **Scope and applicability.**
1393. Promise to do anything.
    (1) Right of option.
    (2) "On demand", as condition precedent.
1394. Specified date.
1395. "At a specified time."
1396. Specified contingency.
1397. Contingent securities.
1398. Principal and surety.
1399. Starting point of limitation.

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[31] *Asirvada Nadan* v. *Vedamuthu*, 86 I.C. 942 (Mad.).

[32] *Kesha Proshad Singh* v. *Sarwanlal*, (1915) 40 I.C. 359=25 C. L.J. 335=21 C.W.N. 591.

[32-a] (1677) 1 Madd. 270.

[33] B. B. Mitra's Limitation Act, p. 460.

## NOTES.

**1391. CORRESPONDING PROVISION.**—This article corresponds to Art. 63 of Act IX of 1871; and to Art. 65 of Act XV of 1877; and similar suits were dealt with in S. 1, cls. 9 and 10 of Act XIV of 1859.

In the corresponding Art. 63 of Act IX of 1871, reference was made to suits "upon a promise to do anything at a specified time or upon the happening of a specified contingency," and the period of three years was to commence running "at the time specified or upon the contingency happening". The alteration in language made since Act XV of 1877, has suits "for compensation for breach of promise" instead of suits "upon a promise," which was an inaccurate description of such suits.

**1392. SCOPE AND APPLICABILITY.**—This article is a general article applicable to suits for compensation for *breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.* Art. 115 of the Limitation Act is also a general article which is applicable to suits for compensation for breach of a contract, which would include breach of a promise of a type covered by Art. 65. The period of limitation under both the articles is the same. It has therefore been remarked that this article is a superfluity. However, this article is less general than Art. 115, and would apply more appropriately to the particular type of general breaches of promise dealt with under this article. Where the promise is not to *do anything* but to abstain from doing anything, or where no fixed time or event is specified for the performance of the contract, Art. 115, etc., will apply. Where the promise is recorded in a writing registered, the limitation would be extended by Art. 116 to six years.[34] The period of limitation by the combined operation of Art. 65, and Art. 116, would begin to run against a suit brought on a similar single unregistered document.[35] This article applies to suits for *compensation,* meaning damages, and not where the plaintiff is seeking to get back the money which he had deposited.[36] However, a suit for recovery of a specified sum of money agreed upon, with interest from the date of default when the money was to be paid, has been held to be a suit for compensation for breach of contract falling within Art. 65 or Art. 115.[37] When grain is advanced on a contract that it should be repaid in kind and the contract is broken, a suit to recover the cash value of the advance is governed either by Art. 65 or by Art. 115, Sch. I, Limitation Act.[38]

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[34] *Kishenlal* v. *Kinlock,* (1881) 3 All. 712=1 A.W.N. (1881) 67; *Naubat Singh* v. *Indar Singh,* (1890) 13 All. 200=11 A.W.N. (1891) 5.

[35] *Naubat Singh* v. *Indar Singh,* 13 All. 200=11 A. W. N. (1891) 5; also see *Bukandin* v. *Hassandin,* (1923) 72 I. C. 897=1923 Lah. 23 (Six years under combined operation of Art. 65 and 116, allowed. Where defendant received certain sum of money for consideration, and agreed to refund if consideration failed or became deficient).

[36] *Johuri Mahton* v. *Thakoor Nath,* (1880) 5 Cal. 830=6 C.L.R. 355 (Article 62 applied).

**Promise to do anything.**

1393. A debtor's **promise to pay,** when he shall have the means to do so, would be governed by this article: and the period prescribed would run from the time of the debtor being able to pay, although the plaintiff had made no demand and had no knowledge or notice of the ability or means of the defendant to pay.[39] Where *A,* as surety of *B,* promises that "if *B* does not pay eventually (*shesh parjanta*), I will," the article applicable is Art. 65, with limitation commencing to run when the creditor demands compensation from *A* on *B's* failure to pay after demand. The words *shesh parjanta* could not be held limited to the time specified in *B's* bond.[40]

**(*i*) Right of option.**

In the case of a clause in the mortgage-deed creating a right in the mortgagee to recover at his option, in case of default of the promise to pay interest regularly, both the principal and interest before the date fixed for payment of the principal, the mortgagee may or may not take advantage of the option. If the right is not waived, limitation would start from the date of the default. But, defendant is not bound to pay unless plaintiff exercises his option to demand the principal and interest before the due date in terms of the document.[41] The words used "You may recover whenever you require" are not equivalent to immediately or forthwith, but mean "we shall pay whenever you require".[42]

**(*ii*) "On demand" as condition precedent.**

In *Seetharama Ayyar* v. *Munisami Mudaliar,*[43] the **Madras High Court** has held that where the defendant promised to pay the subscriptions due to a chit fund in certain specified instalments, and there was a penal clause for the payment of the whole amount remaining due on failure to pay any instalment *on demand,* the expression "on demand" was not merely a technical one meaning that the money was payable at once, but that it was intended to be **a condition precedent** that a demand should be made if the whole amount was to be asked to be paid at once. Mercantile transactions are distinguished from other transactions: and, technical meaning is not adopted in ordinary cases.[44]

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[37] *Nistarini* v. *Chandi,* 12 C.L.J. 423.

[38] *Muhammad Din* v. *Sohan Singh,* (1922) 65 I.C. 691=1922 Lah. 271=4 L.L.J. 268; also see *Mengha Ram* v. *Hasen,* 49 I.C. 231=41 P.R. 1918; and *Lab Singh* v. *Rur Chand,* 1922 Lah. 122=4 L.L.J. 64.

[39] Darby and Bosanquet's Limitation Act, 2nd Edn., p. 26; Mitra's Limitation Act, Vol. II, p. 1239.

[40] *Bishumber* v. *Hungseshur,* (1879) 4 C.L.R. 34.

[41] *Ramadh Bibi Ammal* v. *Kandasami Pillai,* (1919) 51 I.C. 724 =1919 M.W.N. 82=25 M.L.T. 154=9 L.W. 479.

[42] *Ibid.*

[43] (1919) 50 I.C. 87=1919 M.W.N. 185=9 L.W. 42 (Diss.); *Perumal Ayyan* v. *Alagirisami,* 20 Mad. 245=7 M.L.J. 222; and *Periannna Goundan* v. *Muthuvira,* 21 Mad. 139=7 M.L.J. 315. ....

**Specified date.**

**1394.** Where a specified date is fixed for the performance of a promise, limitation starts from the date fixed, and there is no question of a demand. Where a bond payable by instalments provided that the whole amount due should be paid, in default of any instalment, "on demand without reference to future instalments," it was held that after all the instalments *had ceased to run* in a particular year, a suit brought more than six years later within three years of a demand made for payment was barred. The language of the bond applied to instalments still running, and when they had come to an end, there could be no question of exercising a right or option.[45] A similar view was taken in *Lachakkammal* v. *Sokkayya Naick,*[46] and in *Mackenzie* v. *Tiruvengadathan,*[47] where it was said with regard to a document containing a similar stipulation:

> "In effect it creates a case of election as each instalment becomes overdue, and after the last instalment becomes over-due there can be no election, for the obvious reason that there are no two obligations to elect between."

Where by the terms of a promissory note, the principal sum was repayable on 15 months' notice of payment on demand, and to pay interest half-yearly, *held,* that the intention was to insist on a demand at place named.[48]

**"At a specified time."**

**1395.** In the case of a promise to do anything at a future specified time, if the promisor commits an anticipatory breach by declaring beforehand that he will not do it, the promisee may sue as soon as he comes to know of the defendant's declared intention; but he may wait till the specified time arrives when really the cause of action arises.[49] Where an agreement, by a person to give another a share of certain property in consideration of the latter's assistance in recovering it, fixed no particular date for giving the share of the property, it was held that limitation for a suit for the recovery of the property would commence when the final order in the case was passed.[50] Art. 65 does not apply unless there is an agreement between the parties to pay the loss immediately on its being ascertained, and in the absence of any specified time or specified contingency, article does not apply. So a suit by a commission agent to recover loss on the transactions entertained on behalf of his constituents is governed by Art. 83, Limitation Act.[1]

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[44] *Surayya* v. *Tirumalanadhum,* 31 I.C. 335=18 M.L.T. 459; Relied upon *Nettakaruppa* v. *Kumarasami,* 22 Mad. 20=8 M.L.J. 167; *Karunakaran* v. *Krishna Menon,* 12 I.C. 57=36 Mad. 66; and *Kuttiassan* v. *Suppi,* 3 M.L.J. 199.

[45] *Kaliyappa Nadar* v. *Grigori Pillai,* (1919) 50 I.C. 916 (Mad.).

[46] 48 I.C. 191=1918 M.W.N. 586.

[47] 9 Mad. 271=3 Ind. Dec. (N.S.) 585.

[48] *The Secretary of State* v. *Radhika Prasad,* (1923) 74 I.C. 785=1923 Mad. 667=46 Mad. 259=44 M.L.J. 685.

[49] *Mansukhdas* v. *Rangayya,* 1 M.H.C.R. 162.

**Specified contingency.**

1396. The **Allahabad High Court** has held that where in a subsequent mortgage, there was a condition that the mortgagor would pay the amount under that mortgage along with that due under the earlier one, but as a matter of fact he redeemed the earlier mortgage without paying the amount due under the subsequent mortgage; the cause of action for the recovery of the sum due under the second mortgage accrued on the date when the first mortgage was redeemed and limitation began to run from that date, as under the language of the deed, both bonds were to be paid at the same time.[2] A similar view has been taken by the Oudh Judicial Commissioner's Court, that the cause of action for a simple money-decree on deed of further charge arises under Art. 65 from the time when the mortgage is redeemed.[3]

**Contingent securities.**

1397. A suit by a creditor against a surety, upon a letter of guarantee executed by the latter in respect of a debt payable on demand on a promissory note, is governed by Art. 115 and not by Art. 65 of the Limitation Act, and limitation begins to run from the date of the execution of the guarantee, notwithstanding a stipulation in the guarantee to the effect that the creditor may look for repayment to the surety if the principal debtor makes default in payment.[4] *"Repayment guaranteed by me"* endorsed on an 'on demand' promissory note is a contract of guarantee by the person signing the endorsement, whose liability as a surety arises under it from the date of the note, and no demand for re-payment is necessary to create such liability.[5] A pro-note payable with interest on demand is a present debt and becomes due and payable at once without demand so that limitation begins to run from its date, as the debor is considered to be in default from that very date.[6] A surety for a debtor becomes liable to the full extent of his obligation without being entitled to a notice as soon as the default of the principal debtor is complete, unless there is a special stipulation qualifying his obligation.[7] In this case, Art. 65 or 115 may apply.

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[50] *Shriram* v. *Babaji,* (1923) 71 I.C. 40=1923 Nag. 96.

[1] *Harakchand* v. *Sumatilal,* (1931) 33 Bom.L.R. 1200 (*See* notes under Art. 83, *post*).

[2] *Mahabir Prasad* v. *Durbijai Rai,* (1911) 9 I.C. 482=8 A.L.J. 233.

[3] *Brahmajit Singh* v. *Dwarka Singh,* 99 I.C. 466=1927 Oudh 53=3 O.W.N. 976; also see *Lal Behari* v. *Satgur Prasad,* (1917) 38 I.C. 480=3 O.L.J. 714; and *Ram Adhin* v. *Sitla Baksh,* 25 I.C. 905=17 O.C. 303.

[4] *Sreenath Roy* v. *Peary Mohan Mookerjee,* (1917) 39 I.C. 205=25 C.L.J. 91=21 C.W.N. 479 (In this case Art. 65 was applied by the trial Court, but the appellate Court found no contingency in such cases).

**Art. 65 or 115 and 116.**

The **Madras High Court** has taken the view in *Dwarka Doss* v. *Chivakala,*[8] that a surety becomes liable only on his **contract of guarantee** and not by the mere fact of the loan. His liability attaches to each loan as soon as it is made and he is liable to be proceeded against as soon as default is made by the principal debtor. Time runs against the surety from each date of default which is the date of each loan and Art. 65 of the Limitation Act applies to the suit.

**Principal and surety.**

**1398.** There is a conflict of view on the question whether a bar of suit by limitation against the principal debtor discharges the surety. The High Courts of Madras,[9] Bombay,[10] and Calcutta[11] hold that the surety is not discharged in such circumstances from his liability to the creditor, unless there is an express contract to contrary effect. The Nagpur Court[11-a] has taken the same view. The opposite view has been taken by the **Allahabad High Court,**[12] and it is followed in a **Patna** case,[13] and also in an unreported decision of the Judicial Commissioner, North-West Frontier Provinces. This view is also supported by a single Bench decision of the Lahore High Court,[14] in which the authorities for and against are not noticed; but it is opposed by a considered ruling of Tek Chand, J., in which the authorities are carefully reviewed.[15] The view taken by the learned Judge is that a creditor's omission to sue the principal within limitation is not an act or omission of the kind contemplated by S. 134 or 139, Contract Act, whereby the surety is discharged.

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[5] *Brojendro Kissore* v. *The Hindustan Co-operative Insurance Society, Ltd.,* (1917) 39 I.C. 705=25 C.L.J. 238=21 C.W.N. 482.

[6] *Ibid.,* 39 I.C. 705 (710, 713).

[7] *Ibid.*

[8] (1911) 9 I.C. 204=2 M.W.N. 41=9 M.L.T. 215=21 M.L.J. 457; cf. *Bishumber* v. *Hungsheshur,* 4 C.L.R. 34 (Where the contract was construed to be one, "to secure the plaintiff from loss, *viz.,* a contract of indemnity, and not one of guarantee").

[9] *Subramanian* v. *Gopala,* (1909) 33 Mad. 308=20 M.L.J. 633=7 I.C. 898; *Abraham* v. *Raphial,* (1914) 39 Mad. 288=27 M.L.J. 746.

[10] *Hajarimal* v. *Krishna Rao,* (1881) 5 Bom. 647; *Bankara* v. *Virupakshappa,* (1883) 7 Bom. 146; *Gopal* v. *Gopal,* (1903) 28 Bom. 248; *Raghavendra* v. *Mahipat,* (1924) 49 Bom. 202.

[11] *Kristo Kishen* v. *Radha Raman* (1885) 12 Cal. 330.

[11-a] *Narain Das* v. *Nenu,* 1929 Nag. 145=116 I.C. 421=25 N.L.R 74.

[12] *Ranjit Singh* v. *Naubat,* (1902) 24 All. 504; *Radha* v. *Kinlock,* (1889) 11 All. 310; *Salig Ram* v. *Lachman Das,* (1927) 50 All. 211=107 I.C. 42; *Jagmohan Singh* v. *Sat Ali,* 1930 A.L.J. 1034=1930 All. 380=122 I.C. 189.

[13] *Jwala Prasad* v. *Maharaja,* (1916) I P.L.J. 497=37 I.C. 184.

**1399. STARTING POINT OF LIMITATION.**—In a suit for recovery of damages for breach of contract, under Art. 65, the starting point would be the time specified for the performance of the promise, *re.* the date on which the breach occurred. Where the plaintiff entered into an agreement with the defendant to sell to him cotton seeds which were to be delivered between specified dates: but in the meantime the parties decided that the actual delivery of the cotton seeds would not take place and agreed to settle the amount due as damages, it was held that this settlement did not give the plaintiff a fresh cause of action, and the limitation for the suit began to run from the breach of the defendant which happened on the date originally fixed for the delivery of goods.[16] The cause of action for a simple money-decree on the basis of a deed of further charge arises under Art. 65 of the Limitation Act from the time when the mortgage is redeemed.[17] When in an agreement to give share of property in consideration of assistance in recovering it, no particular date was fixed for giving the share of the property, limitation for a suit for the recovery of the property was held to have commenced when the final order in the case was passed.[18] Where a person sells his share in a certain land to another and agrees to pay compensation to the latter if the land sold does not come to his share at the time of partition, the compensation would be payable if the final order of the Revenue Officer was passed allotting a less area than that sold by the vendors.[19]

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[14] *Nur Din* v. *Allah Ditta,* 1928 Lah. 246=106 I.C. 481=29 P.L.R. 68 (Zafar Ali, J.).

[15] *Dil Muhammad* v. *Sain Das,* 100 I.C. 922=1927 Lah. 396; Reld. on *Carter* v. *White,* (1884) 25 Ch. D. 666 (672); 51 L. J. Ch. 138=50 L.T. 670=32 W.R. 692.

[16] *Nandlal-Lajpatrai* v. *Ramjidas Dwarka Das,* (1927) 99 I.C. 591 =1927 Lah. 122.

[17] *Brahmajit Singh* v. *Dwarka Singh,* (1927) 99 I.C. 466=1927 Oudh 53=3 O.W.N. 976; also see *Lal Behari* v. *Satgur Prasad,* (1917) 38 I.C. 480=3 O.L.J. 714 (Limitation starts on the date when the mortgage was redeemed wholly or in part).

[18] *Shriram* v. *Babaji,* (1923) 71 I.C. 40=1923 Nag. 47.

[19] *Rukan Din* v. *Hassan Din,* (1923) 72 I.C. 897=1923 Lah. 23.

In the case of a **conditional debt,** time would run from the fulfilment of the condition.[20] In order to postpone the running of the statute upon a **claim payable upon a contingency,** the contingency must be such as postpones or suspends the right of action, or the statute will run from date of contract.[21] Time will not commence to run in case of a contingent promise until the event has happened on which the contingency depends.[22] In the case of a **specified time,** limitation runs from the specified time, and not from any prior anticipated breach of the contract.[23]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 66. | On a single bond where a day is specified for payment. | Three years. | The day so specified. |

### SYNOPSIS.

1400. Corresponding provisions.
1401. Bond—Defined.
1402. Single-bond.
1403. Specified day.
1404. Scope and application.

### NOTES.

**1400. CORRESPONDING PROVISIONS.**—This article corresponds to Art. 65 of Act IX of 1871; and to Art. 66 of the previous Act XV of 1877. A similar provision was found in Sec. 1, Cl. (10) of Act XIV of 1859.

**1401. BOND: DEFINED.**—A bond is defined in S. 2 (3) of the Limitation Act, as "*including* any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be". This definition is not exhaustive. The definition of bond, under the Stamp Act, is more extensive than the definition of "bond" in the Limitation Act, inasmuch as the former includes expressly, in Cl. (*b*), the ordinary *"khata"*, and *"tamasuk"*; and also in Cl. (*c*), instruments securing the re-payment of a loan in kind. But, it has been pointed out by the **Lahore High Court,** in *Wadhawamal* v. *Karim Bux,*[24]

> "that the definition of the term 'bond', even in the present Stamp Act, is not exhaustive, and that the term in the course of years has been extended so as to include instruments which would not have fallen under the earlier definition".

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[20] Macpherson, Civil Procedure Code, p. 190; Rustomji's Limitation Act, p. 441.

[21] Wood's Limitation, 4th Edn., p. 634; Rustomji's Limitation Act, p. 442.

[22] *Ibid.*, p. 629; Rustomji's Limitation Act, p. 442.

[23] 1 M.H.C. 162; also see (1912) 9 A.L.J. 8 (Jour.).

[24] (1925) 6 Lah. 276=86 I.C. 844.

And, in *Nandlal* v. *Karm Chand Shamirmal,*[25] Scott-Smith, J., has adopted the definition of "bond", as given in Donogh's Stamp Law, which is to the following effect:

> "A bond is an instrument under his seal, whereby one person becomes bound to another for the payment of a sum of money or for the performance of any other act or thing."

This is the ordinary sense of bond in **English Law.**

*A* bond is a deed wherein a party acknowledges himself to be bound or indebted to another in a certain sum of money.[26] **Wharton** defines it as "an instrument by which one person binds himself to pay a debt." **Entries in a Bahi account,** containing *Baki Khare,*[27] or *Baki Lena,*[28] etc., terms implying a promise to pay the amount due, or though not containing an express promise to pay the principal, but making mention of interest being payable at the *shahukara* rate, which may be taken to imply a promise to pay the principal have been held to be bonds.[29] A suit for recovery of money due on a book entry containing a promise to pay at a certain rate of interest and attested by witnesses has been held to be governed by Art. 67 of Sch. I to the Limitation Act.[30]

1402. **SINGLE BOND.**—"A bond merely for the payment of a certain sum of money, without any condition in or annexed to it, is called a simple or single bond.[31] Such instruments are rarely, if ever, met with at the present day, and the term *"single bond"* is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more".[32] Whereas a "double" or "conditional bond" is a form of bond accompanied by a condition in the nature of a defeasance providing that on due performance of the condition the bond shall be void.[33] No particular form of words is necessary to create a bond. The obligor must be bound in a certain sum of money,[34] but, if this requisite is satisfied, any mode of expression by which the intention of the parties is made clear will suffice.[35] A single bond is a bill or written engagement for the payment of money, without a penalty.[36] The expression "single bond" in Arts. 66 and 67 is to be contrasted with a "bond subject to a condition" (Art. 68).[37] A single bond means a simple bond, without alternative conditions, or penalty attached—an absolute engagement in writing for the payment of money.[38] The expression "single bond" is opposed to a double bond or a bond with condition annexed in English Law, but possibly it is used in Arts. 66 and 67, in a wider sense as including any instrument whereby a person obliges himself to pay money to another, absolutely or unconditionally.[39] There are no alternative conditions in a single bond.[40]

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[25] (1920) 2 L.L.J. 224 (Per Scott-Smith, J.).

[26] Leake on Contracts, 7th Edn., p. 100.

[27] *Narain Das* v. *Miran Baksh,* (1924) 84 I.C. 524=1925 Lah. 75 =5 Lah. 406=6 L.L.J. 595.

[28] *Daula* v. *Gonda,* 35 P.R. 1903=101 P.L.R. 1903 (F.B.).

[29] (1924) 84 I.C. 524=1925 Lah. 75=5 Lah. 406; also see *Ladhu Shah* v. *Fazal Dad,* 72 P.R. 1879 and *Bhola Ram* v. *Nanak Chand,* 8 I.C. 575=135 P.W.R. 1910.

[30] *Hari Singh* v. *Fazal,* (1920) 56 I.C. 117 (Lah.).

[31] Halsbury's Laws of England, Vol. 3, p. 80, citing 2 Bl. Comm. 340; *Morrant* v. *Gough,* (1827) 7 B. & C. 206; see *Hori Lal* v. *Thaman Lal,* (1922) 70 I.C. 85 (Oudh).

[32] Halsbury's Laws of England Vol. 3, p. 80; see *Hori Lal* v. *Thaman Lal,* (1922) 70 I.C. 85 (Oudh).

[33] *Ibid.*

[34] *Ibid.,* p. 81, citing *Loggins* v. *Titherton,* (1613) Jelv. 225.

[35] *Ibid.,* p. 81, citing Shep. Touch. 368.

A Full Bench of the **Allahabad High Court,**[41] has explained that the expression "single bond" used in Art. 66 is clearly borrowed from the English Law, and is distinguished by Lord Halsbury, from double or conditional bonds. This was also the view taken by Chamier, J., in the Oudh case of *Har Narain* v. *Beni Prasad,*[42] where it was held that

> "a single bond is a deed wherein a party acknowledges himself to be bound or indebted to another in a certain sum of money which he promises to pay. If there is appended to it a condition that upon the performance of a certain act the bond is to be void, otherwise to remain in force, it is called a bond with a condition."

According to a definition given in Brown's Law Dictionary,

> "a bond is called single when there is no condition added to it".[43]

*Illustrations.*

(1) An ordinary simple bond or tamasuk is a single bond under this article: so also is a promissory note as defined in S. 2, Limitation Act. Negotiable instruments are, however, provided for in Arts. 69, 72, 73, 80, etc.

(2) Where money was deposited with the defendant for the purpose of advances for costs of suit and household expenses of the depositor and the balance was to be repaid with interest on the disposal of the suit, it was held that the transaction might be treated as a loan repayable at a fixed date, that it was governed probably by Art. 66 and if not, by Art. 115, of the Limitation Act.[44]

(3) Art. 66 is not however applicable to a suit to enforce the money obligation contained in a bond, giving the creditor, on default, the right of treating the transaction as a conditional sale of certain properties.[45]

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[36] *Lachman Singh* v. *Kesri,* (1881) 4 All. 3=1 A.W.N. (1881) 93; Folld. in *Balakrishnudu* v. *Narayanasawmy,* (1914) 22 I.C. 60 (Mad.).

[37] *Gurditta Mal* v. *Pal Singh,* 26 P.R. 1892.

[38] *Ibid.*

[39] *Sundar Singh* v. *Bur Singh,* 138 P.R. 1890.

[40] Thompson, cited in Mitra, 2nd Vol., p. 1241.

[41] 45 All. 27=69 I.C. 981=1923 All. 1 (F.B.).

[42] **8 Oudh Cas. 77; Reld. on 2 All. 322 (331).**

[43] Pal's Limitation Act, p. 635.

[44] *Balakrishnudu* v. *Narayanaswamy,* 22 I.C. 60=1914 M.W.N. 264 (Per White, C.J. and Oldfield, J.) on appeal from *Balakrishna* v. *Narayanaswamy,* 24 I.C. 852=37 M. 175 (Per Wallis, J.).

[45] *Lachman Singh* v. *Kesri,* (1881) 4 All. 3=1 A.W.N. (1881) 93.

(4) Where the bond in suit provided a specified period of twelve years for payment, but it contained a condition that in case of non-payment from year to year the creditor would either add the interest to the principal and charge interest thereon or sue for the whole money and realise the amount as indicated; and, it further provided that in case the money was not paid within the stipulated period, compound interest would continue to run till realization, it was held that the bond could not be regarded as a single bond, the time for suing on which runs only from the day specified.[46]

(5) A suit to recover a sum of money from a principal debtor, and his surety, based on a single bond executed by both of them, with a day specified for payment, is governed by Art. 66, both with regard to the principal and the surety, where the latter's liability, if any, is immediately on the bond, and not upon any separate contract of guarantee.[47]

(6) A bond, which stipulates for the repayment, within three years of the principal, and every half year, of the interest thereon, and of the premia of certain policies of insurance made over to the creditor as collateral security for the debt, is not a single-bond within the meaning of Arts. 67 and 68 of the Schedule to Limitation Act if there is a liability for immediate demand of the entire amount due before the expiration of the term of the bond on the occasion of default of payment.[48]

(7) Similarly, in the case of a money-bond where interest is payable from year to year and the whole amount of principal with interest is payable within a period specified, with liberty to the lender to demand repayment of the entire sum due on the happening of default in payment of interest for any two consecutive years, and the bond becomes enforceable only on his exercising the option to recall entire money on default, Art. 80, Limitation Act, applies.[49]

**1403. SPECIFIED DAY.**—Article 66 does not apply to a deed where no day of payment is specified in the bond. However, where the debt is to be paid **within a stated period,** say within three years, from the date of the bond, any one is entitled to tender payment of the debt within the time fixed for its re-payment.[50] Accordingly, where the defendant executed a bond, which provided that interest should be payable monthly, and that the principal should become due within six months from the date of execution; the bond providing for the option of plaintiff to realise his principal and interest without waiting for the expiry of the period named, it was held that a suit on the bond brought within three years from the date of the day specified therein for payment, fell under Art. 65, Sch. II, Act IX of 1871 (Art. 66, Present Act).[1] Where a mortgage-deed stipulated that the mortgagor would pay the debt, with interest, *within ten years,* and redeem the mortgaged property, it was held that the use of "within" was not a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than ten years.[2] There has been some difference of opinion as to whether under a provision of this kind a mortgagor is entitled to redeem before the end of the period. The **Bombay** view is supported by the **Allahabad** decision in *Khanam* v. *Hussain Khan.*[3] But contrary view has been taken in **Madras,**[4] and **Calcutta.**[5] However, the Privy Council decision on appeal from the Allahabad case, favours the conclusion of the Allahabad High Court.[6] Where in a subsequent mortgage there was a condition that the mortgagor would pay the amount under that mortgage along with that due under the earlier one, this was held to mean that both bonds were to be paid at the same time, therefore, the breach of the second bond occurred when the earlier mortgage was redeemed without satisfying this bond.[7] The **Lahore High Court** has held in a similar case that the condition regarding the time for redemption did not amount to specifying a day within the meaning of Art. 66 of the Limitation Act; and the starting point of limitation was the date of the second mortgage.[8] Where a bond indicated that the debtor was to be allowed seven years for the re-payment of the loan and that if the debt remained unsatisfied at the end of that period, the creditor might sue to recover damages for breach of contract, it was held that the liabilities were intended to be adjusted on the expiry of the term.[9] An agreement to pay on demand, or, some time after demand, or within a certain time, or in certain contingencies is not an agreement to pay on a specified date.[10]

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[46] *Shib Dayal* v. *Meharban,* (1922) 45 All. 27=1923 All. 1=69 I.C. 981 (987) (F.B.).

[47] *Nihal Chand* v. *Khuda Bux,* (1923) 76 I.C. 150=1924 Lah. 534.

[48] *Ball* v. *Stowell,* (1879) 2 All. 322=4 Ind. Jur. 461 (Art. 80 applied).

[49] *Hori Lal* v. *Thamman Lal,* (1922) 70 I.C. 85 (86)=1923 Oudh 19=26 O.C. 121.

[50] *Ball* v. *Stowell,* (1879) 2 All. 322 (331).

[1] *Narain* v. *Gouri,* (1879) 5 Cal. 21=4 Ind. Jur. 407; cf. *Gauri* v. *Surju,* 3 All. 276 (Where the bond stipulated for payment *within two years* or on certain contingencies, it was held that this article had no application,

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as no particular day had been specified for payment); also see *Gaya Prasad* v. *Sher Ali,* 39 I.C. 574=15 A.L.J. 313 (Art. 66 applied) and *Sham Lal* v. *Tohariya,* 58 I.C. 278=18 A.L.J. 476; Folld. 39 I.C. 574=15 A.L.J. 313.

[2] *Vadju* v. *Vadju,* (1880) 5 Bom. 22.

[3] 29 All. 471=A.W.N. (1907) 133=4 A.L.J. 375; s.c. on appeal 23 I.C. 355=12 A.L.J. 473=36 All. 195 (P.C.).

[4] *Rose Ammal* v. *Rajarathnam,* 23 Mad. 33; *Chinnasami Reddiar* v. *Krishna Reddy,* 16 M.L.J. 146; *Chandu* v. *Koaja,* 30 I.C. 370 (Mad.).

[5] *Purna Chandra* v. *Peary Mohan,* 39 Cal. 828=15 I.C. 287=17 C.W.N. 149; also see *Jamir Howladar* v. *Arabjan Bibi,* (1922) 65 I.C. 273 (Cal.).

[6] 23 I.C. 355=12 A.L.J. 473=36 All. 195 (P.C.) (It was, however, unnecessary to decide the point); cf. *Chandu* v. *Kvaja,* 30 I.C. 370 (Mad.).

[7] *Mahabir Prasad* v. *Durbijai Rai,* (1911) 9 I.C. 482 (All.).

[8] *Bhaiwan Sahai* v. *Bhuria,* 1933 Lah. 84=140 I.C. 855.

[9] *Ram Narain* v. *Ojindra Nath,* 15 C.L.J. 17=13 I.C. 440 (Cal.).

[10] *Gouri* v. *Surja,* 3 All. 276; *Raja Ram* v. *Odindra Nath,* (1911) 17 C.W.N. 369; *Hori Lal* v. *Thaman Lal,* 1923 Oudh 19.

**1404. SCOPE AND APPLICATION.**—It has been noticed in S. 1402, *ante,* that the expression "single bond" is borrowed from English Law, and must be taken to mean a document whereby one obligor, or two or more obligors, give an undertaking to repay a certain sum of money without any condition in or annexed to it.[11]

A bond containing a stipulation "that if the principal is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money together with interest fixed by instituting a suit from my moveable and immoveable property" does not create a mortgage upon any property of the obligor, and to such a bond, the Allahabad High Court held Art. 66 applicable; read with **Art. 116,** where the instrument was registered, and the suit was to recover money on the failure of the defendant to pay the bond debt.[12]

A suit on the basis of a *personal covenant* contained in a mortgage-deed, where the mortgagor made himself responsible for any deficiency in the realization of the mortgage-debt out of the mortgaged properties has been held to be governed by the three years' rule under Art. 66, and not by 12 years' rule under Art. 132.[13] If the mortgage-deed was a registered document, Art. 116 would give the period of six years for a suit on basis of the *personal* covenant as the cause of action. The High Courts in India seem to be agreed in holding this view. This has been so held by the Calcutta High Court in *Miller* v. *Runga,*[14] which has been approved of by the Privy Council in *Ganesh Lal* v. *Khetra Mohan.*[15] Also see *Rahmat Karim* v. *Abdul Karim*[16]; *Ram Narain Singh* v. *Odindranath*[17]; and *Umapada* v. *Haripada.*[18]

The **Madras High Court** has held this point in several cases,[19] and it is now concluded by a Full Bench decision in *Ratnasabapathy*

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[11] *Nihal Chand* v. *Khuda Baksh,* 76 I.C. 150=1924 Lah. 534; *Lachman* v. *Kesari,* 4 All. 3; *Gurditta Mal* v. *Pal Singh,* 26 P.R. 1892; *Hori Lal* v. *Thaman,* 1923 Oudh 19=70 I.C. 85=26 Oudh Cas. 121; *Shib Dayal* v. *Meharban,* (1922) 45 All. 27=1923 All. 1=69 I.C. 981 (F.B.).

[12] *The Collector of Etawah* v. *Beti Maharani,* (1892) 14 All. 162=12 A.W.N. (1892) 27.

[13] *Ganesh Lal* v. *Khetra Mohan,* 1926 P.C. 56=5 Pat. 585=95 I.C. 839 (P.C.) (Not clear whether the document was registered: their Lordships had not to consider whether three years' or six years' rule applied).

[14] 12 Cal. 389.

[15] 95 I.C. 839=53 I.A. 131=1926 P.C. 56=5 Pat. 585=31 C.W.N. 25 (P.C.).

[16] 34 Cal. 672=6 C.L.J. 119=11 C.W.N. 674.

[17] 13 I.C. 440=17 C.W.N. 369=15 C.L.J. 17.

[18] 53 C.L.J. 520=35 C.W.N. 1030.

[19] *Rathnasami* v. *Subramanya,* 11 Mad. 56; *Unichaman* v. *Ahmad Kutti,* 21 Mad. 242=8 M.L.J. 81; *Thiruvendipuram* v. *Veeraraghava,* (1929) 114 I.C. 340=1928 Mad. 1124=55 M.L.J. 506.

v. *Devasigamany*.[20] This has explained the Privy Council decision in *Ganesh Lal* v. *Khetra Mohan*,[21] where three years' rule is mentioned. The observations in this case were supported by referring to and approving of *Millar* v. *Runga*,[22] where the six years' rule was applied. The words "3 or 6 years as the case may be" in *Ram Din* v. *Kalka Prasad*,[23] obviously refer to unregistered and registered mortgages. The decision in *Kameshar Pershad's case*[24] expressly states the six years' rule is applicable to registered documents. The **Allahabad** decisions are to the same effect[25]; and the **Bombay High Court** has taken a like view in *Dinkar Hari* v. *Chhaganlal*.[26] The recent Patna case in *Bala Bux* v. *Nath Mull*,[27] also has applied Art. 116, and not Art. 66 or 67, to a claim based on the personal covenant to recover the balance due to the mortgagee after the sale of the mortgaged property.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 67. | On a single bond, where no such day is specified. | Three years. | The date of executing the bond. |

## SYNOPSIS.

1405. Corresponding provision.
1406. Scope and application.
1407. Starting point.

## NOTES.

**1405. CORRESPONDING PROVISIONS.**—This article is same as Art. 67 of Act XV of 1877; and corresponds to Art. 66 of Act IX of 1871.

**1406. SCOPE AND APPLICATION.**—(1) Article 67 of the Limitation Act has to be read with Art. 66 and both these articles apply to unregistered bonds.[28]

**Bonds payable upon a contingency.**

(2) Neither Art. 66, nor Art. 67, can properly be applied to a bond which, though it does not specify a particular day for payment, yet in effect lays down that the money due on the bond is payable on a future date upon a certain contingency happening.[29]

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[20] (1929) 116 I.C. 817=1929 Mad. 53=52 Mad. 105=56 M.L.J. 10 (F.B.).

[21] (1926) 53 I.A. 134=51 M.L.J. 82=5 Pat. 585 (P.C.).

[22] 12 Cal. 389, *supra*.

[23] (1884) 7 All. 502=12 I.A. 12 (P.C.).

[24] 20 Cal. 79=19 I.A. 234 (P.C.).

[25] *Naubat Singh* v. *Indar*, 13 All. 200; *Jangi Singh* v. *Chander Mal*, 30 All. 388; *Lachhmi Narain* v. *Turab*, 14 I.C. 505=34 All. 246.

[26] 38 Bom. 177=23 I.C. 363=16 Bom. L. R. 20.

[27] 13 Pat. 228=1934 Pat. 578.

[28] *Kirpa Ram* v. *Churn*, (1916) 32 I.C. 575=30 P.W.R. 1916.

[29] *Ibid*.

**Bond payable on demand.**

(3) Under the Limitation Act of 1871, the period of limitation for a suit on a bond payable on demand was computable from the date of the demand. But, under the Acts of 1877 and 1908, it is made computable from the **date of the bond.** In other words the later Acts have shortened the period of limitation for such a suit.[30] A bond payable on demand does not specify the date of payment, and falls under Art. 67, and not Art. 66.[31] The limitation period of 6 years mentioned in Art. 116, Limitation Act, is applicable to suits for money on registered money-bonds payable on demand.[32]

**Day not specified.**

(4) A bond provided "we will pay when we redeem the mortgage"; it was held that Art. 67 and not Art. 66, applied.[33] Where a document of further charge stipulated that the mortgagors would pay the money when they redeemed the original mortgage, it was held that the document did not amount to specifying a date for payment.[34] Art. 67 is not applicable where a surety promises to pay a sum of money on the disposal of a pending appeal.[35] Where a bond provided that the money due upon it would be paid at the time of payment of a certain sum of money due on two mortgage-deeds executed previously, it was held that since the money due on the bond could not be demanded by the plaintiff before the money due on the mortgage-deeds was paid to him, the starting point was the date of such payment and that Art. 80 of Sch. I of the Limitation Act governed the case.[36]

1407. **STARTING POINT OF LIMITATION.**—Under Art. 67, time runs from the date of *executing* the bond. Where the defendant executed a mortgage in favour of the plaintiff on 18th November, 1907, and one of the terms was that the money was to be paid at the time of registration; the deed was registered three days later and the money was paid on that date; it was held that the claim for a simple money-decree instituted on 21st November, 1913, *i.e.*, within six years of date of registration, but more than six years from date of execution was time-barred.[37] A suit to enforce the personal liability of the mortgagors, under a registered bond was held governed by Art. 67, cause of action starting from the date of execution.[38] A suit based on the entries of the balance struck by the defendant in the plaintiff's books which made mention of the interest being payable at the *shahukara* rate implied a promise to pay, and was governed by Art. 67, Limitation Act. The suit was within time where it was brought within six years of the date of the entries, by the operation of the Punjab Loans Limitation Act.[39]

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[30] *Rup Kishore* v. *Mohini,* (1881) 3 All. 415=5 Ind. Jur. 603.

[31] *Ibid.*

[32] *Husain Ali Khan* v. *Hafiz Ali Khan,* (1881) 3 All. 600=1 A.W.N. (1881) 33; also see *Bansidhar* v. *Harsa Bai,* (1880) 3 All. 340.

[33] *Bahadur Lal* v. *Gaman,* 139 P.R. 1889.

[34] *Ibid.*

[35] *Surendra* v. *Nabin,* (1897) 1 C.W.N. 223.

[36] *Kirpa Ram* v. *Churn,* (1916) 32 I.C. 575=30 P.W.R 1916.

[37] *Mohan Lal* v. *Lekhraj Singh,* (1916) 33 I.C. 111 (All.); cf. *Kirpa Ram* v. *Churn,* (1916) 32 I.C. 575=30 P.W.R. 1916.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run: |
|---|---|---|---|
| 68. | On a bond subject to a condition. | Three years. | When the condition is broken. |

## SYNOPSIS.

1408. Corresponding provision.
1409. Scope and application:
    (1) Double or conditional bond, explained.
    (2) Agreement with a penal clause.
    (3) Difference between a bond and a covenant.
1410. *Illustrative cases.*
1411. Administration bonds.

## NOTES.

1408. **CORRESPONDING PROVISIONS.**—This article corresponds to Art. 67 of Act IX of 1871; and is the same as Art. 68 of Act XV of 1877.

**(i) Double or conditional bond, explained.**

1409. **SCOPE AND APPLICATION.**—This article is to be distinguished from Art. 66, dealing with single bond. Under English Law, there is a marked difference between a single or unconditional, and double or conditional bond. Halsbury, Vol. 3, p. 80, explains the "**double or conditional bond**" thus:—

> "The ordinary form of bond now in use is one accompanied by a condition in the nature of a defeasance, **the performance of the condition generally being secured by a penalty.** This form of bond is called a double or conditional bond, and **consists of two parts: first, the obligation, and secondly, the condition. The condition,** which may be contained in the same or another instrument or may be endorsed on the back, **specifies the real agreement** between the parties—that is to say, the money to be paid or acts or duties to be performed or observed, the payment, performance, or observance of which is intended to be secured by the bond—and provides that on due performance of the condition the bond shall be void. **The obligation,** as in the case of a single bond, **simply binds the obligor to** the payment of a certain sum of money, such sum of money being usually, though not necessarily, a penalty, and does not in terms refer to the condition. **On breach of the condition the bond is said to become for-**

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[38] *Ghulam Murtaza Khan* v. *Fazal Ilahi,* 1927 Lah. 101=27 P.L.R. 801.

[39] *Narain Das* v. *Miran Baksh,* (1924) 84 I.C. 524=5 Lah. 406= 1925 Lah. 75.

feited or **absolute,** though it does not follow that the obligee is entitled to recover the sum mentioned in the obligation."

"A conditional bond sometimes contains explanatory **recitals.** When it does so, the recitals follow the **obligation,** and precede the **condition".**

**(ii) Agreement with a penal clause.**

The **Allahabad High Court,** in the **Full Bench** case of a reference by Board of Revenue, under Stamp Act I of 1879, held that **an agreement with a penal clause,** by which the obligor undertakes, in the event of his failing to fulfil the conditions of the agreement, to pay a certain amount as penalty to the obligee is chargeable with the stamp duty leviable on a bond for the amount of such penalty. Stuart, C.J., *dissenting* held that for the purposes of the Stamp Act, the penal clause in the agreement **cannot be considered separately, as constituting a bond,** but simply as one of the several subsidiary clauses making up the whole agreement, and the document is only chargeable as an agreement. The majority of the Full Bench held

> "that the words in the definition of bond in the Stamp Act 'on condition that the obligation shall be void if a specified act is performed, or not performed, as the case may be,' refer to the obligor, and it is the obligor and not the obligee on whom the performance or non-performance of the specified act is incumbent."[40]

The **Calcutta High Court,** has held in *Gisborne* v. *Subal Bowrie,*[41] that an instrument containing a covenant to do a particular act the breach of which is to be compensated in damages, is not a bond, and requires to be stamped only as an agreement. Garth, C.J., was of opinion that the definition of a bond in the Stamp Act is precisely what is understood by a bond in England, and it is an obligation of a different character from a covenant to do a particular act, the breach of which must be compensated in damages.

**(iii) Difference between bond and covenant.**

> "Whether a penal clause is attached to such a covenant or not, the remedy for the breach of it is in form and substance a suit for damages. The remedy upon a bond is different. The plaintiff in the case of a simple money-bond recovers the sum named in the bond, or in the case of a bond conditioned for the performance of covenants, he recovers the actual damage which he can prove that he has sustained. In either case not only is the bond a contract of a different form and nature from a covenant with a penal clause, but the remedy upon it, and the amount recoverable for the breach of it, is also different."[42]

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[40] (1880) 2 All. 654=5 Ind. Jur. 264 (F.B.).

[41] (1881) 8 Cal. 284=10 C.L.R. 219.

[42] *Ibid.,* 8 Cal. 284 (286) [Diss. from the majority decision in 2 All. 654 (F.B.); Referred in In the matter of *Gajraj Singh,* (1887) 9 All. 585=7 A.W.N. (1887) 190 (F.B.); Doubting 2 All. 654 (F.B.)]; also see *Yeo Eng Pwa* v. *Chetty Firm,* 5 L.B.R. 162=4 I.C. 293.

The Calcutta view has been relied on in a later Allahabad Full Bench decision, in In re *Gajraj Singh,*[43] which has been relied upon by the L. B. Chief Court, in *Yeo Eng Pwa* v. *Chetty Firm,*[44] and by the Nagpur Judicial Commissioner's Court in the case of *Collector of Nimar* v. *Lakhimchansa.*[45] The conclusion reached was

"that in estimating the stamp duty payable on an instrument, the Court must look to the **primary contract** and not take into account the stipulation which it may contain for payment of any damage in case of a default, as such a stipulation is by way of penalty in case of breach of the original covenant. A covenant in an agreement to do a particular act, and to compensate its breach in damages, does not convert it into a bond".[46]

## 1410. ILLUSTRATIVE CASES—

(1) Where a **security bond** provided that defendant would pay Rs. .... if upon dismissal of an insolvency petition he failed to produce the judgment-debtor when required by the Court, time runs, it seems, from failure to produce, *i.e.,* when the condition is broken.[47]

(2) Article 68 may apply to a **suit to recover a penalty** due under a contract.[48]

(3) There is some conflict of view on the question, but the prevailing view is that Art. 68 applies to the case of **administration bond.** *See* separate note in S. 1411.[49]

(4) **A bond executed by a guardian** under provisions of S. 34 of the Guardian and Wards Act, in the form prescribed by Civil Rules of Practice, would be governed by Art. 68 of the Limitation Act, unless the bond charges immoveable property, when that article may be inapplicable.[50]

(5) A suit to recover **penalty imposed under S. 165 of the Madras** Local Boards **Act (V of 1884),** is covered by this article.[1]

(6) The Calcutta High Court has held that a **covenant with a penal clause** is not a bond conditioned for the performance of a covenant.[2] The stipulation by way of penalty in an agreement in case of breach does not convert it to a bond.[3]

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43. (1887) 9 All. 585 (589) (F.B.).

44. (1909) 5 L.B.R. 162=4 I.C. 293.

45. 1927 Nag. 72=98 I.C. 631.

46. *Ibid.*

47. *Musar* v. *Gurucharn,* (1910) 12 C.L.J. 419=7 I.C. 917; cf. (1897) 1 C.W.N. ccxxiii (S.N.) (Security bond for costs of suit—Art. 80, applied).

48. *See* notes to Art. 6, *ante.*

49. *Maung Sun Yu* v. *Maung Kyaw Mye,* (1923) 76 I.C. 802=1 Rang. 463=1924 Rang. 68; *Ahmed Moola Dawood* v. *Fatima Bee,* 26 I.C. 505=8 L.B.R. 99=8 Bur.L.T. 59; *Ramanathan Chetty* v. *Ragammal,* (1914) 27 I.C. 849=17 M.L.T. 61; cf. *Kantee Chandra* v. *Alinabi,* 9 I.C. 935=33 All. 414=8 A.L.J. 199; *Ko Pu* v. *Ma Theim Yin,* (1920) 56 I.C. 968=12 Bur.L.T. 225.

50. *Pathma Re Krishna* v. *Mu Pa Venkatachala,* (1919) 49 I.C. 587=36 M.L.J. 114=42 Mad. 302.

1. *Kundapur Taluq Board* v. *Lakshmi Narayana,* 17 M.L.J. 537.

2. *Gisborne & Co.* v. *Subal Bowri,* (1881) 8 Cal. 284.

3. Collector of *Nimar* v. *Lakhimchandsa,* (1926) 98 I.C. 631=1927 Nag. 72.

**Allahabad.**

1411. **ADMINISTRATION BOND.**—There has been some conflict of authority on the question whether an administration bond, is covered by Art. 68 of the Limitation Act. The **Allahabad High Court** held in *Kantee Chandra* v. *Ali Nabi,*[4] that where an executor entered into an administration bond with two sureties whereby he undertook to exhibit an inventory within a certain time with the proviso that the obligation undertaken was to continue in force until the executor fulfilled the duties of the administration of the estate, probate of which had been granted to him; and the inventory was not *exhibited* at the proper time during the lifetime of the executor, a suit to enforce the bond against the sureties had to be brought within six years of the death of the executor. No article of Limitation Act is referred to, but it is presumed that Art. 120 was contemplated possibly Art. 116. The **L. B. Chief Court** in *Ko Pu* v. *Ma Thein Yin,*[5] similarly held that an administration security bond is not a bond subject to a condition as contemplated in Art. 68, Sch. I, Limitation Act.

**Lower Burma Chief Court.**

**Rangoon High Court.**

But, the weight of authority is against this view. The **Rangoon High Court** has considered the authorities in *Maung San U* v. *Maung Kyaw Mye,*[6] where it has been held that an **administration bond is a bond subject to a condition,** and a suit founded on such a bond is **governed by Art. 68** of Sch. I to the Limitation Act. Where an administration bond contains several conditions, a breach of each one of the conditions gives rise to a cause of action and should, therefore, be taken to be the starting point of limitation in the case of a suit based on that particular breach.[7] The **Madras High Court,** in *Ramanathan Chetty* v. *Ragammal,*[8] takes the view that

**Madras High Court.**

> "in cases where the bond contains successive covenants each breach gives a separate cause of action but the date of the last breach is the starting point of limitation in a suit on the bond when the bond is conditioned on the performance of several acts and the obligation to pay is enforceable till the last of the conditions is fulfilled".

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 69. | On a bill of exchange or promissory note payable at a fixed time after date. | Three years. | When the bill or note falls due. |

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[4] (1911) 9 I.C. 935=33 All. 414=8 A.L.J. 199.

[5] (1920) 56 I.C. 968=12 Bur.L.T. 225.

[6] (1923) 76 I.C. 802=1 Rang. 463=1929 Rang. 68; Relied on *Ahmed Mulla Dawood* v. *Fatima Bee,* 26 I.C. 505=8 L.B.R. 99=8 Bur.L.T. 59.

[7] *Maung San U* v. *Maung Kyaw Mye,* (1929) Rang. 68.

[8] (1914) 27 I.C. 849=17 M.L.T. 61.

## SYNOPSIS.

1412. Corresponding provisions.
1413-14. **Article explained.**
1413. Promissory Note.
1414. Bill of Exchange.
1415. **Starting point of limitation.**

**1412. CORRESPONDING PROVISIONS.**—This article is the same as Art. 68 of Act IX of 1871: and re-enacts Art. 69 of the previous Act XV of 1877.

**1413. ARTICLE EXPLAINED.—A promissory note** is defined in S. 4 of the Indian Negotiable Instruments Act. It refers only to notes that are negotiable.[9] A promissory note must be an instrument in writing,[10] containing an unconditional undertaking to pay,[11] express or implied,[12] signed by the maker,[13] or makers shown distinctly in the instrument, for a certain sum of money.[14] The payee of a promissory note must be a certain person, where it is not payable to bearer.[15] This **article does not apply to promissory notes payable on demand,**: but only to those *"payable at a fixed time after date"*. An **undated instrument** may be shown to operate from date of delivery, or some other date.[16] **The date of execution** is not essential for validity of a pronote, but is useful for computing the period of limitation. A note bearing a date, shall be presumed to have been made on that date.[17] A promissory note may be ante-dated or post-dated without affecting its validity.[18] If no time for payment is specified in a note, or the time for payment is left blank, it is payable "on demand".[19] The maturity of a promissory note, or bill of exchange is the date on which it falls due.[20]

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[9] *Satiya Priya* v. *Govinda Mohan,* 5 I.C. 110.

[10] *See* S. 3 (58), General Clauses Act, as to definition of "writing".

[11] *Carlos* v. *Fancourt,* (1794) 5 T.L.R. 482 (485)=2 R.R. 647.

[12] *Mohindra* v. *Nagina,* 1932 Lah. 22; *Nanak Chand* v. *Ram Sarup,* 1924 Lah. 684=78 I.C. 163; also see *Udit Upadhya* v. *Bhawani Din,* 27 All. 84; *Govind Gopal* v. *Palwantrao,* 22 Bom. 986; *Manick Chand* v. *Jamna Das,* 8 Cal. 645.

[13] *Baker* v. *Denning,* 8 A. and E. 94; *Radhakrishna* v. *Mancherdas,* 15 N.L.J. 5.

[14] *Jones* v. *Simpson,* 26 R. R. 371.

[15] *Cowie* v. *Sterling,* (1826) 6 E. and B.; Followed in *Ye Eng Pwa* v. *Chetty Firm,* 4 I.C. 293=5 L.B.R. 102 (F.B.).

[16] *Davis* v. *Jones,* 25 L.J.C.P. 91; and *Giles* v. *Brown,* 105 E.R. 1170; also see *Ponnuswami Chetti* v. *Vellore Commercial Bank, Ltd.,* (1919) 56 I.C. 384=38 M.L.J. 70.

[17] Section 118 (6), Negotiable Instruments Act, XXVI of 1881; also see *Gobinda Kumar* v. *Ramchandra,* 51 I.C. 945.

[18] *Nallaya* v. *Palian,* 98 I.C. 308=1926 Mad. 1154.

[19] Section 19, Negotiable Instruments Act, 1881.

[20] Section 22, Negotiable Instruments Act, 1881.

1414. **A bill of exchange** is defined in S. 5, Negotiable Instruments Act, 1881, as an instrument in writing, containing an unconditional order, signed by the maker, directing a certain person, to pay a certain sum of money only to or to the order of a certain person, or to the bearer of the instrument. This article contemplates **suits upon an accepted bill of exchange,** not paid on maturity, but in case the suit is on bill which has been dishonoured by non-acceptance, Art. 78 applies. Chapter V of the Negotiable Instruments Act deals with presentation. *See* S. 61, as to presentation for acceptance: and S. 66, as to presentment for payment at maturity. A bill of exchange also includes a *hundi.* Any person can draw a bill or note payable to bearer, when it is made payable not on demand, but after date after sight, or after a certain event.[21] All *summary* suits upon bills of exhange or promissory notes under O. 37 of the Code of Civil Procedure are governed by Art. 5, prescribing a period of one year for institution of such suits. This article does not apply where the suit is not based on a bill of exchange or *hundi,* but on the original consideration where the *hundi,* not being properly stamped, is inadmissible in evidence.[22]

1415. **STARTING POINT OF LIMITATION.**—A bill or promissory note falls due on maturity.[23] Section 24 of the Negotiable Instruments Act provides that

**When the bill or note falls due.**

> "in calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date, or after sight or after a certain event, is at maturity, the day of the date, or of presentment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded".

If a bill drawn at a fixed period after date is **undated,** the time of maturity counts from the date on which it was drawn.[24] Every bill of exchange (*hundi*) made payable a certain number of days after date of its execution is at maturity on the third day after the day on which it is expressed to be payable under S. 22 (2), Act XXVI of 1881, and the day of that date is also to be excluded as laid down in S. 24 of the Act. Thus a *hundi* payable on 28th January falls due on 31st of that month.[25] When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day.[26] The days of grace may be waived by contract.[27] When a promissory note is executed for a loan, but is undated, evidence is receivable to fix the date of payment.[28] However, if a date is mentioned as fixed for payment in the bill or note, no evidence is admissible to prove that the date fixed was different.[29]

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[21] *Swee Leong* v. *Chettyar Firm* (1927) 101 I.C. 641=1927 Rang. 159 (2).

[22] *Gobinda Kumar Sur* v. *Ramchandra,* (1919) 51 I.C. 945 (Cal.).

[23] Section 22, Negotiable Instrument Act, 1881.

[24] *Giles* v. *Brown,* (1817) 6 M. and S. 73.

[25] *Nanak Singh* v. *Kesho Das,* (1915) 27 I.C. 608=34 P.L.R. 1915.

[26] Section 25, Negotiable Instruments Act, 1881.

| Article. | Description of Suit. | Period of Limitation | Time from which period begins to run. |
|---|---|---|---|
| 70. | On a bill of exchange payable at sight, or after sight but not at fixed time. | Three years. | When the bill is presented. |

## SYNOPSIS.

- 1416. Corresponding provisions.
- 1417. Article explained.
- 1418. Starting point of limitation.

## NOTES.

**1416. CORRESPONDING PROVISIONS.**—This article is the same as Art. 70 of Act XV of 1877.

The corresponding article in Act IX of 1871 was Art. 69, where the words used in the first column were as follows:—"*On a bill of exchange payable at or after sight*". The change is significant. Under English law, where a promissory note is payable after sight, the statute runs only from the time of presentment.

**"Bill of exchange" payable at sight, or after sight.**

**1417. ARTICLE EXPLAINED.**—A bill of exchange is defined in S. 5, Negotiable Instruments Act, XXVI of 1881. This article deals with bills of exchange only. A promissory note payable at sight would fall under Art. 73, Limitation Act. A bill of exchange *payable at sight,* or *payable after sight,* is governed by this clause. But, a bill of exchange payable at a fixed time is outside the scope of this article. It would be governed by Art. 72, Sch. I to the Limitation Act.

**"At sight".**

**"After sight".**

In a promissory note or bill of exchange, the expression "*at sight,*" means on demand. The expression "*after sight*" means, in a promissory note, after presentment for sight, and, in a bill of exchange, after acceptance, or noting for non-acceptance, or protest for non-acceptance.[30]

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[27] *Valliappa* v. *Subramanian,* (1916) 23 I.C. 431=26 M.L.J. 494; *Nanak Singh* v. *Kesho Das,* (1915) 27 I.C. 608=34 P.L.R. 1915.

[28] *Ponnuswamy Chetti* v. *The Vellore Commercial Bank,* (1919) 56 I.C. 384=38 M.L.J. 70.

[29] *Govindo* v. *Ram,* 51 I.C. 945=29 C.L.J. 508.

[30] Section 21, Negotiable Instruments Act, XXVI of 1881.

The expressions "at sight" and "on presentment" mean "on demand", according to S. 21 of the Negotiable Instruments Act, which should be read with S. 19 of that Act. Bills of exchange, in which no time for payment is specified, would be payable "at sight" or "on demand". The expressions *"at sight"*, "on presentment", "on demand" though treated as equivalents under S. 21, Negotiable Instruments Act, so far as time allowed for payment is concerned, have this difference that in the case of bills, or notes payable "on demand", no actual demand is necessary as a condition precedent to institution of a suit on its basis[31]; but in the case of bills, or notes, payable "at sight", or "presentment", they must be presented or shown before payment can be demanded.[32] Another difference arises with reference to the article of limitation applicable.[33] *Cf.* Art. 72, Limitation Act. For purposes of Art. 70, the words "at sight" do not mean "on demand", and time starts from date of presentation. In case of promissory notes payable "at sight", or "after sight", Art. 73 would not apply, if presentment for payment is necessary to maintain an action on the same, but only Art. 80, Limitation Act, will apply.[34]

**1418. STARTING POINT OF LIMITATION.**—A bill of exchange must specify the period, so many days, or months, "after sight", at the end of which it is to become payable. In the case of bills of exchange, the bill has to be presented for acceptance to the drawee. If the drawee accepts the bill, payment can be demanded from him on the maturity of the bill, but if the acceptance has been refused, the bill has to be noted or protested for non-acceptance,[35] and the payment cannot be demanded till the fact of presentment and refusal to accept liability has been certified. Time, therefore, runs from the day on which the bill is accepted, or protested and noted for non-acceptance.[36] In the case of *Rowe* v. *Younge*,[37] it was held that the presentment for payment of a bill of exchange payable at a named place was a condition precedent to the right to sue on the bill.[38] Presentation may be

**"After sight" bill of exchange.**

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[31] *Meghraj* v. *Johnson*, 31 I.C. 880; *Annamalai* v. *Velayuda*, 39 Mad. 129=32 I.C. 869 (F.B.); also see Ss. 4 and 19, Negotiable Instruments Act, 1881.

[32] Section 64, Negotiable Instruments Act, 1881.

[33] *See* Obhrai's Negotiable Instruments Act, S. 160, p. 94.

[34] *Annamalai Chetty* v. *Velayuda*, 32 I.C. 869=30 M.L.J. 51=39 Mad. 129=(1916) 1 M.W.N. 93=19 M.L.T. 62 (F.B.).

[35] Sections 99 and 100, Negotiable Instruments Act, 1881.

[36] *Bhashyam*, p. 101; Obhrai's Negotiable Instruments Act, S. 162, p. 95.

[37] (1820) 4 E.R. 372=21 R.R. 91.

[38] *Secretary of State* v. *Radhika Prasad*, 1923 Mad. 667=74 I.C. 785 (788)=46 Mad. 259 (277) (The particular rule has since been altered by statute, but the principle of the decision is in no way thereby affected).

presumed from circumstances as when interest was paid. But when presentation is not necessary, limitation would run from the time when the holder becomes aware of some fact which makes the presentment unnecessary.[39] The case of a *promissory note* "at sight" or "after sight" is different. *See* notes under Art. 73, *post.*[40]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 71. | On a Bill of exchange accepted payable at a particular place. | Three years. | When the bill is presented at that place. |

### SYNOPSIS.

1419. Corresponding provision.
1420. Article explained.
1421. Presentment at a specified place.

### NOTES.

**1419. CORRESPONDING PROVISION.**—This article is the same as Art. 70 of Act IX of 1871, or Art. 71 of Act XV of 1877.

**1420. ARTICLE EXPLAINED.**—Section 69 of the Negotiable Instruments Act, XXVI of 1881, provides for instruments payable at specified place.

> "A promissory note or bill of exchange made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at that place."

This corresponds to Ss. 45 (4) and 87 (1) of English Bills of Exchange Act. Under English law, where a note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker and indorsers liable, but presentment for payment is not, in any other case, necessary in order to render the maker liable. When a place of payment is indicated by way of memorandum only, the presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

**1421. PRESENTMENT AT A SPECIFIED PLACE.**—Though S. 69 of the Negotiable Instruments Act, XXVI of 1881, only mentions the case of the maker of a note, and the drawer of a bill,[41] the case of an indorser of a negotiable instrument is similarly affected, and presentment for payment at a specified place is necessary in order to charge the indorsers, who stand in the relation of sureties.[42]

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[39] Pal's Limitation Act, p. 640; citing Mew's Digest, Vol. IX, p. 6; *Bethel* v. *Bethel,* (1887) 34 Ch.D. 561.

[40] *Durga Prosad* v. *Kali Charan,* 40 C.L.J. 84=1924 Cal. 1085.

[41] *Spindler* v. *Grellet,* 154 E.R. 163; *Sands* v. *Clarke,* 79 R.R. 719=137 E.R. 703; also see *Ghaniya* v. *Karam,* 10 Lah. 755; *Jagannath* v. *Dewan Chand,* 1931 Lah. 758.

**Alternate places of payment.**

Where a promissory note, or bill is made payable at either of two places, presentment at either of these places will suffice, even though it is proved that it would have been paid at the nearer of the two places.[43] For instance, where "Madras or any other place where you (the creditor) have your shop", was mentioned as the place of payment, it was held that the presentment had to be made at one or the other of these places.[44] This article deals with the case of bills of exchange and does not provide for a promissory note made payable at a specified place. *See* notes under Art. 80, *post.*

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 72. | On a bill of exchange or promissory note payable at a fixed time after sight or after demand. | Three years. | When the fixed time expires. |

## SYNOPSIS.

1422. Corresponding provision.
1423. Article explained.

## NOTES.

**1422. CORRESPONDING PROVISION.**—This article is the same as Art. 72 of Act XV of 1877 and corresponds to Art. 71 of Act IX of 1871.

**1423. ARTICLE EXPLAINED.**—The expression "after sight" means, in a promissory note, after presentment for sight, and, in a bill of exchange, after acceptance, or noting for non-acceptance, or protest for non-acceptance (S. 21 of the Negotiable Instruments Act, XXVI of 1881). The expressions after sight, or after demand, seem to be treated as equivalents, in S. 21 of the Negotiable Instruments Act, so far as time allowed for payment is concerned. The words "after sight" have not the same meaning for promissory notes and for bills of exchange. In the case of promissory notes the limitation would commence to run from the date of presentment; and, in the case of bills of exchange, from the date of acceptance. And, the fixed time would be deducted afterwards.[45] For instance in the case of a note payable at twelve months' notice the time would not begin to run until after notice is given and twelve months subsequent.[46]

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[42] *Roche* v. *Campbell,* (1813) 3 Camp, 247.

[43] *Beeching* v. *Gower,* 17 R.R. 644; and *Pollard* v. *Herries,* 127 E.R. 183.

[44] *Cheggанmull* v. *Desur Manika,* (1926) 94 I.C. 384=1926 Mad. 792=50 M.L.J. 292.

[45] *Thorpe* v. *Coombe,* (1826) 8 Dowl and Ry. (K.B.) 347; *Thorpe* v. *Booth,* (1826) Ry. and M. 388.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 73. | On a bill of exchange or promissory note payable on demand and not accompained by any writing restraining or postponing the right to sue. | Three years. | The date of the bill or note. |

### SYNOPSIS.

1424. Corresponding provisions.
1425-26. **Article explained.**
1425. Payable on demand.
1426. Writing restraining or postponing.
1427. Starting point of limitation.

### NOTES.

**1424. CORRESPONDING PROVISION.**—Act XIV of 859 contained no provision as to the date of the accrual of the cause of action in a suit on a promissory note payable on demand. The Calcutta High Court,[47] also Bombay,[48] and Madras[49] High Courts, held that in a suit brought on a promissory note payable on demand, after the demand, the cause of action arose at the date of the note. Act IX of 1871, Art. 72, made the 3 years' period run from the date of the demand.[50] But, the law was again altered in Art. XV of 1877, giving the starting point in Col. 3, as the date of the bill or note, to bring it into accordance with English Law. The present article is the same as Art. 73 of Act XV of 1877.

**Payable on demand.**

**1425. ARTICLE EXPLAINED.**—The expression "*payable on demand*", in this article has been used **in the technical sense**, meaning immediately or forthwith, and without the necessity of making any formal demand, as a condition precedent.[1] If no time for payment is specified in a note, or the time for payment is left blank it is payable "on demand".[2] But, a note or bill payable "after demand," or "when demanded", is not deemed to be payable till a demand is actually made.[3] A bill of exchange is nonetheless payable on demand for the fact that the demand cannot be made on the day when the bill is drawn.[4] A bill or note which is payable to bearer, who brings it to the place of payment, or the order of the payee does not offend against the Indian Paper Security Act and is an "on demand" pro-note.[5] For example, a bill payable "on demand", with interest after six months, is an "on demand instrument", and not one in which payment is deferred for 6 months.[6] A promissory note payable with interest on demand is a present debt, and becomes due and payable at once without demand so that limitation begins to run from its date, as the debtor is considered to be in default from that very date.[7] Under S. 80 of the Negotiable Instruments Act, on a promissory note payable on demand, interest begins to run from the date of the note, and not from the date of the demand for payment.[8] Where no place of payment is specified in the note, the expression "payable on demand" can only mean that it is payable forthwith. The demand in such cases is constituted by the suit itself.[9] Where the pro-note is payable on demand at a specified place, the note should be presented at that place in order to charge the maker thereof.[10] But where the note is not payable at a specified place, presentment of the note is not necessary, and no demand is required to entitle the holder to sue on the note.[11] though this may involve him in costs of the action.[12] Cause of action starts in such cases from date of the note, and not date of demand.[13] A promissory note "payable on demand", is payable immediately, or forthwith, without any previous demand, *even though interest has been reserved.*[14] When a promissory note is made payable "at sight", it must be taken to mean

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[46] *Clayton* v. *Gosling* (1826) 5 B. and C. 560; *Moore* v. *Petchell,* (1856) 22 Beav. 172; cited in Pal's Limitation Act, p. 640; and Mitra's Limitation Act, Vol. II, p. 1248.

[47] *Nocoor Chunder* v. *Kally Coomar,* (1876) 1 Cal. 328.

[48] *Ramchandra* v. *Soma,* 1 Bom. 305 Note; *Vinayak* v. *Babaji,* 4 Bom. 230.

[49] *Madhavan* v. *Achuda,* 1 Mad. 301.

[50] *Sanjivi Reddi* v. *Kama Errappa,* 6 Mad. 290.

[1] *Meghraj* v. *Johnson,* 31 I.C. 880 (Nag.); *Bishanchand* v. *Oudhbehari,* 40 I.C. 350; *Perumal* v. *Aligirasami,* 20 Mad. 245 (248); *Perianna* v. *Muthuvira,* 21 Mad. 139; *Secretary of State* v. *Kunhi Krishna,* 1933 Mad. 376 (378); *Annamalai* v. *Velayuda,* 39 Mad. 129=32 I.C. 869 (F.B.).

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[2] Section 19, Negotiable Instruments Act.

[3] *Bishun Chand* v. *Oudhbehari,* 40 I.C. 350.

[4] *Gopalachariar* v. *Maiyappa,* 45 I.C. 22 (Mad.).

[5] *Ibid.*

[6] Obhrai's Negotiable Instruments Act, p. 87.

[7] *Brojendro Kissore* v. *The Hindustan Co-operative Insurance Society,* 39 I.C. 705=44 Cal. 978=25 C.L.J. 238.

[8] *Framror Eduljee* v. *Mahomed Essa,* 50 Bom. 266=1926 Bom. 241 =94 I.C. 21=28 Bom.L.R. 141.

[9] *Ramchander Ghoshal* v. *Juggat Manmohiny,* 4 Cal. 283.

[10] *See* S. 69, Negotiable Instruments Act; also see *Jagannath* v. *Devanchand,* 1931 Lah. 758.

[11] *Ghaniyalal* v. *Karam Chand,* 10 Lah. 755=115 I.C. 860=1929 Lah. 240.

[12] *Ibid.,* 10 Lah. 755.

[13] *Secretary of State* v. *Radhika,* 46 Mad. 259=74 I.C. 785=1923 Mad. 667.

[14] *Shaha & Co.* v. *Bengal National Bank,* 47 Cal. 861=33 C.L.J. 541=60 I.C. 940.

"payable on demand". A suit on such a pro-note is governed by Art. 73 or Art. 80, Sch. I, Limitation Act; and time begins to run from the date of the execution of the promissory note.[15] Under S. 74 of Negotiable Instruments Act,

> "subject to the provisions of S. 31, a negotiable instrument payable on demand must be presented for payment within a reosonable time after it is received by the holder".[16]

**Writing restraining or postponing the right to sue.**

**1426.** Where a promissory note was in terms one containing merely "a promise to pay on demand", *viz., "at any time within six years on demand"*, it was held that the special term of six years for demand was intended to restrain the payee from making a demand after six years, and therefore restrained his right of suit unless and until such demand was made within six years. This instrument was not, however, "accompanied by a writing,' though it contained within itself the terms restraining the suit by the payee to the extent abovementioned. This special form of note was held not provided for by Art. 73, Limitation Act, and the case was governed by Art. 120.[17] But, the period of limitation applicable to a suit upon a bill of exchange or promissory note, accompanied by a writing **postponing the right to sue** for a definite period, is contained in Art. 80 of Sch. I to the Limitation Act, and the period commences to run from the date when such bill or note becomes payable.[18] An agreement in writing executed along with a promissory note postponing the time for payment is a valid and enforceable agreement.[19] Where, therefore, in a suit on a promissory note payable at demand, it appeared that the drawer gave an agreement in writing fixing ten months' time for payment from the date of the pro-note, it was held, that the time began to run from the expiry of the period fixed in the agreement and that the suit was governed by Art. 80 of the Limitation Act.[20] A promissory note payable after six months whenever the plaintiff shall demand the same, is a promissory note payable on demand with the right to sue restrained for six months, and limitation consequently begins to run on the expiry of the six months from its date.[21] Where a pro-note was payable on demand after the obligee attains majority, it was held that limitation would run from the date of demand after he had attained majority.[22] Under this article, a *writing* preventing the running of limitation is essential, and no oral agreement would be sufficient.[23] When an on-demand pro-note is given as a continuing security for future advances (*e.g.*, to secure a banking account), the statute does not begin to run until the credit is determined and the account closed. If the suit, in such a case, is brought *on the pro-note*, and not on the basis of account, Art. 73 would apply.[24]

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[15] *Durga Prosad Sen* v. *Kalicharan,* (1924) 84 I.C. 475=1924 Cal. 1065=40 C.L.J. 84.

[16] Obhrai's Negotiable Instruments Act, p. 280.

[14] *Sanjivi Reddi* v. *Kama Errappa,* 6 Mad. 290=7 Ind. Jur. 356.

[18] *Jwala Prasad* v. *Shama Charan,* (1919) 52 I.C. 235=42 All. 55 =17 A.L.J. 950.

[19] *Annamalai Chetty* v. *Velayuda,* (1916) 39 Mad. 129=32 I.C. 869 =30 M.L.J. 51=19 M.L.T. 62=3 L.W. 38=(1916) 1 M.W.N. 93 (F.B.).

[20] *Ibid.,* 39 Mad. 129=32 I.C. 869 (871) (F.B.); O.R. *Simon* v. *Hakim Mahomd Sheriff,* 19 Mad. 368 and *Somasundaram Chettiar* v. *Narasimha Chariar,* 29 Mad. 212.

[21] *Jeaunnissa* v. *Manekji,* 7 B.H.C.R. 26.

1427. **STARTING POINT OF LIMITATION.**—Where the instrument is payable on demand, then time is calculated from the date of the instrument,[25] unless indeed the instrument was issued at a later date than appears upon its face, in which case time runs from the date of issue.[26] If the note has no date, the statute runs from its delivery.[27] A note running for an *indefinite time* is in law a demand note, and is payable when the promise is made irrespective of actual demand of payment, and against such a note the statute starts to run concurrently with making of the promise.[28] It makes no difference that the debt is to be paid with interest, simple or even compound; time runs from the date of the bill or note.[29] On a note payable "on demand with interest, after four months," the statute is not postponed till actual demand.[30] On a note payable "at any time within two years, the statute runs on the expiry of two years, unless the holder elects to demand the same before the two years, in which case statute runs from such demand.[31] The liability of an endorser, does not arise out of the note, but independently of it.[32]

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[22] *Kuttiasan* v. *Suppi,* 3 M.L.J. 199.

[23] Cf. *Nath* v. *Janardhan,* 1 Bom. 503 (Where a substituted contract gave rise to a fresh starting point of limitation).

[24] Pal's Limitation Act, p. 642; Rustomji's Limitation Act, p. 450; Byles on Bills, p. 321.

[25] Halsbury's Laws of England, Vol. 2, p. 558 (First Edn.), citing *Norton* v. *Ellam,* (1837) 2 M. & W. 461; also see *Brojendra* v. *Hindustan Insurance Society,* 44 Cal. 978; *Framroz* v. *Mahomed,* 50 Bom. 266; *Durga* v. *Kali Charan,* 1924 Cal. 1065 (Promissory note payable "at sight") and *Shaha & Co.* v. *Bengal National Bank,* 47 Cal. 861=60 I.C. 940.

[26] Halsbury's Laws of England, Vol. 2, p. 559.

[27] Wood's Limitation, 4th Edn., pp. 619, 621; Rustomji's Limitation Act, p. 450.

[28] Wood's Limitation, 4th Edn., p. 693; Rustomji's Limitation Act, p. 450.

[29] Darby's Limitation, p. 30; also see *Shaha & Co.* v. *Bengal National Bank,* 47 Cal. 861=60 I.C. 940=33 C.L.J. 541; *Brojendra* v. *The Hindustan Co-operative Insurance Society,* 44 Cal. 978=39 I.C. 705 =25 C.L.J. 238; *Sreenath Roy* v. *Pearey Mohan Mookerjee,* (1917) 39 I.C. 205=21 C.W.N. 479=25 C.L.J. 91.

[30] Wood's Limitation 4th Edn., p. 726; Rustomji's Limitation Act, p. 450.

[31] Wood's Limitation, 4th Edn., p. 730; Rustomji's Limitation Act, p. 451.

[32] *Jagannath* v. *Lakshmana,* 47 M.L.J. 475=80 I.C. 932.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 74. | On a promissory note or bond payable by instalments. | Three years. | The expiration of the first term of payment as to the part then payable; and for the other parts the expiration of the respective terms of payment. |

### SYNOPSIS.

1428. Corresponding provisions.
1429. Article explained—Instalment Bond.
1430. Illustrative cases.

### NOTES.

**1428. CORRESPONDING PROVISIONS.**—This is same as Art. 74 of Acts IX of 1871 and XV of 1877. In Act XIV of 1859, the corresponding provision was made by S. 1, cl. 10 of that Act.

**1429. ARTICLE EXPLAINED.**—As to meaning and definition of a bond, *see* S. 1401; and of a Promissory Note, *see* S. 1413, *ante*.

**Instalment decrees.**

Where defendant agreed to liquidate a debt due from him to plaintiff in a number of instalments, but the agreement contained no stipulation that default in payment of any one of such instalments shall entitle the plaintiff to sue for the whole amount, the plaintiff's cause of action in respect of each instalment should be taken to accrue on the date on which such instalment might fall due, and not on the date of the bond.[33] When a note is made payable in several annual instalments, cause of action for the first payment accrues as soon as it becomes payable, and the statute begins to run from that time, and not from the time when the latest sum becomes due.[34] Under Art. 74 of the Limitation Act, time would run from the due date of each instalment[35]; even where it is provided that on failure to pay three instalments, the whole shall become payable[36]; because, the provision as to waiver is enacted only in favour of the promisee, and it is open to him to waive its benefit.[37] The prin-

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[33] *Ram Dass* v. *Mohur Singh*, 64 P.R. 1869.

[34] Wood, 4th Edn., p. 732: Rustomji, p. 451; Lightwood, p. 202.

[35] *Cotha Krishnasawmy Chetty* v. *Sitaram Chetty*, (1912) 17 I.C. 513=38 Mad. 374: s.c. 24 I.C. 507.

[36] *Ibid.*

**ciple** underlying the provision in column 3 of Art. 74 has been taken from Pothier, Vol. I, p. 406, where it is laid down that

> "when a debt is payable at several times, limitation begins to run from the expiration of the first term for the part then payable, and for the other parts only from day of expiration of the respective terms of payment".[38]

**The cause of action** for each instalment or part-debt being separate, it follows that failure to realise a particular instalment within time prescribed, will not prejudice the right to recover other instalments which are not barred under this article.[39]

### 1430. ILLUSTRATIVE CASES.—

(1) A bond provided for payment of the entire principal amount, within 18 years, by 18 annual instalments. A certain rate of interest per mensem was also provided for. It was held that under Art. 74, the plaintiff, who brought a suit to recover the entire sum due on the expiry of the period, would be entitled to recover last three instalments with interest thereon at the stipulated rate.[40]

(2) Where a suit is brought for the recovery of the instalment that has fallen due, and before there is such a default as makes the whole amount due, in such a case, although the bond is a bond payable by instalments, and there is a default clause, Art. 74 would nevertheless be applicable.[41] If Art. 74, applied, the claim for recover of instalments which were within 3 years of the suit should be decreed.[42]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run |
|---|---|---|---|
| 75. | On a promissory note or bond payable by instalments, which provides that, if default, be made in payment of one or more instalments, the whole shall be due. | Three years. | When the default is made unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver. |

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37. *Cotha Krishnaswamy Chetty* v. *Sitaram Chetty,* (1912) 38 Mad. 374.

38. Rustomji, pp. 451, 452.

39. Shep., p. 31 ("The action for a past instalment may be barred although other and future instalments still remain recoverable").

40. *Mt. Gaura* v. *Ramcharan,* (1927) 100 I.C. 655=4 O.W.N. 207 (s.c., 121 I.C. 891=4 Luck. 480=1927 Oudh 539).

41. *Jawaharlal* v. *Mathura Prasad,* 1934 All. 661 (667)=151 I.C. 585 =1934 A.L.J. 1035 (F.B.) (If Art. 75 applies, there can be no question of the applicability of Art. 74).

42. *Ibid.*

## SYNOPSIS.

1431. **Previous history.**
1432. **Scope and application.**
1433. Suits on promissory notes or bonds.
1434. Payable by instalments.
1435. Default clause.
1436. Option to creditors not a penalty.
1437. Single or consecutive defaults.
1438. English cases—Election or option.
1439. English doctrine of waiver.
**1440-1449. Election or waiver of option.**
1440. **Conflict of views.**
1441. Calcutta.
1442. Allahabad.
1443. Lahore.
1444. Madras.
1445. Bombay.
1446. Patna.
1447. Nagpur.
1448. Oudh.
1449-1453. **Waiver of a default.**
1449. Option to waive.
1450. Waiver defined.
1451. Waiver how constituted.
Mere forberance to sue is not waiver.
1452. Payment of overdue instalments.
1453. Waiver, a question of fact.
1454. **Starting point of limitation.**

## NOTES.

**Act XIV of 1859.**

**1431. PREVIOUS HISTORY.**—Under Act XIV of 1859, provision was made for such suits in S. 1, cl. 10 of that Act. In *Hullodhur* v. *Hogg,*[43] it was queried whether a suit on a bond for payment by instalments, with a clause making the whole amount payable on default in payment of any instalments, must be instituted within three years from the time of the first default. A **Full Bench of the Calcutta High Court,** held in *Hurronauth* v. *Maheroolah,*[44] that where a suit was brought upon an instalment bond, and not upon any fresh agreement between the parties, the period of limitation must run from the time when default was made in payment of the first instalment, in consequence of which the whole amount became due. A **Full Bench of the Bombay High Court,** similarly, held that where a promissory note, payable in half yearly instalments, provided that in the event of any one of these instalmens, not being punctually paid, the whole amount was to become payable at once, right to bring the suit under S. 1, cl. 10, Act XIV of 1859, accrued to the plaintiff for the recovery of the whole amount on the *first* default.[45]

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[43] (1864) 1 W.R. 189.

[44] 7 W.R. 21 (F.B.).

[45] *Gunna Dambershat* v. *Bhiku,* (1876) 1 Bom. 121 (F.B.); also see *Narayanappa* v. *Bhasker,* 7 B.H.C.R. 125; *Navalmal* v. *Dhondiba,* 11 B.H.

**The principle of waiver** was expressly introduced by Act IX of 1871, but it was doubted whether it was restricted to *first* defaults. The language of Art. 75, Act IX of 1871 was somewhat ambiguous; though there seemed no reason on principle why such waiver should be confined to a first default, and not apply to any subsequent default.[46] The improved language of Art. 75, Sch. II, Act XV of 1877, made it obvious that *"a fresh default in respect of which there is no waiver"* clearly indicated that the article was not intended to be confined to *first* defaults only. However, the omission of the word *"first"*, in Act IX of 1908, has cleared up all doubts and ambiguities in this respect.

**Act IX of 1871.**

**1432. SCOPE AND APPLICATION.**—This article applies to suits brought on the basis of instalment bonds which contain a default clause, to enforce the recovery of whole amount due, in which the provision as to waiver may be material.[47] It contemplates that, in the absence of waiver, an instalment bond is to be treated as a bond not permitting instalments for the purposes of limitation.[48] Art. 74 deals with suits on contracts not containing such a provision, or cases in which no default has occurred.[49] Both Arts. 74 and 75 deal with instalment bonds. But, Art. 74 applies to simple bonds payable by instalments without reference to provision for default. Art. 75 deals with bonds containing a default clause with provision for immediate recovery of whole if default is made in payment of one or more instalments. If the bond does not fall strictly within Art. 74 or Art. 75, the more general Art. 80 would seem to be applicable.[50]

In **Punjab**, a suit on a bond payable by instalments and containing a clause that on default in payment of two instalments the whole should be due is governed by the special statutory provision in Art. 16 of the Punjab Loans Limitation Act (1904), and not Art. 75 of the Limitation Act, 1908.

A **Full Bench of the Allahabad High Court,**[1] in *Jawaharlal* v. *Mathura Prasad,*[2] has considered the scope of Art. 75, and Sulaiman, C.J., has held that

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C.R. 155; and *Karupanna* v. *Nallamina,* 1 M.H.C.R. 209; Relied on *Hemp* v. *Garland,* 4 Q.B. 519.

[46] *Sri Raja Satracherla* v. *Sri Raja Setarama,* 3 Mad. 61.

[47] *Sitarama Chetty* v. *Krishnasami Chetty,* 38 Mad. 374=21 I.C. 24.

[48] Per Ashworth, A.J.C., in *Bankey Lal* v. *Ram Lal,* (1925) 86 I.C. 918=1925 Oudh 373=12 O.L.J. 112.

[49] *Sitarama Chetty* v. *Krishnasami Chetty,* 21 I.C. 24=38 Mad. 374.

[50] *Sham Sunder Lal* v. *Babu Lal,* 1933 Lah. 548 (Per Bhide, J.); cf. s.c. 1935 Lah. 557.

[1] *Siha Singh* v. *Sundar Singh,* 3 L.L.J. 522=1921 Lah. 280.

[2] 1934 All. 661 (665)=3 A.W.R. 845=151 I.C. 585=1934 A.L.R. 873=1934 A.L.J. 1035 (F.B.).

> "Art. 74 is the article applicable to simple bonds payable by instalments, in which case time begins to run from the expiration of the term of payment. Art. 75 applies to suits on a bond payable by instalments which provides that if default be made in payment of one or more instalments the whole shall be due. It is obviously intended to apply to the particular case of instalment bonds where there is a default clause of the nature abovementioned. If there were no such default clause the earlier article would apply."

Art. 75, applies although the bond contains a default clause with an option to the creditor to sue or to wait.[3]

At the same time, the learned Chief Judge, Sulaiman, C.J., took pains to point out

> "that the mere fact that the bond contains a default clause of that nature does not necessarily make Art. 75 applicable if the nature of the claim or the character of the suit be different".

For instance, where some other covenant in the document is being enforced, or where the suit is brought for the recovery of the instalment that has fallen due and before there is such a default as makes the whole amount become due.[5] But, where column 1 of Art. 75 is in terms applicable, then Art. 74 cannot be relied upon.[6] This was emphasized in the Division Bench case of *Sukhlal* v. *Bhoora,*[7] by the learned Chief Justice, saying that

> "it was never intended to be laid down, and was in fact not laid down, that whenever a suit is brought on the basis of a bond, no matter for what relief, the mere fact that the bond contains a default clause would make Art. 75 applicable to it". "What was decided in the Full Bench case was that where there has been no waiver of the benefit of the provision of a default clause made by the creditor, and owing to a default the whole amount has become due and a suit is brought to recover either the whole of that amount or only a portion of it after the expiry of three years from the date of the default (or six years if the deed be a registered one), then the whole claim is barred by time and the creditor cannot be allowed to say that he should get a portion of that amount because his suit should be treated as one falling under Art. 74."[8]

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[3] *Ibid.*, 1934 All. 661 (665) (F.B.); Reld. on *Ball* v. *Stowell,* (1879) 2 All. 322; *Mumford* v. *Peal,* (1879) 2 All. 857; *Maharaja of Benares* v. *Nand Ram,* (1907) 29 All. 431=1907 A.W.N. 139=4 A.L.J. 336; *Ajudhia* v. *Kunjal,* (1908) 30 All. 123=1908 A.W.N. 36=5 A.L.J. 72; *Chandan Singh* v. *Bidhya Dhar,* (1912) 15 I.C. 856; *Amolak Chand* v. *Baijnath,* (1913) 35 All. 455=20 I.C. 933; *Mohanlal* v. *Tikaram,* (1918) 47 I.C. 926=41 All. 104; *Kanhaiya* v. *Amrit,* 1925 All. 499=87 I.C. 162=47 All. 552; *Shyamlal* v. *Jotia,* 1926 All. 142=89 I.C. 383; *Kaunsilla* v. *Dip Singh,* 1929 All. 812=121 I.C. 272; cf. *Lalta Prasad* v. *Gajadhar,* 1933 All. 235=149 I.C. 181=55 All. 283 (A case of *interest* payable by instalments) and *Muhammad Hussain* v. *Sanwal Das,* 1934 All. 397=148 I.C. 951 (F.B.) (Art. 181).

[4] *Jawahir Lal* v. *Mathura Prasad,* 1934 All. 661 (667) (F.B.) (Per Sulaiman, C.J.).

[5] *Ibid.*

[6] *Ibid.*

[7] 1934 All. 1039 (1041); Reld. on 1934 All. 661 (667) (F.B.).

[8] Per Sulaiman, C.J., in *Sukhlal* v. *Bhoora,* 1934 All. 1039 (1041)

If was further explained, that

"In the Full Bench case, the decision proceeded on the assumption that there had been *no waiver* whatsoever of the benefit of the provision, and that the whole amount had become due and time had begun to run from the first default. It was accordingly held by the majority of the Judges that a creditor could not evade the law of limitation by saying that he would sue for a portion only of the amount which had become due. To such a case Art. 75 and that article alone was applicable, for when once the whole amount has fallen due and there is no question of waiver, then no question for future instalments arises, and a suit cannot be maintained when brought after the period prescribed for such suits under Art. 75, Limitation Act, has expired."[9]

*Illustrations.*

(1) A simple money-bond provided for the repayment of a certain sum of money in instalments, and also provided that if default was made in the payment of the principal amount for three consecutive instalments, or if interest for three consecutive months was allowed to fall into arrears, the Bank might close the amount and recover the entire amount due. *Held,* that the bond fell within the operation of Art. 75, Sch. I, Limitation Act.[10]

(2) A bond provided that the money due under it would be payable within 18 years by 18 annual instalments. The creditor, on the expiry of the period, brought a suit to recover the entire sum due. *Held,* that the plaintiff would be entitled to recover the last three instalments only under Art. 74 of the Limitation Act as the claim in respect of the other instalments was barred by time.[11]

(3) The amount of a bond was expressed as payable within six months and interest thereon was to be paid month by month and it was provided that in the event of default in payment of interest for any month compound interest was to accrue on the unpaid amount and the lender was to have a right to file a suit at once for the recovery of principal and interest without waiting for the stipulated period of six months. No interest was paid under the bond. In a suit to recover principal and interest, it was held that the suit was governed by Art. 80 of the Limitation Act.[12]

(4) In *Raja Ram* v. *Narain,*[13] Hallifax, A.J.C., held that the limitation for a suit to recover an instalment due on a bond is governed by Art. 74, and that for a suit to recover the whole amount still unpaid irrespective of the agreement to pay by instalments is governed by Art. 75, Limitation Act. He held further that the claim to recover the unpaid amount of the whole debt, intact, or reduced by the amount that had become irrecoverable under Art. 74 of the schedule, as well as by the amounts that had been actually paid, was governed by Art. 75 of the same schedule. The

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[9] *Ibid.,* 1934 All. 1039 (1041, 1042) (Per Sulaiman, C.J.).

[10] *The Nicholson Bank, Tanjore* v. *Rajagopala Aiyar,* (1917) 38 I.C. 302 (Mad.).

[11] *Mt. Gaura* v. *Ram Charan,* (1927) 100 I.C. 655; Folld. *Pherai* v. *Pudai Ram,* 85 I.C. 280=27 Oudh Cas. 318=1925 Oudh 502=1 O.W.N. 647.

[12] *Pherai* v. *Pudai Ram,* (1925) 85 I.C. 280=27 O.C. 318=1925 Oudh 502=1 O.W.N. 647; also see *Ball* v. *Stowell,* (1879) 2 All. 322 (Art. 80 applied) and *Shib Dayal* v. *Meharban,* (1922) 69 I.C. 981=45 All. 27=1923 All. 1 (F.B.).

[13] 1927 Nag. 28=97 I.C. 554=22 N.L.R. 126.

view taken by this case as to waiver was dissented from in the Full Bench case of *Vishwanath* v. *Sadashiva*.[14]

(5) This article would be inapplicable if the instalment arrangement becomes void, or is cancelled on default. For in that case, there can be no election or option to waive the default, and the only alternative is to enforce the subsisting obligation. And, if the whole sum has been allowed to become time-barred, the plaintiff cannot fall back on Art. 74 for some instalments which may be within time.[15]

### 1433. SUITS ON PROMISSORY NOTES OR BONDS.—

**Instalment decrees.**

It has been held by the **Allahabad High Court,** that this article which refers to *suits* on promissory notes or bonds payable by instalments, and which allows a waiver of default by the payee and a fresh cause of action on a fresh default has no application to the case of execution of a decree directing payment to be made on a fixed date, subject in default to certain other reliefs claimable by the decree-holder.[16] If there was an option in the decree, it would not amount to direction under Art. 182, Cl. 7, and the decree-holder might execute the decree in respect of separate instalments as and when they became due. In *Shib Doyal* v. *Meharban,*[17] and *Joti Prasad* v. *Sri Chand,*[18] the view taken was that when it was directed that payment of the full amount should be made when default was made in the payment of any instalment, under Art. 182, Cl. (7), time began to run from the date when the first instalment became due. The **Patna High Court,** in *Monindra* v. *Kanai Ram,*[19]; *Ganga Bishun* v. *Raghunath Prosad,*[20] follows the Allahabad view.

However, the **Calcutta, Bombay** and **Lahore** High Courts do not share this view. The principle of waiver has been held applicable, in a number of cases, to even instalment decrees, and limitation starting from a default has been held to be checked by the creditors subsequently accepting an overdue instalment.[21]

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[14] 1932 Nag. 1=28 N.L.R. 44 (F.B.).

[15] *Bankey Lal* v. *Ram Lal,* (1925) 86 I.C. 918=1925 Oudh 373; also see *Mackenzie* v. *Thiruvengadathan,* (1886) 9 Mad. 271 (272); *Jodhistir* v. *Nobin,* (1886) 13 Cal. 73.

[16] *Ugrah Nath* v. *Lagan,* (1881) 11 All. 83=1 A.W.N. (1881) 124; cf. *Shib Dutt* v. *Kalka,* 2 All. 443.

[17] 45 All. 27 (F.B.).

[18] 51 All. 237 (F.B.).

[19] 48 I.C. 728.

[20] 10 Pat. 173.

[21] See and cf. *Gopaldas* v. *Kanshi Ram,* 1929 Lah. 390=113 I.C. 541 (Bhide, J.); *Sitab Chander* v. *Hyder,* 24 Cal. 281; *Jadab* v. *Bhairab,* 31 Cal. 297; *Girindra* v. *Khir Narain,* 36 Cal. 394; *Monmohun* v. *Durga,* 15 Cal. 502; *Bir* v. *Darpa,* 20 Cal. 74; *Kashiram* v. *Pandu,* 27 Bom. 1 (F.B.); *Rai Chand* v. *Dhando,* 42 Bom. 728; *Amrit* v. *Gobindo,* 44 Bom. 840; also see and cf. *Jayamuddin* v. *Jamiruddin,* 21 C.W.N. 835.

**Mortgage suits.**

This article has no application to mortgage suits governed by Art. 132 as held in *Gaya Din* v. *Jhuman Lal*[22]; and similarly in *Shibdoyal* v. *Meharban*[23] which were followed in *Sheoram* v. *Babu Singh.*[24] But, the authority of these Full Bench decisions, is shaken by the Privy Council rulings in the case of *Pancham* v. *Ansar*[25] and *Lasa Din* v. *Gulab Kunwar.*[26] Their Lordships point out that an option given to the mortgagee to call in the entire money was exclusively for the benefit of the mortgagee, and it was in the nature of option to enforce the security at once, or if the security be ample to stand by his investment for the full term of mortgage. The Calcutta High Court has applied the principle of Art. 75 to instalment mortgage-bond: though there is some conflict of view in this High Court with regard to the question of waiver.[27] Art. 75 was not applied in *Gagdeo* v. *Balgobinda*[27-a]; but it was applied by analogy in *Surendra* v. *Raja Rishee*[28] and in *Probhat* v. *Mohesh.*[29] The **Madras High Court** holds the principle of Art. 75 inapplicable to mortgage suits with instalment bonds. The starting point of limitation in such cases depends upon the election of the mortgagee.[30] This view is followed by the **Patna** High Court.[31] In *Tulshi Ram* v. *Muhammad Hadi,*[32] Art. 75 has been applied by analogy to mortgage suits, by the Oudh Court; also see *Kalyandas* v. *Balchand,*[33] a decision of **Sind Judicial Commissioner's Court.** The limitation prescribed under Art. 75 can only be applied by analogy to a bond hypothecating immoveable property.[34]

**Verbal contract.**

An *obiter dictum* in an early Calcutta case is to the effect that Art. 75 of the Limitation Act, according to its strict terms, is **not applicable** to a suit brought upon a verbal contract.[35]

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[22] 37 All. 400 (F.B.).

[23] 45 All. 27 (F.B.).

[24] 48 All. 302.

[25] 53 I.A. 187 (P.C.).

[26] 59 I.A. 376=7 Luck. 442 (P.C.).

[27] *Jagat Mohini* v. *Monohur,* 25 W.R. 278; also see *Sitab Chand* v. *Hyder Molla,* 24 Cal. 281.

[27-a] 2 I.C. 653.

[28] 27 C.W.N. 893.

[29] 58 Cal. 615.

[30] *Ramadh Bibi* v. *Kandaswami,* 51 I.C. 724; *Narna* v. *Ammanai* (1916) I.L.R. 39 Mad. 981=31 M.L.J. 868; *Nettai Karuppa* v. *Kumaraswami,* 22 Mad. 20; *Rangasami* v. *Kuppuswami,* 1928 Mad. 647; cf. *Rego* v. *Philip Tauro,* 1929 Mad. 37.

[31] *Ram Sekhar* v. *Mathuralal,* 4 Pat. 820; *Ramchandra* v. *Gharbaran,* (1930) 132 I.C. 112; *Bishun* v. *Raghunath,* 10 Pat. 173; *Mukhdeo* v. *Harak Narayan,* 1931 Pat. 285.

[32] (1916) 32 I.C. 551.

[33] 1933 Sind 365.

[34] *Ramnath* v. *Mt. Jio,* 101 P.R. 1880.

[35] *Koylash Chunder* v. *Boykoonto Nath,* (1878) 3 Cal. 619=2 C.L.R. 167.

**Registered bonds.** In the case of registered bonds or notes, Art. 116 would extend the period of three years in this article to six years.[36]

**Payable by instalments.**

1434. Art. 75, like Art. 74, applies only to instalment bonds. In *Ball* v. *Stowell*,[37] the bond contained the stipulation that it would be optional with the obligee to claim and if necessary, to sue for the full amount of the bond for any one or more of the stipulated payments or on full expiry of the period of three years, but the default clause related to the *payment of interest* and not to the principal sum due. Art. 75 was, therefore, not directly applicable. In *Mumford* v. *Peal*,[38] the bond provided that on failure of any one or more of the instalments the whole amount would become payable and it gave authority to the creditor to recover the amount. Art. 75 was applied though the suit was brought for the recovery of the unpaid balance of the loan. In *Narain Bala* v. *Gouri Pershad*,[39] the bond in question provided that *interest* should be payable monthly, and that the principal should become due within six months from the date of execution. There was a clause in the bond that if *interest* should not be paid according to the terms of the bond, or if the creditor should not like to wait until the expiry of six months in order to bring his suit, he should not be so bound. It was held that the case fell under Art. 66, Limitation Act (old Art. 65 of Act IX of 1871) and not under Art. 75 of the Act. But where a bond provided that the obligee should be put in possession of land, and out of the produce thereof pay himself certain sums annually, and the balance to the obligor, and that if the obligee's receipts of produce should in any way be interfered with, the obligor should pay certain sums annually, it was held that this was a bond payable by instalments.[40] Where the bond was worded as follows:— *"Agar Hasab Sharafat bala Zariasel wee sud ada na kare to malik rupaya ko ikhtiah hoga ki 'kul rupaya yakfusht wasul kare,"* Bhide, J., construed it as an instalment bond providing that in default of payment of *interest* month by month the whole amount would become payable at once; while on Letters Patent appeal, the contention was accepted that the plaintiff would be entitled to recover the whole amount if there was default both in payment of interest as well as principal. The question of proper application of Arts. 74, 75 or 80, would depend upon the wording of the bond, and their proper interpretation, as showing the real intention of the parties.[41]

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[36] *Babu Ram* v. *Jodha Singh*, (1912) 18 I.C. 690=11 A.L.J. 9; also see *Babu Ram* v. *Abdhoot Singh*, (1917) 41 I.C. 423=4 O.L.J. 402.

[37] (1879) 2 All. 322.

[38] (1879) 2 All. 857.

[39] (1879) 5 Cal. 21=4 Jud. Jur. 407.

[40] *Ram Chandra* v. *Gokal Giri*, 1877 P.J. 309.

[41] *Shamsundar Lal* v. *Babu Lal*, 1933 Lah. 548=142 I.C. 851; s.c. 1935 Lah. 557 (L.P.).

**Default clause.**

1435. Article 75, can only apply to classes of suits in which a *default* has occurred and in which a provision as to waiver may be material.[42] If the bond or note comes within the description of the first column, this article would apply where there is a default, while to other cases of instalment bonds or pronotes Art. 74 would apply.[43]

In some cases, the right to sue for the whole is given at once by the default clause.[44] In others, the right or option may be given to the creditor to elect to recover the whole amount at once on failure in payment of an instalment.[45]The instalment bond in question may provide for *demand* being made by the creditor to call in his whole principal money or unpaid balance of principal or interest due on a bond.[46]

**Option to creditors not penal.**

1436. The Courts in India have relied upon the leading English authorities for adopting the view, that even in the cases of option to creditors, where the creditor may sue for the whole Art. 75 would apply. This will be discussed in detail in Ss. **1440-1449**, under the head **"Election, or waiver of option—Conflict of views"**. Meanwhile, it may be noticed that the stipulation for waiver is not necessary to enable the creditor to waive the benefit of the default provision, thereby preventing the running of limitation.[47] The obligee *might* waive the default, though he cannot be *compelled* to waive it.[48] In equity, an agreement to pay by instalments is not regarded in the nature of a penalty.[49] The Indian authorities are also in favour of regarding a provision of this nature outside the scope of S. 74, Contract Act. An acceleration of payments is not a penalty.[50] To constitute a penalty, in the case of a contract to pay a specified sum of money, the sum named as payable on breach must be a sum in excess of the principal sum due under the contract.[1]

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[42] *See* **S. 1432: "Scope and application"** citing *Sitarama Chetty* v. *Krishnasami Chetty*, 38 Mad. 374=21 I.C. 24 and *Jawahar Lal* v. *Mathura Prasad*, 1934 All. 661 (665)=151 I.C. 585=1934 A.L.J. 1035 (F.B.).

[43] *Seetharama* v. *Krishnaswami*, (1913) 38 Mad. 374=25 M.L.J. 264.

[44] *Syama Charan* v. *Narattan Borman*, 65 I.C. 257.

[45] *Kankuchand* v. *Rustomji*, 20 Bom. 101 (112); *see* **Ss. 1440-1449: "Election or waiver of option".**

[46] *Seetharamayyar* v. *Munisami Mudaliar*, (1919) 50 I.C. 87=37 M.L.J. 613 ("On demand" held to be a condition precedent).

[47] *Hemp* v. *Garland*, 4 Q.B. 519; and *Reeves* v. *Butcher*, 2 Q.B. 509 (*See* **S. 1438, English cases: Election or option**).

[48] *Ragho Govind Paranjpe* v. *Dipchand*, (1879) 4 Bom. 96; *Tatayya* v. *Gangayya*, (1927) 53 M.L.J. 562.

[49] *Sterne* v. *Beck*, 32 L.J.Ch. 682; and *Ex parte Burden, In re Neil*, (1881) 16 Ch.D. 675; 44 L.T. 525.

[50] *Venna Totayya* v. *Kakarla Gangayya*, (1927) 105 I.C. 789 (791)= 1927 Mad. 965=53 M.L.J. 562; Relied on *Wallingford* v. *Director*, (1880) 5 A.C. 685=50 L.J.Q.B. 49.

**Single or consecutive defaults.**

**1437.** The words *"one or more instalments"* in column 1 of Art. 75, in Act IX of 1908, are new. This addition makes it clear that Art. 75 would apply where the penalty of the whole amount falling due attaches not to *one* default, but to two or more consecutive defaults. Under Acts IX of 1871 and Act XV of 1877, there was a conflict of views on this point.[2]

**Hemp v. Garland.**

**1438. ENGLISH CASES:—OPTION OF CREDITOR, OR RIGHT OF ELECTION.**—In *Hemp* v. *Garland,*[3] the bond stipulated for payment of the entire amount due upon default of any one instalment; and the plaintiff claimed a decree for such of the instalments as were within the period of limitation. It was held that the cause of action had arisen in favour of the plaintiff from the date of the *first* default: and their Lordships observed:—

> "If he (plaintiff) chose to wait until all the instalments became due no doubt he might do so, but **that which is optional upon plaintiff's part would not affect the right of the defendant,** who might well consider the action as accruing from the time when the plaintiff had the right to maintain it."

Acordingly, in that case, where there was a default more than six years ago, and upon that the plaintiff *might,* if he pleased, have recovered *all* that remained due, it was held that the cause of action against the defendant accrued on the first default for *all* that then remained, owing to the whole debt; and plaintiff's claim was time-barred.[4]

**Reeves v. Butcher.**

In *Reeves* v. *Butcher,* the facts were pecuiar. A loan of money was made for five years "subject to the power to call in the same at an earlier date in the event hereinafter mentioned," *viz.,* that the defendant would pay interest quarterly and in case of regular payment of interest, the plaintiff would not call in the principal for five years, but that should the defendant fail in any of the quarterly payments of interest, it should be lawful for the plaintiff to call in and demand payment of the principal and all interest then owing. The plaintiff brought a suit within six years from the expiry of the five years (under 21 Jac. 1, c. 16), and contended that to call in for the principal and interest upon default was not binding upon him but was merely optional, and that he was at liberty to wait till the end of five years when a fresh cause of action arose. It was *held* that **statute began to run from the date of the first default in payment of interest.**[5]

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[1] *Kishen Prasad* v. *Kunj Beharilal,* 91 I.C. 790=24 A.L.J. 210=1926 All. 278 (Where on default the plaintiffs were to get nothing more than what was declared to be due to them).

[2] *Sitarama* v. *Krishnaswami,* (1913) 38 Mad. 374; *Siba Singh* v. *Sundar Singh,* 1921 Lah. 280; *Sobha* v. *Ram Partab,* 74 P.R. 1901; *Rajphat* v. *Mt. Wali,* 107 P.W.R. 1909; Compare *Navalmal* v. *Dhondibai,* 11 Bom. H.C.R. 155 (Followed English Law).

[3] (1843) 4 Q.B. 519.

[4] *Shibdayal* v. *Meharhan,* 45 All. 27=1923 All. 1=69 I.C. 981=20 A.L.J. 819 (F.B.); *Girindra Mohan* v. *Bochadas,* 36 Cal. 394; *Sarat Lakshi* v. *Narendra,* 1929 Cal. 292=33 C.W.N. 250; *Perianan Chetty* v. *Mariappan,* 1924 Mad. 310=77 I.C. 48=1923 M.W.N. 699; *Nenumal Jiamal* v. *Chandumal Assamal,* 116 I.C. 581=1929 Sind 410.

**The conclusion** reached in these two English decisions was that the cause of action would arise from the date of first default: and that though the creditor might have an option, that would not arrest the limitation running in favour of the defendant, once the plaintiff was in a position to have brought his suit on the basis of the default.

**1439. THE ENGLISH DOCTRINE OF WAIVER.**—We have noticed that according to the two leading English cases (S. 1438, *ante*), waiver will not stop the running of the statute. The **English doctrine of waiver,** as stated in Halsbury, is as follows:—

> "A person who is entitled to the benefit of a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent and the fact that the other party has acted upon it is sufficient consideration."[6]

Waiver, in the sense of an abandonment of right, may be **express or** it may be **implied** from conduct which is inconsistent with the continuance of the right.[7] An acceptance of mortgage interest in arrear is not inconsistent with, and therefore, may not amount to waiver of the right to call in principal for non-punctual payment of interest. A waiver is nothing until it amounts to a release.[8] A waiver of right for a consideration operates as a new contract.[9] A right may be lost by acquiescence on the principle of estoppel by conduct.[10]

**1440-1449. ELECTION, OR WAIVER OF OPTION—CONFLICT OF VIEWS.**—Article 75, Sch. I, Limitation Act, gives the creditor a right of waiver of default made by the debtor (*See* **S. 1450,** *post*). The period of limitation would not start running against the payee or obligee, where the benefit of the provision as to default is waived by him. (*See* **S. 1451,** *post*).

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[5] *Gayadin* v. *Jhumanlal,* 37 All. 400=28 I.C. 910; cf. *Babu Ram* v. *Ardhut Singh,* (1917) 41 I.C. 423=4 O.L.J. 402.

[6] *See* Halsbury, Vol. 13, p. 165; also see *Re Stokoe,* (1876) 2 Ch. D. 802 C.A.

[7] *Keene* v. *Biscoe,* (1878) 8 Ch.D. 201; Pal's Limitation Act, p. 647.

[8] *Stockhouse* v. *Braunston,* (1805) 10 Ves. 453.

[9] *Williams* v. *Stern,* (1879) 5 Q.B.D. 409.

Halsbury, Vol. 13, p. 166; also see *Hepworth* v. *Pickles,* (1900) 1 Ch. 108.

The English doctrine, that option, or no option of creditor, time runs from the first default unless there was evidence of waiver has been generally accepted upon by many High Courts in India[11]; but, there is another set of rulings where distinction has been sometimes made between cases where on default by the debtor, the creditor had the option to sue for the whole amount, and where he had no such option.[12] It is considered by some High Courts that by mutual agreement, the creditor may become bound in some cases to elect or exercise his option: and if the agreement recites that demand is to be made for the whole, the mere failure to pay the instalments in default, does not in itself make the amount payable at once.[13]

**Calcutta.**

**1441.** The principle of English Law has been followed in many decisions of the Calcutta High Court, since Act XIV of 1859. In *Horronauth* v. *Maheroolah,*[14] it was held that where a suit is brought upon an instalment bond, and not upon any fresh agreement between the parties the period of limitation is to run from the time when default was made in payment of the first instalment, in consequence of which the whole amount became due. A subsequent acceptance of the instalment in arrear operates as a **waiver** and **suspend the** law of **limitation**; but merely allowing the default to pass unnoticed does not.[15] In the case of **decree payable by instalments,** on certain specified dates, providing that in default of payment of any instalment, the whole of the money shall become due and payable and be recoverable in execution, limitation begins to run from the date of first default, unless there is waiver of default by acceptance of overdue instalments, which remits the parties to the same position as they would have been if no default had occurred.[16] Where overdue instalments up to a certain date had been paid, and it was held that that being so, limitation would only run from the latter period, the first default having been waived. The same view was taken in *Ram Culpo Bhuttacharji* v. *Ram Chunder Shome*.[17] There again the prior instalments were paid and received, the penalty being thus waived, and a fresh period of limitation was held to run. In *Chunder Komaldas* v. *Bisassurree Dassia*,[18] it seems to have been held, however, that although defaults had occurred, and no subsequent payment had been made in respect of the *kists* in default, it was still open to the creditor to say that the provision making the whole sum payable on default of payment of one instalment was one only for his protection. However, it was laid down in *Sitab Chand* v. *Hyder Malla*,[19] that

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[11] *Gayadin* v. *Jhummanlal,* 37 All. 400 (F.B.); *Shibdoyal* v. *Meherban,* 45 All. 27 (F.B.); *Amolak* v. *Baijnath,* 35 All. 455 (Art. 32); *Naval Mal* v. *Dhondiba,* 11 Bom.H.C.R. 155; *Hari Prosad* v. *Nasib Singh,* 21 Cal. 542; *Sitab* v. *Hyder,* 24 Cal. 281; *Perumal* v. *Alagirisami,* 20 Mad. 245; *Vasudeva* v. *Srinivasa,* 30 Mad. 426; *Sheo Narain* v. *Ram Din,* (1911) 14 Oudh Cas. 129; also see and cf. *Shanmuga* v. *Ramalingam,* (1927) 108 I.C. 786=1928 Mad. 952 (Option to sue or wait); also see *Wasa Ram* v. *Mahomed Bux,* (1929) 121 I.C. 80=1930 Lah. 124.

[12] *Maharaja of Benares* v. *Nanduram,* 29 All. 431; *Ajudhia* v. *Kunjat,* 30 All. 123; *Koylash Das* v. *Boikonta,* 3 Cal. 620 (Verbal contract); *Narna* v. *Ammani Amma,* 39 Mad. 981 (Art. 132); *Ramnath* v. *Mt. Jio,* 101 P.R. 1880; also see *Chunder Komul* v. *Bisassurree,* 13 C.L.R. 243.

[13] *Kankuchand* v. *Rustomji,* 20 Bom. 101 (112); also see *Nilmadhab* v. *Ramsodoy,* 9 Cal. 857; *Hanmant Ram* v. *Bowles,* 8 Bom. 561; *Natakurupu* v. *Kumarasami,* 22 Mad. 20.

[14] (1867) 7 W.R. 21 (F.B.)

[15] *Chein Bash* v. *Kadum,* (1879) 5 Cal. 97.

> "where there is an optional right given to enforce payment of money, such right may be waived; but when it is not waived, or when there is nothing to show that it has been waived, limitation would run from the date when the right accrues".

And, in *Jadab Chandra Bakshi* v. *Bhairab Chandra*,[20] the view taken in *Chunder Komal Das's* case,[21] was expressly dissented from. However, this position was revived in the case of *Rup Narayan Bhattacharjee* v. *Gopinath Mondal*,[22] where it was decided that the proviso in the bond having been inserted for the advantage of the creditor it was open to him, if default were made, to sue at once for the whole amount, or if he so elected, to waive the benefit of the provision which was thus conferred upon him. In *Girindra Mohun* v. *Bocha Das*,[23] where in view of the conflicting rulings on the subject of waiver, the decision of the Full Bench in the case of *Hurronath* v. *Maheroola*,[24] was still considered good law, and was followed, although the decision had been given in a case under Act XIV of 1859. The above decision of the Full Bench was supported by the principle of the English case of *Hemp* v. *Garland*.[25] In *Jadab Chandra Bakshi* v. *Bhairab Chandra*,[26] the learned Judges quoted with approval certain remarks in the decision of *Hurri Pershad* v. *Nasib Singh*, that "nor can any distinction be drawn between a case in which it is provided that on non-payment of an instalment the whole amount **shall become due, and** one in which it is provided that on non-payment of an instalment the whole amount **may be sued for.**[27] Case-law has been reviewed fully in *Sarat Lakshi* v. *Narendra*,[28] and it has been pointed out, by Mukerji, J., that

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[16] *Monmohan Roy* v. *Durga Churn*, 15 Cal. 502; Followed in *Abinash* v. *Bama*, 13 C.W.N. 1010=4 I.C. 17.

[17] 14 Cal. 352.

[18] (1883) 13 C.L.R. 243.

[19] 24 Cal. 281 (284)=1 C.W.N. 229; Reld. on *Bir Narain Panda* v. *Darpa Narain*, 20 Cal. 74 and on *Hemp* v. *Garland*, 4 Q.B. 519.

[20] (1904) 31 Cal. 297; Folld. 21 Cal. 542; Relied upon 15 Cal. 502.

[21] (1883) 13 C.L.R. 243.

[22] 11 C.W.N. 903; Reld. on 13 C.L.R. 243 and 9 Cal. 857.

[23] (1909) 36 Cal. 394=9 C.L.J. 226=1 I.C. 49.

[24] 7 W.R. 21 (F.B.).

> "a long series of decisions of this Court have laid it down that where there is an optional right given to enforce payment of money, such right may be waived, but when it is not waived, or when there is nothing to show that it has been waived, limitation would run from the date when the right accrues".

These decisions have engrafted into the Act the principle of *Hemp* v. *Garland*, which was adopted in this country so far back as the Full Bench case of *Hurronath Roy* v. *Maheroolah*,[29]

**Allahabad.**

**1442.** The case-law has been reviewed very fully in the **Full Bench decision** of *Jawahur Lal* v. *Mathura Prasad*,[30] by Sulaiman, C.J. In *Shankar Prasad* v. *Jalpa Prasad*,[31] it was held that where the decree-holder is entitled to execute the decree payable by instalments, for the whole amount due on the happening of a default, he may do so, on the first, second or any subsequent default, unless the decree clearly leaves the decree-holder no option on the happening of a default. In *Mohanlal* v. *Tika Ram*,[32] the plaintiff had, under terms of a bond, the option to waive his right to bring his suit at once on the happening of the first default, which right he had exercised. It was held that his suit with regard to the last three instalments was, therefore not barred under Art. 75, Limitation Act. The English decision in *Reeves* v. *Butcher*,[33] was relied upon in the **Full Bench** decision of *Gayadin* v. *Jhummanlal*,[34] where in a case of registered mortgage-deed (Art. 132, Limitation Act), the money under the bond was held to have "become due" when the first default was made.[35] The question whether the creditor had an **option to waive** his right to bring a suit at once on the happening of the default, and whether, as a matter of fact, he did exercise this right of waiver, is in each case, a **question of fact.**[36] In the absence of anything to show such option and exercise of waiver, the ordinary rule of limitation starting from the time when the first default in the payment of instalments is made applies.[37] A **Full Bench** of the **Allahabad High Court,** in *Shib Dayal* v. *Meharban,*[38] held on the analogy of the above rule, in a mortgage suit governed by Art. 132, that where the creditor is given the option to re-call the money at the happening of a certain event, or to wait for the entire stipulated period, if the event happens *"money becomes due"*, within the meaning of Art. 132, and limitation begins to run against him from that time, and the fact of the creditor having an option to wait for the entire stipulated period is wholly immaterial. This view was in consequence of the rule of law prevailing in England—*Hemp* v. *Garland,*[39]; and any distinction based on the existence of an option was held to be a distinction without a difference. In *Kanhai Lal* v. *Amrit,*[40] the case of *Ajudhia* v. *Kunjal,*[41] was distinguished on the ground that in the latter case the bond was so worded as to compel a creditor to sue for the whole amount immediately if any default occurred. In *Shiamlal* v. *Jotia,*[42] the default clause was not so worded as to entitle the plaintiff to recover the *entire* amount; but it provided that on the expiry of the term for payment of half the sum with interest and compound interest, the creditor had a right to recover it. In *Lalta Prasad* v. *Gajadhar,*[43] the case was not of an instalment bond but of payment of only interest by instalments. It was held by a Division Bench (Iqbal Ahmad and Kisch, JJ.), that the covenant in the bond, entitling the creditor to sue for the amount due on the bond before the expiry of the stipulated period of four years, was for the benefit of the creditor, and it was open to him to waive that option, and to wait for the full period of 4 years before putting the bond into suit, and that the time for recovery of the debt did not begin to run from the date of the first default. The recent **Full Bench ruling** in the case of *Jawahar Lal* v. *Mathura Prasad,*[44] reviews the whole case-law elaborately. Reference is made to two earlier Full Bench decisions in *Gaya Din* v. *Jhamman*[45] and *Shib Dayal* v. *Meharban,*[46] where even in the case of mortgage-deeds containing default clauses, it has been held that when under the terms of the agreement, the whole amount becomes payable by the defendant on account of default, then even though the plaintiff may have an option to wait, and not sue or to sue immediately for the whole amount, time begins to run against the plaintiff under Art. 132, Sch. I, Limitation Act. Though doubt was thrown as to the soundness of the Full Bench ruling, by their Lordships of the Privy Council, in *Pancham* v. *Ansar Husain*[47] and *Lasa Din* v. *Gulab Kunwar,*[48] this Full Bench decision was definitely overruled in its bearing under Art. 132, Limitation Act, their Lordships "did not mean to lay down any general principle of law which would apply to Art. 75": and the Full Bench of Allahabad High Court in *Muhammad Hussain* v. *Sanwal Das,*[49] recently applied, with slight extension, the principle of these Privy Council rulings. It has been pointed out by Sulaiman, C.J., in *Jawahir Lal* v. *Mathura Pershad,*[50] that

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[25] 4 Q.B. 519.

[26] (1904) 31 Cal. 297.

[27] Cf. *Chunder Kamal Das* v. *Bisassurree Dassia*, 13 C.L.R. 243 and *Rup Narayan* v. *Gopinath*, 11 C.W.N. 903; also see 21 Cal. 542; 31 Cal. 297; 36 Cal. 394; 53 Cal. 277.

[28] 1929 Cal. 292=33 C.W.N. 250.

[29] 7 W.R. 21 (F.B.).

[30] 1934 All. 661=3 A.W.R. 845=151 I.C. 585=1934 All. L. R. 873=1934 A.L.J. 1035.

[31] (1894) 16 All. 371=14 A.W.N. (1894) 115.

[32] (1918) 47 I.C. 926=41 All. 104=16 A.L.J. 929.

[33] (1891) 2 Q.B.D. 509.

[34] 37 All. 400=28 I.C. 910=13 A.L.J. 510 (F.B.); Reld. in *Shib Dayal* v. *Meharban*, (1922) 45 All. 27=1923 All. 1=69 I.C. 981 (F.B.).

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[35] Doubted in 1926 P.C. 85=99 I.C. 650=53 I.A. 187 (P.C.); O.R. 1932 P.C. 207=138 I.C. 779=59 I.A. 376=7 Luck. 442 (P.C.).

[36] *Jiwan Mal* v. *Jageshar Kasondhan,* (1922) 66 I.C. 655=1922 All. 113 (1).

[37] *Ibid.*

[38] (1922) 45 All. 27=1923 All. 1=69 I.C. 981 (F.B.); Folld. in *Pherai* v. *Pudai Ram,* (1925) 85 I.C. 280=27 Oudh Cas. 318=1 Oudh W. N. 647.

[39] (1843) 4 Q.B. 519.

[40] (1925) 87 I.C. 162=23 A.L.J. 424=1925 All. 499=47 All. 552; Ref. 1934 All. 661 (666) (F.B.).

[41] 5 A.L.J. 72=A.W.N. (1908) 36=30 All. 123.

[42] (1925) 89 I.C. 383=23 A.L.J. 896=1926 All. 142 (1).

[43] 1933 All. 235=55 All. 283=1933 A.L.J. 550; Dist. in 1934 All. 661 (667) (F.B.).

> "the use of the word '*shall*' in this article does not imply that it shall be obligatory on the creditor to sue for the whole amount without waiting for the full term before Art. 75 can apply".[1] "The main question is whether the amount had become due which entitled the plaintiff to sue for the whole amount. It is immaterial whether he is suing for the whole of that amount or only a part of it."[2]

**Lahore.**

1443. A **Full Bench** of the **Punjab Chief Court** held in *Khair-ud-din* v. *Atumal,*[3] that when an instalment bond contains a proviso that if default be made in payment of one instalment, it is optional and competent to the obligee to sue for the whole amount, then in case the obligee neglects to avail himself of the option to sue when such default occurs, the whole amount is to be deemed to have become due from the date of the default within the meaning of Art. 75, Limitation Act. No stipulation between the parties reserving an option to the obligee as to bringing a suit for money due, could exclude the operation of the provisions of the Limitation Act as to the time from which the limitation for a suit falling under Art. 75 is to be reckoned.[4] In *Sham Sunder Lal* v. *Babu Lal,*[5] where a bond provided that the interest was to be paid every month, and that the principal amount was to be paid in instalments after three years, and it was also provided that the promisee was entitled to sue for the entire sum on default of payment of interest in any month, and the debtor committed default in payment of interest after six months, Bhide, J., held, that the cause of action arose on the first default committed for payment of interest. But, this has been reversed on Letters Patent Appeal (Addison and Din Mahomed, JJ.). It was held, that the whole amount would become payable at once, only if there was a default as regards the payment of principal and interest, and that the cause of action for the whole amount did not arise at time of first default of payment of interest.[6] Where a bond was payable in six annual instalments, and in default of any one instalment, promisee had the option to realize the entire amount at once, and the first two instalments were paid, but the third was not paid, it was held that the bond gave the plaintiff the option of taking advantage of the forfeiture clause, and his right to realize the amount by instalments as originally agreed upon could not be lost by his failure to exercise his option and that the suit for the fourth, fifth and sixth instalments was not time-barred.[7]

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[44] 1934 All. 661=151 I.C. 585=1934 A.L.J. 1035=1934 All. L. R. 873=3 A.W.R. 845 (F.B.).

[45] 1915 All. 189=28 I.C. 910=37 All. 400 (F.B.).

[46] 1923 All. 1=69 I.C. 981=45 All. 27 (F.B.).

[47] 1926 P.C. 85=99 I.C. 650=53 I.A. 187=48 All. 457 (P.C.).

[48] 1932 P.C. 207=138 I.C. 779=59 I.A. 376=7 Luck. 442 (P.C.).

[49] 1934 All. 397=148 I.C. 951 (F.B.); Dist. in 1934 All. 661 (F.B.).

[50] 1934 All. 661 (665).

[1] *Ibid.,* 1934 All. 661 (667).

[2] *Ibid.;* Folld in *Sukhlal* v. *Bhoora,* 1934 All. 1039.

[3] 188 P.R. 1883 (F.B.).

**Madras.**

1444. In *Karunakaran Nair* v. *Krishna Menon,*[8] it was held by Abdur Rahim, J., that where the creditor does not choose to enforce the stipulation for payment of the entire amount on default of any one instalment, he must be deemed to have waived the benefit of it, and time will run only from the date of each fresh default, under Art. 75 of the Limitation Act. No one is obliged to take advantage of a forfeiture clause, and a benefit secured to a creditor should not be availed of by a debtor when the creditor does not want it.[9] The option given to a creditor to recover the entire amount on default in the payment of instalments does not affect the commencement of limitation.[10] The distinction sought to be drawn between cases where a document provides that the whole amount shall become due on default, and cases, where it only gives an option to the creditor is unfounded in law.[11] The English decisions in *Hemp* v. *Garland*[12] and *Reeves* v. *Butcher*,[13] were referred to in support of the view. Where defendant executed a mortgage deed in favour of plaintiff stipulating to repay the amount advanced thereunder by monthly instalment, with a penal clause binding the mortgagor to pay the full amount at an enhanced rate of interest on his failure to pay the first instalment whenever the mortgagee required, it was held that as the plaintiff had failed to exercise the option to enforce the penal clause, the contract for instalments subsisted.[14] In *Ramadh Bibi Ammal* v. *Kandasami Pillai*,[15] a mortgage-bond stipulated for payment of interest by instalment, and of principal on a specified date and for payment of whole amount due with compound interest on default "whenever you (creditor) require". The mortgagee did not exercise his option of suing for the entire amount on the first default, but brought his suit within twelve years of the date fixed for payment of the principal asking for compound interest according to the stipulation in the bond: it was held, that the mortgagee was not bound to exercise his option of calling in the whole amount on the first default. Art. 75 of Sch. I to the Limitation Act gives an option to the promisee of a note or the obligee of a bond to waive the consequences of a default. Where no option or waiver is given, time begins to run from the date of default.[16] The effect of the failure to make a demand, after default, as provided by the bond, is that the option given to the plaintiff is gone, and time begins to run in respect of each instalment as it becomes due.[17] Where a stipulation in a mortgage-bond gave an option to the mortgagee to call in at once the principal amount and interest due on the mortgage-bond without reference to the period stipulated for payment, it was held that the creditor having exercised the option, the cause of action to sue on the mortgage arose from the date of the default.[18] In the case of an instalment bond providing for payment of entire amount on default of one instalment, if there is a default, the plaintiff gets a complete cause of action, and he cannot split up the claim for past instalments, and reserve suit for later instalments.[19]

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[4] *Ibid.;* Folld. in *Sayad Mir Shah* v. *Atar Singh,* 66 P.R. 1904; also see and cf. *Sham Sunder Lal* v. *Babu Lal,* 1933 Lah. 548=142 I.C. 851; Folld. 188 P.R. 1883 (F.B.); s.c. on L. P. appeal *Babu Lal* v. *Sham Sunder Lal,* 1933 Lah. 557=37 P.L.R. 242.

[5] 1933 Lah. 548=142 I.C. 851.

[6] *Babu Lal* v. *Sham Sundar Lal,* 1935 Lah. 557=37 P.L.R. 242. 242.

[7] *Chhaju* v. *Nanak Baksh,* 1933 Lah. 849 (1).

[8] (1911) 36 Mad. 66=12 I.C. 57.

[9] *Narna* v. *Ammani Amma,* (1916) 35 I.C. 418=39 Mad. 981.

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[10] *The Nicholson's Bank* v. *Rajagopala Aiyar*, (1917) 38 I.C. 302 (Mad.).

[11] *Ibid.*, 38 I.C. 302 (Mad.); Reld. on 21 Cal. 542; 24 Cal. 281; 31 Cal. 297.

[12] 4 Q.B. 519.

[13] (1891) 2 Q.B. 509.

[14] *Lachakkammal* v. *Sokhayya*, (1918) 48 I.C. 191=1918 M.W.N. 586.

[15] (1919) 51 I.C. 724=1919 M.W.N. 82=9 L.W. 479.

[16] *Perianan Chetty* v. *Mariappan Asari*, (1923) 77 I.C. 48=1924 Mad. 310.

[17] *Ibid.*

[18] *Rangaswamy Pillai* v. *Kuppuswamy*, (1928) 107 I.C. 650=1928

1445. **Bombay.** The observations of Lord Denman, in *Hemp* v. *Garland,*[20] were accepted as correct in *Hanmant Ram Sadhuram* v. *Bowles,*[21] where plaintiff obtained an instalment decree, with a provision for the entire sum being payable on default, and after some payments, when plaintiff applied to execute the decree for the balance remaining due, it was objected that, as the whole sum due under the decree became payable at a date when there had been a failure to pay six consecutive instalments, held, that the application was barred by time, and that from the mere fact of the payments, an agreement for a new period of limitation could not be inferred.[22] If a creditor simply sleeps on his right and does nothing for three years, it cannot be implied from this that he had agreed to waive his right to recover the whole amount of the bond which accrued to him when the default occurred.[23]

1446. **Patna.** Where an instalment bond provided for payment of entire sum on default, with interest at a certain rate, in whatever way possible without waiting for expired and unexpired instalments, it was held, on a construction of the bond, that the creditor was not "compelled," but only "entitled" to sue for the entire amount on default, and limitation did not, therefore, begin to run from the date of the first default in respect of the entire amount.[24]

1447. **Nagpur.** In *Gopal* v. *Dhondya,*[95] where a bond payable by instalments provided that if default was made in the payment of five instalments, the debtor would pay up the whole amount of the debt in a lump sum with stipulated interest; it further gave the creditor the right to recover according to instalments foregoing the advantage of recovery in

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Mad. 637; Ref. to *Pancham* v. *Ansar Husain,* 99 I.C. 650=53 I.A. 187 =1926 P.C. 85.

[19] *Mukyaprana Bhatta* v. *Kelu Nambiyar,* 112 I.C. 270=1928 Mad. 705=1929 M.W.N. 204.

[20] 4 Q.B. 519.

[21] 8 Bom. 561.

[22] *Hansraj Godhaji* v. *Bapu Krishnaswamy,* (1923) 72 I.C. 275=25 Bom. L. R. 153=1923 Bom. 207.

[23] *Ganpat Balaji* v. *Narayan Sawaliram,* (1924) 82 I.C. 203=1924 Bom. 301.

[24] *Sri Ram Chandra Nayek Kalia* v. *Gharbharan Ahir,* (1931) 132 I.C. 112=11 P.L.T. 866.

[25] (1912) 14 I.C. 685 (Nag.).

a lump sum, it was held that the suit for recovery of the amount due on the bond was governed by Art. 75, Limitation Act, and that the express mention in the bond of the creditor's option did not give him anything more than what was contemplated under Art. 75. The law in this matter has been explained by Hallifax, A.J.C., in the case of *Raja Ram* v. *Narain*,[26] thus:—

> "The limitation for a suit to recover an instalment due on a bond is governed by Art. 74, and that for a suit to recover the whole amount still unpaid irrespective of the agreement to pay by instalments is governed by Art. 75 of the same schedule. In addition to the judgments of this Court in *Gopal* v. *Dhondya*[27] and *Kesho Rao* v. *Sukhya Mali*,[28] there are the Allahabad cases of *Ajudhya* v. *Kunjal*,[29] *Amolak Chand* v. *Baij Nath*[31] and *Mohan Lal* v. *Tika Ram*,[31] and the Calcutta case of *Basanta Kumar Singha* v. *Nabin Chandra Shaha*.[32]"

It is conceivable that a bond might be so worded as to compel a creditor to sue for the whole amount immediately if any default occurred.[33] In such a case the original agreement to pay by instalments would cease to exist when the default occurred and the agreement to pay the whole sum would be substituted for it.[34] The Nagpur Court has held that a simple money bond differs from mortgages to which Art. 132 applies; and the same principles do not apply to suits that fall under Art. 75, Limitation Act.[35]

**1448.** In *Durga* v. *Totaram*,[36] where a simple money-bond provided for a right to sue in default of any of the conditions of the bond, and it was stipulated that if default was made in the payment of interest for six months, the creditor would be at liberty to realize the principal and interest due on the bond without waiting for the expiry of the said term or after the expiry of the said term, whichever be thought proper, it was held that as the bond in suit gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for repayment, whether the interest for the first six

**Oudh.**

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26. (1926) 97 I.C. 554=22 N.L.R. 126.
27. 14 I.C. 685=8 N.L.R. 44.
28. 76 I.C. 122=19 N.L.R. 170=1924 Nag. 61.
29. 30 All. 123=5 A.L.J. 72=A.W.N. (1908) 36.
30. 20 I.C. 933=35 All. 455=11 A.L.J. 664.
31. 47 I.C. 926=41 All. 104=16 A.L.J. 929.
32. 86 I.C. 594=53 Cal. 277=1926 Cal. 789.
33. (1926) 97 I.C. 554=22 N.L.R. 126=1927 Nag. 28; Reld. on 30 All. 123.
34. *Ibid.*
35. *Shamrao* v. *Moreshwar*, 1934 Nag. 180.
36. (1913) 19 I.C. 738=16 O.C. 45 [Dist., *Sheo Narain* v. *Ram Din*, 11 I.C. 526=14 O.C. 129 (A case of instalment bond under Art. 75); cf. *Reeves* v. *Butcher*, (1891) 2 Q.B.D. 509 (Not applicable to a case of express option)].

months was paid or not, the plaintiff's claim could not be regarded as barred by time because he chose to stick to the longer term. Where such an express condition exists, the question is not one of waiver but of a pure contract. This does not conflict with the decision in *Tulshi Ram* v. *Muhammad Hadi*,[37] where in a mortgage-deed, option was given to the mortgagee to sue or not to sue on default in payment of interest. It was held that the starting point of limitation was the date of the first default, notwithstanding any stipulation in the deed giving the mortgagee the option of not enforcing payment on such date. Where a *contract* gives a party an express option to sue on one occasion or another, he cannot be compelled to sue when the cntract authorises him to wait.[38] Where a contract gives the power to elect, it is not within the province of law to say that such election shall not be made.[39] A contract which gives the mortgagee one of two options does not bind him to either of them, if he chooses to stick to the other, in other words, it is open to him to waive the benefit of an acceleration, if the contract leaves him such an option; and that option cannot be taken away by statute, unless there is anything to show that the grant of such an option is illegal or forbidden by law.[40] In *Pherai* v. *Pudai Ram*,[41] the **Oudh Judicial Commissioner's Court** has followed the Full Bench ruling of **Allahabad High Court** in *Shib Dayal* v. *Meharban*,[42] that it makes no difference in principle whether the right to sue for repayment before the stipulated period is optional or compulsory.

1449. **WAIVER OF A DEFAULT.**—"While Act XIV of 1859 was in force, there was no distinct statutory provision applicable to an instalment-bond with a stipulation that on default of payment of any one instalment, the whole debt shall be due. The reported decisions during that period ranged themselves under two heads, *viz.*, those which threw out the claim of the obligee altogether on the ground of limitation, and those which left him to avail himself of the benefit of the doctrine of waiver. The Legislature in enacting Art. 75 in Sch. II, Limitation Acts IX of 1871, and XV of 1877, effected a sort of compromise."[43]

**(i) Option to waive.**

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[37] (1916) 32 I.C. 551 (Oudh); also see *Mandharlal* v. *Sakina Begam*, (1917) 37 I.C. 442 (A case of mortgage-deed, under Art. 132, covenant to pay interest on default of payment of instalment).

[38] *Babu Ram* v. *Ardhoot Singh*, (1917) 41 I.C. 423 [Dist., 28 I.C. 910=37 All. 400=13 A.L.J. 510 (F.B.); and *Reeves* v. *Butcher*, (1891) 2 Q.B. 509].

[39] *Ibid.*

[40] *Mubarik Ali* v. *Gopi Nath*, (1918) 45 I.C. 613=5 O.L.J. 73.

[41] (1925) 85 I.C. 280=27 O.C. 318=1 O.W.N. 647.

[42] 69 I.C. 981=45 All. 27=20 A.L.J. 819=1923 All. 1 (F.B.).

[43] Per Mukerji, J., in *Sarat Lakshi* v. *Narendra*, 1929 Cal. 292=33 C.W.N. 250.

**The general rule,** applicable to a bond payable by instalments, falling under Art. 75 of the Limitation Act, is that in the case of such a bond the cause of action, and limitation begins to run, when the first default is made.[44] But, an **exception** engrafted upon it is the rule that payments made and accepted afterwards may operate to waive the effects of a default, and to restore the provision for payment by instalments, provided for by the bond in question.[45] Where money secured by a bond is payable by instalments, with a condition that the whole amount secured will become due upon non-payment of any instalment, the creditor is not bound to enforce the condition, but he may accept payment of instalments after due date—thereby impliedly waiving his right to sue for the whole amount due—and he may sue upon a subsequent default in payment of any future instalment.[46] A provision by way of a default clause in a bond payable by instalments does not mean that the creditor should be compelled to sue for the whole on the default of payment of one instalment.[47] In *Mohanlal* v. *Tika Ram,*[48] it was held that under the terms of the bond the plaintiff had an **option to waive** his right to bring his suit at once on the happening of the first default; which right he had exercised and that, therefore, his suit with regard to the last three annual instalments was not barred. It should be noted that where a defendant has expressed his willingness to pay, there cannot be said to be a "default" within the meaning of Art. 75, Sch. I, Limitation Act.[49]

***(ii)* Waiver defined.**

1450. The word waiver is defined in Wharton's Law Lexicon as follows:—

> "The passing by of an occasion to enforce a legal right whereby to enforce the same is lost . . . . mere lying by is not waiver for this purpose; there must be some *positive* act, which act if done is a waiver in law."

In Halsbury's Laws of England, Vol. 7, p. 423, S. 868, waiver of the right to insist upon the performance of a contract is thus explained:—

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[44] *Mumford* v. *Real,* (1880) 2 All. 857; Ref. 1934 All. 661 (665) (F.B.).

[45] *Hulladhar* v. *Hagg,* (1864) 1 W.R. 189.

[46] *Maharaja of Benares* v. *Nand Ram,* (1907) 29 All. 431; cf. *Basentlal* v. *Gopal Pershad,* A.W.N. (1906) 193; also cf. *Shib Dayal* v. *Meharban,* (1922) 45 All. 27=1923 All. 1=69 I.C. 981, (F.B.) (A case under Art. 132, Limitation Act).

[47] *Raghu* v. *Dipchand,* 4 Bom. 97 (The Court cannot compel the creditor to waive the right he has acquired on default of the debtor to sue for the whole); also see and cf. *Ajudhia* v. *Kunjlal,* 39 All. 123.

[48] (1918) 47 I.C. 926=41 All. 104=16 A.L.J. 929.

[49] *Sitaram Chetty* v. *Krishnaswami,* (1914) 24 I.C. 507=38 Mad. 374 (383).

"Where, for instance, one party consents at the request of the other to extend the time for performance, or to accept performance in a different mode from that contracted for, although there is no binding agreement which prevents him from enforcing his rights under the contract, unless a fresh agreement is made under seal or he receives some consideration for his forbearance, still, if the new arrangement is in fact carried out, the obligation of the other party under the contract is discharged to the extent to which the promisee has waived his rights".

Waiver is consent to dispense with or forego something to which a person is entitled.[50] Where it was proved that demand was made in three successive years in respect of three instalments due upon an instalment bond, but the plaintiff consented not to sue for the whole amount as he was entitled to do under the bond, for default on the first two occasions but refused to consent on the third, it was held that this amounted to waiver of the payment of the two earlier instalments.[1]

**Mere forbearance to sue, is not waiver.**

1451. **WAIVER HOW CONSTITUTED.**—It has been repeatedly held that a mere forbearance to sue for the whole amount of a bond payable by instalments, on default in payment of one or more instalments is not a waiver within the meaning of Art. 75, Limitation Act.[2] The mere fact of doing nothing to enforce the condition in a bond or pronote under which the whole debt became due on failure of payment of one instalment, is no evidence of waiver within the meaning of the Limitation Act.[3] In *Kanhai* v. *Amrit*,[4] the **Allahabad High Court** held that the mere omission of the creditor to sue the debtor on the occurrence of a default in payment of an instalment does not amount to such waiver as is contemplated by Art. 75, Limitation Act. It is settled law, according to the **Madras High Court**, that mere inaction or delay, or even the receipt of an overdue instalment does not *per se* amount to a waiver. Mere abstinence from suits is not sufficient to prove waiver of a right to enforce a condition whereby, upon default of payment of an instalment, the whole debt becomes due.[5] Waiver is not to be inferred from mere abstinence to enforce the condition.[6]

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[50] *Ramchander Banka* v. *Rawatmull*, (1915) 31 I.C. 672=19 C.W.N. 1172.

[1] *Ibid.*, 31 I.C. 672=19 C.W.N. 1172; also see *Selvyn* v. *Garfit*, 38 Ch. D. 284.

[2] *Hara Kumar* v. *Ram Chander*, (1918) 47 I.C. 943; *Girindra Mohan* v. *Bocha Das*, 36 Cal. 394=9 C.L.J. 226=13 C.W.N. 1004=1 I.C. 49; *Sukhlal* v. *Bhoora*, 1934 All. 1039=153 I.C. 205.

[3] *Surendranath* v. *Raja Reshee case-law*, (1924) 79 I.C. 271=27 C.W.N. 893=1924 Cal. 139; *Mon Mohun* v. *Durga*, 15 Cal. 502; *Nobodip Chunder* v. *Ram Krishna*, 14 Cal. 397; *Hurri Pershad* v. *Nasibgul*, 21 Cal. 542; *Ganpat* v. *Narain*, 82 I.C. 203.

[4] 47 All. 552=87 I.C. 162=1925 All. 499.

[5] *Sethu* v. *Nayana*, (1884) 7 Mad. 577.

[6] *Gopala* v. *Paramma*, 7 Mad. 583.

In *Seshan Patter* v. *Veera Raghavan,*[7] the **Madras High Court** has reiterated the proposition that mere abstinence from suing will not constitute such a waiver as will postpone the starting point of limitation in cases falling within Art. 75 of the Limitation Act. This view is supportable by decisions of all the High Courts. In *Babu Ram* v. *Jodh Singh,*[8] the **Allahabad High Court** held that mere fact that the plaintiff waited a long time after the first default, was no evidence of waiver. It cannot be assumed that the plaintiff had forborne to sue by waiver of his right to recover the whole balance due, merely because of great delay in suit.[9] The recent Allahabad decision in *Sukh Lal* v. *Bhoora,*[10] has held that waiver is something more than mere inaction or omission, and it cannot be inferred as a matter of law without making this article nugatory. The **Punjab Chief Court,** in the **Full Bench** case of *Khair-ud-din* v. *Atumal,*[11] has laid down the same rule. A mere forbearance to sue or a mere inaction on the part of the obligee is not a waiver within the meaning of this article. The **Sind Judicial Commissioner's Court** has likewise held that though failure to sue may be evidence of waiver, it does not amount to proof so as to affect limitation, as pointed out in Calcutta cases.[12] And the **Nagpur Judicial Commissioner** has adopted the same view that mere abstention from suing does not amount to a waiver, within the meaning of Art. 75.[13]

**Payment of overdue instalments.**

1452. There can be a waiver by payment and receipt of an overdue instalment, "provided that it can be definitely proved that the payment has been made towards the liquidation of that particular instalment, and *ex-necessitate,* **the whole** sum due is paid. But otherwise, a payment towards the reduction of the debt generally can on no account be considered a waiver, because it is not an **acceptance of a specified instalment.**"[14]

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[7] (1908) 32 Mad. 284=5 M.L.T. 351=19 M.L.J. 372=4 I.C. 38; Relied on 7 Mad. 577; 7 Mad. 583; 31 Cal. 297.

[8] (1913) 18 I.C. 690 (All.); Cf. 30 All. 123 and 41 All. 104.

[9] *Amolak Chand* v. *Baij Nath,* (1913) 20 I.C. 933=35 All. 455=11 A.L.J. 664.

[10] 1934 All. 1039=153 I.C. 205.

[11] 188 P.R. 1883 (F.B.).

[12] *Kimatrai* v. *Wadero,* (1914) 25 I.C. 938=8 S.L.R. 63; Follows 31 Cal. 297 and 36 Cal. 394; not followed *Ajudhia* v. *Kunjlal,* 30 All. 123=5 A.L.J. 72=A.W.N. (1908) 36; also see *Nenumal* v. *Chandramal,* 1929 Sind 140 (144).

[13] *Gopal* v. *Dhondiya,* (1912) 14 I.C. 635=8 N.L.R. 44; *Sewakram* v. *Basod,* 1933 Nag. 70 (72) (Acceptance of overdue instalment by itself not proof of waiver); *Vishwanath* v. *Sadashiwa,* 1932 Nag. 1 (F.B.) (O.R. *Rajaram* v. *Narayan,* 1927 Nag. 28=97 I.C. 554=22 N.L.R. 126. Where it was held that to do nothing may amount to waiver).

[14] 1935 Peshr. 179 (*Gopichand* v. *Md. Umar*).

This proposition is supportable by reference to the **Punjab Chief Court** decision in *Dharmdas* v. *Niamat Singh.*[15] An acceptance of payments made on account of general reduction of whole debt does not amount to a waiver,[16] within the meaning of Art. 75, Limitation Act. To make Art. 75 applicable, it is essentially requisite that the penalty should be attached to a defaut, and that the whole should then fall due.

**(ii) Calcutta.**

The **Calcutta High Court** has held that a subsequent acceptance of the instalment in arrear operates as a waiver, and suspends the operation of the law of limitation, but merely allowing the default to pass unnoticed does not.[17] In the case of payment of overdue instalments, there can be no waiver within this article, unless there is mutuality of payment, and receipt.[18] In *Probhat Chandra* v. *Mohesh Chandra,*[19] there is an illustration of the principle of waiver, by a mortgagee accepting overdue instalments. In *Jadab Chandra* v. *Bhairab Chandra,*[20] the proposition was stated somewhat broadly thus:—

> "Mere abstinence from suing cannot amount to waiver, and there cannot be any waiver so as to affect limitation save by payment and acceptance of an overdue instalment."

Compare, however, the view taken in *Abinash Chandra* v. *Bama Bewa,*[21] that

> "mere omission to sue does not constitute a waiver, but, waiver can be effected not only by acceptance of a subsequent instalment, but in a **variety of ways**".

Though, waiver may be effected in a variety of ways, and may be inferred from various circumstances, it must, however, always depend on some definite act or forbearance on the part of the plaintiff.[22] In *Sarat Lakshi* v. *Narendra,*[23] the fact of a *false* payment of interest was held to be inconsistent with the theory of waiver.

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[15] 78 P.R. 1890; Relied on 5 Cal. 97; 5 All. 289 and 12 Mad. 192 (*Held,* that "the acceptance of an over-due instalment **in full and on account of the specific instalment in arrear,** certainly constitutes a waiver within the meaning of Art. 75, Limitation Act").

[16] *Wazirat Hossain* v. *Mohanlal,* 43 All. 38; *Balla* v. *Rati,* 106 I.C. 874 (Lah.); *Gopal* v. *Kanshi,* 1929 Lah. 390.

[17] *Ramchander Banka* v. *Rowatmull,* (1915) 31 I.C. 672=19 C.W.N. 1172; *Surendra* v. *Raja Reshee,* (1924) 79 I.C. 271=1924 Cal. 139; *Cheni Bash* v. *Kadum,* (1879) 5 Cal. 97; also see *Mohesh* v. *Prasanna,* 38 Cal. 83; *Rafezuddin* v. *Ashraf Ali,* 33 I.C. 608.

[18] *Hurri Parsad* v. *Nasib,* 21 Cal. 542.

[19] 1931 Cal. 157=52 C.L.J. 591=58 Cal. 615.

[20] (1904) 31 Cal. 297 (299, 300).

[21] (1909) 4 I.C. 17=13 C.W.N. 1010 (1012).

[22] *Sarat Lakshi* v. *Narendra,* 1929 Cal. 292=33 C.W.N. 250 (252); also see *Keshorao* v. *Sukhyamali,* 1924 Nag. 61 (Overt act of creditor abandoning his right to re-call the whole of his debt irrevocably); also see *Manmohan* v. *Durga,* 15 Cal. 502; *Girindra* v. *Kher Narain,* 36 Cal. 394.

[23] 1929 Cal. 292=33 C.W.N. 250 (252).

**(iii) Bombay.**

The waiver contemplated by this article must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver.[24] A **Full Bench of the Bombay High Court** has held in *Kashi Ram* v. *Pandu*,[25] that

> "it is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver. The point is one to be determined on the circumstances of each case".

The principle on which it rests is that of **estoppel by conduct,** *viz.*, intentionally causing the other party to believe that the payment was a regular satisfaction of the obligation. In this view, the first default, under the influence of after-events may *cease* to be a default as between the parties.

**(iv) Madras.**

The **Madras High Court** holds that, as a general rule, an acceptance of an overdue instalment may be evidence of waiver.[26] Waiver may be inferred from circumstances, in some cases, without acceptance of overdue instalments.[27] Where the plaintiff, who is entitled in default of payment of a certain sum by defendant, to receive a much larger sum than that which was due at the prescribed time, but one smaller than that which he was entitled to on default under the agreement, a waiver cannot be said to have been established of his right to the larger amount.[28]

**(v) Nagpur.**

The **Nagpur Judicial Commissioner's Court** has denied the broad principle that subsequent acceptance of instalments constitutes a waiver of the obligee's right to claim the entire sum.[29] In *Raja Ram* v. *Narayan*,[30] Hallifax, A.J.C., laid down the dangerous proposition that to do nothing may amount to waiver in some cases. This was not accepted as correct, and the decision was overruled by the **Full Bench** in *Viswanath* v. *Sadasiva*.[31]

Where waiver is not express, it might be implied from conduct which is inconsistent with the continuance of the right. The principle was laid down in an early **Madras** case, that

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[24] *Kankuchand* v. *Rustomji*, (1895) 20 Bom. 109.

[25] 24 Bom. 1 (F.B.).

[26] *Seshan Pattar* v. *Veeraraghavan*, (1909) 32 Mad. 284=4 I.C. 38 =19 M.L.T. 372=5 M.L.T. 35; Relied on *Nagappa* v. *Ismail*, 12 Mad. 192.

[27] *Karuna* v. *Krishna*, 36 Mad. 66; and *Nicholson* v. *Rajagopala*, 38 I.C. 302; also see *Mohiddeen* v. *Perianayakan*, 84 I.C. 118 (Mad.).

[28] *Nanjappa* v. *Nanjalla*, 12 Mad. 161.

[29] *Sewak Ram* v. *Basod*, 1933 Nag. 70 (N.F. *Mukund Balkrishna* v. *Diwalker*, (1891) 4 C.P.L.R.; Followed *Balldbhdas* v. *Dalip Singh*, (1911) 7 N.L.R. 147=12 I.C. 741).

[30] 1927 Nag. 28=97 I.C. 554=22 N.L.R. 126.

[31] 1932 Nag. 1=28 N.L.R. 44 (F.B.).

"where the obligee subsequently accepts payment of one or more sums as an instalment or instalments due under the bond, such acceptance amounts to a waiver of the condition of forfeiture and puts an end to the cause of action which had accrued, so that a bond is set up again as a bond payable by instalments, and no cause of action under the condition arises until some fresh default is made in payment of a subsequent instalment".[32]

**(vi) Allahabad.**

In *Radha Prosad* v. *Bhagwan Rai*,[33] where the creditor refrained from enforcing the penal condition on default, and there was acceptance of subsequent instalment, the conduct was held to amount to waiver. In *Sakhawat* v. *Gajadhar*,[34] the plaintiff was held to have waived his right to enforce the default clause where he had accepted some irregular payments without objection.

(*vii*) Srivastava, J., has held in an Oudh case

"that it is not possible to lay down a hard and fast rule as to what would or would not constitute a waiver. The waiver may be effected in a variety of ways, and may be inferred from various circumstances. It must however depend on some definite act or forbearance on the plaintiff's part".[35]

To the same effect are decisions of the Calcutta, etc., High Courts noticed in S. 452 (*ii*), *ante*.[36]

**Waiver, a question of fact.**

1453. The question of what constitutes waiver, is a mixed question of law and fact.[37] The question whether the creditor had an option to waive his right to bring a suit at once on the happening of the default, and whether as a matter of fact, he did exercise this right of waiver, is in each case a question of fact.

In a recent Allahabad case, Sulaiman, J., has observed

"that the *waiver of benefit* spoken of in Art. 75 is something exercised for the benefit of the creditor and not against him. The waiver therefore may be a purely one-sided act and need not be for consideration proceeding from the debtor. The waiver may be by expression of an intention to waive the benefit either by communication of the debtor or by any other overt act. *Waiver* is a mixed question of law and fact, and . . . it depends on the circumstances of each case."[38]

In *Satrucherla* v. *Seetharama*,[39] the case was remanded to determine on evidence whether the plaintiff did waive the benefit of the provision. The **Bombay Full Bench** observed in *Kashi Ram* v. *Pandu,*[40] that

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[32] 5 Mad.H.C.R. 198 (199, 200).

[33] 5 All. 292.

[34] 28 All. 622; also see *Srinivasa* v. *Sheo Govinda*, 20 I.C. 156.

[35] *Nageshar* v. *Bakrid*, 1932 Oudh 176=137 I.C. 223=9 O.W.N. 250.

[36] *See* F.N. 22 and 23, *ante*.

[37] *Easim* v. *Abdul Wahab*, 15 C.W.N. 10; also see *Bhawan Das* v. *Mengh Raj*, (1918) 45 I.C. 324 (Sind).

[38] *Sukh Lal* v. *Bhoora*, 1934 All. 1039=4 A.W.R. 966=1934 A.L.J. 1056=1934 All. L. R. 1130=153 I.C. 205.

[39] (1880) 3 Mad. 61=4 Ind. Jur. 557.

> "it is a fundamental proposition of law that payment and acceptance of overdue instalments cannot by themselves prove a waiver. The point is one to be determined on the circumstances of each case."

**The two tests,** which may be applied to determine whether there had been actual waiver are (1) whether the payment might be treated as valuable consideration for the renunciation or abandonment on the part of the decree-holders; (2) whether the execution-creditor did by his act intentionally cause the other to believe that the payment had been received in satisfaction of the obligation and whether the parties acted on that belief, because if they did so, they could not afterwards question their legality. It has been held that receipt of subsequent instalments from the principal debtor does not necessarily operate as waiver so far as surety is concerned.[40-a]

**Principal and surety.**

**1454.** Waiver is to be alleged and proved by creditor.[41] As a general rule, the party setting up waiver must prove the fact which has to be pleaded specifically for his benefit. There must be clear proof that the creditor elected to forego his right to claim whole amount.[42] In order to claim the benefit of Art. 75, it is necessary for the obligee to show that he has waived the benefit of the provision entitling him to sue on an earlier default, and that he bases his claim on the subsequent defaults in respect of which there is no waiver.[43] A clear act with an intention to waive must be proved.[44]

**The onus.**

**1454. STARTING POINT OF LIMITATION.**—Under Art. 75 of the Limitation Act, in the case of a bond payable by instalments, the cause of action arises, and limitation begins to run, when the first default is made.[45] In the case of a decree for money made payable by instalment with a proviso to the effect that on default being made in the payment of the instalments, the rule followed by analogy is, that the decree-holder is entitled to execute the decree for the whole amount due, and he may execute it on the happening of the first, second, or any subsequent default, and the limitation will run against him in respect of each instalment separately from the time when such instalment may become due.[46] Limitation does not necessarily run in respect of the whole debt, commencing from the date of the first default.[47] Where under the terms of the bond, it was open to the plaintiff to waive his right and to recover the money simply by instalments, the limitation under Art. 75 will run when the default is made, unless the payee is shown to have waived the benefit of the provision, and then, when a fresh default is made, in respect of which there is no such waiver.[48] The **Bombay High Court**, has held in *Ragho* v. *Dipchand,*[49] that under this article the starting point would depend upon the provision made in the bond or note as to when the whole amount would become due, whether in payment of one instalment, or a number of instalments. In such cases there may be one or more defaults, by which the whole amount becomes due. But in such cases there cannot be any waiver by the creditor once for all by which he can claim the benefit of an alternative right to sue for the several instalments as they successively fall due. The omission to enforce the condition on one default, does not prejudice the right to enforce the condition on other default.[50]

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[40] (1902) 27 Bom. 1 (F.B.); Folld. in *Easin* v. *Abdul Wahab,* 15 C.W.N. 10 (The question is a mixed question of law and fact).

[40-a] *Mumford* v. *Peal,* 2 All. 857 and *Gopi Chand* v. *Muhammad Umar,* 1935 Pesh. 179.

[41] *Sukh Lal* v. *Bhoora,* 1934 All. 1039=153 I.C. 205=1934 A.L.J. 1056.

[42] *Kanhai* v. *Amrit,* 47 All. 552; *Balu Ram* v. *Jadha Singh,* 11 A.L.J. 89; *Ram* v. *Rawat Mull,* 19 C.W.N. 1172=31 I.C. 672.

[43] *Nageshar Prasad Dube* v. *Bakridi,* 1932 Oudh 176=137 I.C. 223 =9 O.W.N. 223; also see *Kishin Das* v. *Menghraj,* 1925 Sind 144=81 I.C. 834.

[44] *Shivlal* v. *Tani Ram,* 1928 Bom. 444=30 Bom. L. R. 1136.

[45] *Mumford* v. *Peal,* (1879) 2 All. 857; Ref. 1934 All. 661 (665) (F.B.).

In *Jadab Chandra Bakshi* v. *Bhairab Chandra,*[1] dissenting from the view taken in *Chunder Komul Das's case,*[2] it was held by the **Calcutta High Court**, that in an instalment bond stipulating that on default being made in payment of any one instalment, the creditor would be at liberty to realize the amount covered by all the instalments, the period of limitation would start running from the date of first default, unless there was a waiver by the creditor of the right to demand the whole on a default, by a subsequent acceptance of an overdue instalment. Similarly, the **Allahabad High Court** has laid down the rule in *Jiwamal* v. *Jageshar Kasondhan*,[3] that in a suit upon a money-bond which provides for repayment by instalments and which contains a condition that on failure to pay any one instalment the creditor would be entitled to recover the whole amount at once, the point to consider is, whether the creditor had an option to waive his right to bring a suit at once on the happening of the default, and whether, as a matter of fact, he did exercise this right of waiver; in each case the question is one of fact. In the absence of anything to show such option and exercise of waiver limitation begins to run from the time when the first default in the payment of instalments is made.[4] A **Full Bench of the Allahabad High Court,** in *Shib Dayal* v. *Meharban*,[5] has held that "money becomes due" within the meaning of Art. 132, Limitation Act, and limitation begins to run against the plaintiff from the time of the event happening which gives him the option to recall the money, or to wait for the entire stipulated period.

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[46] *Shankar Prasad* v. *Jalpa Prasad,* (1894) 16 All. 371=14 A.W.N. (1894) 115.

[47] *Ajudhia* v. *Kunjal,* (1907) 30 All. 123=5 A.L.J. 72; Diss. from 21 Cal. 542 and 31 Cal. 297; Relied on 16 All. 371 and 29 All. 431; cf. *Jawahir Lal* v. *Mathura Prasad,* 1934 All. 661 (666) (F.B.); also see and cf. *Vishin Das Wadhu Ram* v. *Hotomal Ditomal,* 31 I.C. 479 (S.).

[48] *Babu Ram* v. *Jodha Singh,* (1913) 18 I.C. 690=11 A.L.J. 89; also see *Amolak Chand* v. *Baij Nath,* 20 I.C. 933=35 All. 455; cf. *Ajudhia* v. *Kunjal,* (1907) 30 All. 123=5 A.L.J. 72.

[49] 4 Bom. 96.

[50] *Vaithinatha Aiyar* v. *Govindasami,* (1921) 42 M.L.J. 551=1922 Mad. 67=67 I.C. 995; *Mt. Kaunsilla* v. *Dip Singh,* 1929 All. 812=121 I.C. 272.

[1] (1904) 31 Cal. 297; Followed (1894) 21 Cal. 542 and Relied upon (1888) 15 Cal. 502.

[2] 13 C.L.R. 243.

Where, in a case falling under Art. 75, the benefit of the provision as to the recovery of the *whole* amount is waived, the cause of action accrues on each default and a suit for a separate instalment may be brought within three years of that particular default.[6] There may be waiver by the creditor not only of the first default, but of any subsequent default except the last: column three expressly provides for repeated waivers.[7] The period of limitation for the recovery of instalments commences from the date on which each instalment becomes due even where it is provided that on failure to pay three instalments, the whole shall become payable.[8] **The principle** underlying this article has been clearly stated in an early Madras case reported as 5 Mad. H. C. R. 198.

A waiver of the condition of forfeiture puts an end to the cause of action which had accrued on the bond payable by instalments, and no cause of action under the condition of default arises

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3. (1922) 66 I.C. 655=1922 All. 113 (1).

4. (1922) 66 I.C. 655=1922 All. 113 (1); Folld. 18 I.C. 690=11 A.L.J. 89 and 20 I.C. 933=35 All. 455=11 A.L.J. 664; cf. 30 All. 123 =5 A.L.J. 72=A.W.N. (1908) 36 and 47 I.C. 926=41 All. 104=16 A.L.J. 929.

5. (1922) 45 All. 27=1923 All. 1=69 I.C. 981 (F.B.); Folld. in *Pherai* v. *Pudali Ram,* (1925) 85 I.C. 280=27 Oudh Cas. 318=1 O.W.N. 647; Doubted in 1926 P.C. 85=99 I.C. 650=53 I.A. 187 (P.C.); O.R. in 1932 P.C. 207=138 I.C. 779=59 I.A. 376=7 Luck. 442 (P.C.).

6. *Mt. Kaunsilla* v. *Dip Singh,* (1930) 121 I.C. 272=1929 All. 812 =1930 A.L.J. 494 (Dalal, J.); Dist. 20 I.C. 933=35 A. 455=35 A.L.J. 664.

7. *Satrucherla* v. *Sitaram,* 3 Mad. 61 (64, 65).

8. *Sitarama Chetty* v. *Krishnasami Chetty,* (1914) 24 I.C. 507=38 Mad. 374=25 M.L.J. 264 (Art. 74 would apply where there is no default in the payment of an instalment).

until some fresh default is made in payment of a subsequent instalment. No stipulation between the parties reserving an option to the obligee as to bringing a suit for money due can exclude the operation of the provisions of the Limitation Act as to the time from which the limitation for a suit falling under Art. 75 is to be reckoned, and a mere forbearance to sue or mere inaction on the part of the obligee is not a waiver within the meaning of that article.[9] In the absence of waiver, if the creditor fails to bring a suit based on the default clause, the cause of action will start from the date of default, as to which there is no waiver. In other words, this article contemplates that in the absence of a waiver, an instalment bond is to be treated as a bond not permitting instalments for the purposes of limitation.[10] In such cases time begins to run from the date of first default.[11] In *Nand Lal* v. *Akki*[12] (Sir Shadilal, C.J., and Le Rossignol, J.), the ruling in *Jawanlal* v. *Sharfdin,*[13] has not been followed.

> "The *terminus a quo* provided by Art. 75 is the date of the default; in other words, not the date of payment, but the date of non-payment in accordance with the stipulations of the contract."

Section 20 has no concern with the suit which is governed by Art. 75. The Lahore view, above noted, has been accepted and followed by the Calcutta High Court (Guha and Ghose, JJ.), in *Probhat Chandra* v. *Mohesh Chandra,*[14] where the fact that the mortgagee had accepted overdue instalments, and thereby waived the benefit of the provisions which gave him the right of the entire claim as to first default, could not bring in the application of S. 20, Limitation Act. For the purposes of waiver under Art. 75, it is not necessary that the payment should appear in the handwriting of the debtor as contemplated under S. 20, Limitation Act.[15]

If the creditor does not waive, but elects to enforce the alternative provision, he can do so but once: and he cannot then revert to an enforcement of the instalments.

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[9] *Khair-ud-din* v. *Atumal,* 188 P.R. 1883 (F.B.).

[10] *Bankey Lal* v. *Ram Lal,* (1925) 86 I.C. 918=1925 Oudh 373=12 O.L.J. 112; also see *Nanak Chand* v. *Mir Muhammad,* 75 I.C. 1048=1924 Lah. 702 (No provision for default, fresh cause of action arises upon each default); and *Ram Jawaya Shah* v. *Ram Singh,* 2 L.L.J. 314 (Starting point is the date of default next after waiver).

[11] *Mohanya* v. *Panna Lal,* (1924) 79 I.C. 848=10 O.L.J. 513; also see *Ram Chand* v. *Nanya,* 1934 Lah. 283 (1) (Right to sue for whole amount on default of an instalment reserved—Suit for whole amount on default governed by Art. 75).

[12] (1925) 89 I.C. 294=6 Lah. 163=1925 Lah. 394=26 P.L.R. 328.

[13] 16 I.C. 961.

[14] 1931 Cal. 157=58 Cal. 615=130 I.C. 571=52 C.L.J. 591.

[15] *Ibid.*

"This article creates a case of election as each instalment becomes overdue, and after the last instalment becomes overdue there can be no election for the obvious reason that there are no two obligations to elect between."[16] This principle was applied in *Radha Prasad Singh* v. *Bhagwan Rai*,[17] to the case of a decree payable by instalments. In the case of a mortgage-bond, the stipulation in the default clause gave only an option to the mortgagee to call in at once the principal amount and interest due on the mortgage-bond without reference to the period stipulated for payment.[18]

Where the creditor in his plaint or application claims to realise the *whole amount,* he shows thereby that he adopts one alternative, by which he does not *waive* the benefit of the provision.[19] In such cases, there being *no waiver,* the creditor's suit in respect of later instalments would be time-barred, if limitation has started against him from date of first default.[20] In a recent Lahore case,[20-a] where the creditor had the right to recover the whole sum with interest, if there was default, or he could waive this right and sue for each instalment as it fell due and the creditor sued for the whole amount on non-payment of any instalment it was held that there was no waives and that time ran from date of default.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 76. | On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen. | Three years. | The date of the delivery to the payee. |

## SYNOPSIS.

1455. Corresponding provisions.
1456. Article explained.

## NOTES.

**1455. CORRESPONDING PROVISIONS.**—This article is the same as Art. 76 of Act XV of 1877; and, it corresponds to Art. 76 of Act IX of 1871, with the difference of word "time", for the "date" in the present article.

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[16] *Mackenzie* v. *Tiruvengadathan,* (1886) 9 Mad. 271.

[17] (1883) 5 All. 289=3 A.W.N. 1883) 33.

[18] *Rangaswamy Pillai* v. *Kuppuswamy,* 107 I.C. 650=1928 Mad. 639.

[19] *Bir Narain* v. *Darpa Narain,* (1892) 20 Cal. 74 (78); cf. *Pancham* v. *Ansar Hussain,* (1926) 48 All. 457 (P.C.); *Sarat Lakshi* v. *Narendra,* 1929 Cal. 292=33 C.W.N. 250.

[20] *Bir Narayan* v. *Darpa Narain,* (1892) 20 Cal. 74 (78); *Nicholson Bank* v. *Rajagopala,* (1916) 38 I.C. 302 (Mad.); *Perianan* v. *Mariappan,* 1924 Mad. 310=77 I.C. 48; *Seetharamayya* v. *Munisami,* 50 I.C. 87=9 L.W. 42; *Lachakkammal* v. *Sokkayya,* (1918) 48 I.C. 191 (Mad.).

[20-a] *Ram Chand* v. *Nanga,* 1934 Lah. 283=149 I.C. 972.

**1456. ARTICLE EXPLAINED.**—This article is taken as based on the English decision in *Savage* v. *Aldren*.[21] In that case, a pronote payable *on demand* was deposited with a banker for delivery to the payee, upon the payee producing and cancelling a previous one. It was held that the statute ran only when the note was so delivered by the banker to the payee, and not from the date of the note.[22]

It has been observed, however, that the language of this article is wide enough to include promissory notes, whether payable on demand or otherwise.

This article has to be compared with Arts. 69 and 73, *ante*.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 77. | On a dishonoured foreign bill, where protest has been made and notice given. | Three years. | When the notice is given. |

### SYNOPSIS.

1457. Corresponding provision.
1458. Article explained.
1459. Starting point of limitation.

### NOTES.

**1457. CORRESPONDING PROVISION.**—This article is the same as Art. 77 of Sch. II of the Limitation Acts, IX of 1871 and XV of 1877.

**Foreign bill.**

**1458. ARTICLE EXPLAINED.**—An *"Inland Instrument"* is defined in S. 11 of the Indian Negotiable Instruments Act, XXVI of 1881, as

> "a promissory note, bill of exchange, or cheque, drawn or made in British India, and made payable in, or drawn upon any person resident in British India".

Negotiable instrument, which is not an inland instrument covered by the definition in S. 11, is a foreign instrument. For instance, an instrument drawn in British India, *but* made payable in or upon any person outside British India, is a foreign instrument. Similarly, an instrument drawn outside British India, is a foreign instrument, though made payable in, or upon any person in British India. Instruments both drawn or made, *and* made payable in, or drawn upon, any person outside British India, are foreign instruments.[23]

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[21] (1817) 2 Stark 232.

[22] *See* Banning, p. 31.

[23] *See* Obhrai's "Principles of Negotiable Instruments in India," p. 67.

**Bills in sets.**

**Noting and protest.**

**Foreign instruments** are normally drawn in sets, for sake of precaution as regards instruments sent overseas. Each of the sets or parts is numbered and contains a reference to other parts. **Noting and Protest** are made obligatory on the dishonour of foreign instruments, according to the law of the place where they are drawn. *See* Ss. 93, 100 and 104, Negotiable Instruments Act XXVI of 1881.

1459. **STARTING POINT OF LIMITATION.**—This article is based on the English decision in *Whitehead* v. *Walker.*[24] In the case of a foreign bill, time runs ony when protest has been made for non-acceptance and notice of dishonour is given and not when the bill falls due or acceptance is refused.[25] This authority is relied upon in the **Bombay** case of *Sheth Kahandas Narandas* v. *Dahiabhai,*[26] that the cause of action in a suit on dishonoured foreign bill arises only on dishonour and notice consequent thereon; and not earlier than the announcement of non-payment.

| Article | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 78. | By the payee against the drawer of a bill of exchange, which has been dishonoured by non-acceptance. | Three years. | The date of the refusal to accept. |

### SYNOPSIS.

1460. Corresponding provisions.
1461. Article explained.
1462. Starting point of limitation.

### NOTES.

1460. **CORRESPONDING PROVISIONS.**—This article is the same as Art. 78 of Act IX of 1871, and it re-enacts Art. 78 of the previous Act XV of 1877. Compare Art. 79 of Act IX of 1871: "Like suit when the bill has been dishonoured by non-acceptance and afterwards by non-payment: 3 years: the date of the refusal to accept." That article is omitted in the later Acts of 1877 and 1908.

**(i) Payee.**

1461. **ARTICLE EXPLAINED.**—The word payee, in this article, would include the last indorsee. [*See* S. 16 (2), **Negotiable Instruments**

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24. (1842) 9 M. & W. 506.

25. Darby and Bosanquet's Statutes of Limitation, 2nd Edn., p. 35; Mitra's Limitation Act, Vol. II, p. 1271; Wood's Limitation, 4th Edn., p. 730.

26. (1879) 3 Bom. 182.

**Act.]** Where the endorsee of a bill sues the drawer to recover the amount due under the bill, a notice of dishonour may be excused under S. 98 (*c*) of the Negotiable Instruments Act, if it is established that the drawer could not have suffered damage by the omission.[27] The expression "payee" is used in the Negotiable Instruments Act in a limited sense of a person named by the drawer, in the instrument, to whom or to whose order, the money is directed to be paid. This may include any company or association or body of individuals, whether incorporated or not and a corporation may, therefore, be a payee.[28] The "payee" may also be two or more persons, to whom the bill is made payable either jointly, or in the alternative.

**(*ii*) Drawer.**

The maker of a bill of exchange or cheque is called the drawer. There cannot be a bill of exchange or cheque without a drawer.

**(*iii*) Dishonour by non-acceptance.**

Section 91 of Negotiable Instruments Act, XXVI of 1881, defines "dishonour by non-acceptance". "A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused, and the bill is not accepted. Where the drawee is incompetent to contract, or the acceptance is qualified, the bill may be treated as dishonoured". This section corresponds to S. 43 (1), (English) Bills of Exchange Act, 1882. A dishonour by non-acceptance may take place in one of the following ways:—

(1) When a bill has been duly presented for acceptance, and the drawee, or one of two or more drawees who are not partners, does not accept the bill within 48 hours from the time of presentment, the bill is dishonoured, unless the holder rests content with the acceptance of only some of them.

(2) When the drawee gives a qualified, or conditional acceptance, and the holder does not choose to take it, he may treat the bill as dishonoured.

(3) When presentment for acceptance is excused, and the bill is not accepted, it is said to be dishonoured for circumstances under which a presentment for acceptance will be excused.

This article is **not applicable to a suit** for recovery of sum due **on the original cause of action,**[30] although the hundi and cheque sent by defendant to plaintiff were dishonoured.

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[27] *Jambu Ramaswamy* v. *Sundararaja* (1902) 26 Mad. 239.

[28] *See* S. 3 (39), General Clauses Act, 1897 and *Damodar Das* v. *Benares Bank,* 58 I.C. 265.

[29] *See* S. 4, para. 18.

[30] *Padmalochan* v. *Girish Chandra,* (1917) 46 Cal. 168=45 I.C. 241=27 C.L.J. 392.

**1462. STARTING POINT OF LIMITATION.**—Dishonour by non-acceptance of a bill, or *hundi,* gives the holder an immediate cause of action against the drawer, and indorsers, and the holder is not bound to wait until the maturity of the instrument, or to present it for payment.[31] The liability of the drawer, as compendiously expressed in S. 30, Negotiable Instruments Act, XXVI of 1881, is that, in case of dishonour by the drawee or acceptor thereof, he is bound to compensate the holder, provided due notice of dishonour has been given to, or received by the drawer, as provided in the Negotiable Instruments Act.[32] Where the drawer, and the drawee are the same person, or the drawee does not exist, or is a fictitious person, the holder has the option to treat the instrument as a bill or note. In other cases, the drawer's liability does not arise until presentment is made to the drawee, and the bill is dishonoured by him, or where no presentment is necessary, until the bill can be treated as dishonoured.[33] Dishonour may be either by non-acceptance, (S. 91), or by non-payment (S. 92). **The non-acceptance by the drawee,** gives an immediate cause of action **against the drawer,** and no fresh cause of action arises by reason of the subsequent non-payment.[34] But, further, on the failure of acceptance, the holder is bound to give immediate notice to the drawer.[35] Article 78 of the Limitation Act, however, gives the *"the date of refusal to accept"*, as the starting point of limitation, and disregards the subsequent non-payment in the computation of the period of limitation.[36] According to English cases, time runs when notice of non-acceptance is given.[37] Hence it runs from *the the date of refusal to accept,* not from the date of non-payment on the due date, which but for the prior refusal to accept would ordinarily have constituted a cause of action.[38] Accordingly, a suit by the payee against the drawer, or acceptor of a bill of exchange which has been **dishonoured by non-payment** would be governed by the general **Art. 80,** as this article applies only to a suit based upon the cause of

**"The date of refusal to accept."**

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[31] *Miller* v. *National Bank of India,* 19 Cal. 146; also see *Whitehead* v. *Walker,* 9 M. & W. 506.

[32] *See* S. 30 Negotiable Instruments Act, 1881; *also see* S. 43 (2) of (English) Bills of Exchange Act.

[33] Obhrai's Negotiable Instruments Act, S. 30, p. 139.

[34] *Ram Raoji* v. *Prahlad Das,* 20 Bom. 133; also see *Whitehead* v. *Walker,* 9 M. & W. 506.

[35] Obhrai's Negotiable Instruments Act, p. 139; Bhashyam's Negotiable Instruments Act, p. 151.

[36] Mitra's Limitation Act, Vol. II, p. 1271.

[37] *See* Darby and Bosanquet, Limitations, 2nd Edn., pp. 34, 35; also see Halsbury's Laws of England, Vol. II, p. 559.

[38] *Wilkinson* v. *Verity,* (1871) L.R. 6 C.P. 206; *Miller* v. *Dell,* L.R. (1891) 1 Q.B. 468.

action arising out of *dishonour by non-acceptance.*[39] The **Madras** decision, in *Jambu* v. *Sundararaja,*[40] shows that a suit against *an acceptor* may be time barred without exonerating the drawer if the suit against him was within the prescribed period under Art. 78, Limitation Act.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run |
|---|---|---|---|
| 79. | By the acceptor of an accommodation bill against the drawer. | Three years. | When the acceptor pays the amount of the bill. |

### SYNOPSIS.

1463. Corresponding provision.
1464. Article explained.
1465. Starting point of limitation.

### NOTES.

**1463. CORRESPONDING PROVISION.**—This article corresponds to Art. 81 of Act IX of 1871. The words "of the bill" were inserted in Art. 79 of Act XV of 1877, which has been re-enacted in the present article.

**"Acceptor of an accommodation bill.**

**1464. ARTICLE EXPLAINED.**—"Acceptor" is a term generally applicable to the drawee of a bill, to whom it is presented for acceptance. A bill of exchange can be accepted by the drawee alone, and not by a stranger.[41] The acceptor before maturity of a bill of exchange is bound to pay the amount thereof at maturity, to the holder on demand.[42] **An Accommodation Bill** implies a warranty by the drawer (for whose accommodation the bill was accepted) to indemnify the acceptor against claims arising out of the bill, and on this implied warranty, the **acceptor** can maintain an action against the drawer, if he were obliged to take up the bill at maturity.[43] The acceptor of a bill of exchange, engages by his acceptance that he will pay it according to the tenor of his acceptance, and the effect of such acceptance is to make the acceptor primarily liable to pay the bill, and to render the drawer, and the indorsers liable as sureties only, in case of the acceptor's default.[44] An instrument will not be considered duly accepted, until its delivery by the acceptor.[45]

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[39] See and cf. *Ram Chand* v. *Shadi Ram,* 19 P.R. 1888 (Where Art. 80 was applied to a suit on dishonoured *hundi* not presented for *acceptance* but only for payment); also see Halsbury's Laws of England, Vol. 2, p. 559; *Hemp* v. *Garland,* (1843) 4 Q.B.D. 519.

[40] (1892) 26 Mad. 239.

[41] *Jagannath* v. *The Heap Co., Ltd.,* 71 P.R. 1909; *Davis* v. *Clerk,* (1844) 13 L.J.Q.B. 305.

[42] S. 32, Negotiable Instruments Act, 1881.

[43] Obhrai's Negotiable Instruments Act, S. 32, p. 153.

[44] *Ibid.*, S. 245, p. 154; *Smith* v. *Knox,* (1799) 3 Esp. 46.

**1465. STARTING POINT OF LIMITATION.**—This article does not really refer to a suit upon a bill. It contemplates suits by *the acceptor,* upon an implied agreement, arising out of the accommodation bill, between the drawer and the acceptor, that the former would indemnify the latter for any loss incurred. So that the **cause of action** for the acceptor against the drawer does not arise until he is damnified by paying out the bill.[46] A payment by the acceptor, at or after maturity, discharges the bill, though the acceptor may have his remedy against the drawer for refund of the amount.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 80. | Suit on a bill of exchange, promissory note, or bond not herein expressly provided for. | Three years. | When the bill, note or bond becomes payable. |

## SYNOPSIS.

1466. Corresponding provisions.
1467. Article explained.
1468. Article applied—Illustrative cases.

## NOTES.

**1466. CORRESPONDING PROVISIONS.**—This atricle is same as Art. 80 of Act XV of 1877. The corresponding Art. 80 of Act IX of 1871, made no provision as to *bonds,* in the first column. The words "or bonds", were introduced in Art. 80 of Act XV of 1877, for the first time.

The corresponding provision in Act XIV of 1859 was made in S. 1, Cl. (10), where the words used were "*a written engagement or contract*". These words were held to cover the case of suits on promissory notes payable by instalments.[47]

**1467. ARTICLE EXPLAINED.**—This is the residuary article for suits on Bills, Notes, or Bonds, not covered by Arts. 66 to 79, or by Art. 116.

**Residuary article.**

This article read with Art. 116, Limitation Act is the appropriate article for money claims under a registered bond. The expression *"becomes payable"*, is very much the same thing as the

**"Becomes payable."**

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[45] *Pragdas Thakurdas* v. *Daulatram,* 11 Bom. 258.

[46] *Reynolds* v. *Doyle,* (1840) 1 M. & G. 753; *Angrove* v. *Tippett,* (1865) 11 L.T. 708; cf. Art. 83, Limitation Act.

[47] *Gumna Dumbershet* v. *Bhiku,* (1876) 1 Bom. 125 (129); also see *Pyari Chand* v. *Frazer,* 6 B.L.R. App. 40.

words "become due" in Art. 132, Limitation Act, according to the Full Bench decision of the **Allahabad High Court,** in *Shib Dayal* v. *Meharban,*[48] but this decision has been overruled by their Lordships of the Privy Council in *Lasa Din* v. *Gulab Kunwar,*[49] at least so far as the interpretation of Art. 132 is concerned. " In view of this interpretation of the law the ground on which *Shibdayal's* case,[50] was decided can be longer he sustained."[1]

**Specific excludes the general.**

This article is applicable only to suits *on* a bill of exchange, note or bond, but is not applicable to suits for relief by way of damages, etc., arising *out* of a bill, note or bond, *e.g.,* a suit by the drawer of a bill against the drawee or acceptor for dishonouring the bill, or a suit by an endorser against the principal debtor.[2] However, a suit by the endorsee of a bill or note against the endorser or against the other parties to the bill or note may be governed by this article, if Arts. 69 to 76 be inapplicable. A suit by the payee against the acceptor or drawer of a bill of exchange which has been dishonoured by non-payment is governed by Art. 80, Limitation Act.[3] This general article dealing with bonds as a whole will be excluded from application by a specific article dealing with instalment bonds such as Art. 74, if Art. 75 be not applicable.[4]

## 1468. SCOPE AND APPLICATION.—

**Bond providing for repayment on contingency.**

(1) Neither Art. 66, nor Art. 67 can properly be applied to a bond which, though it does not specify a particular day for payment, yet in effect lays down that the money due on the bond is payable on a future date upon a certain contingency happening,[5] for example, where a bond provided that the money due upon it would be paid at the time of payment of a certain sum of money due on two mortgage-deeds executed previously; it was held that Art. 80 governed the case, and the starting point of limitation was the date of the payment of the money due on the mortgage-deeds.[6]

(2) A bond, which stipulates for the repayment, within three years of the principal, and every half-year, of the interest thereon and of the premia of certain policies of insurance made over to the creditor as collateral security for the debt, and that, in default of such half-yearly payments, the whole amount of the debt shall become payable, but that it should be optional with the creditor to claim full payment on the failure

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[48] 1923 All. 1=69 I.C. 981=45 All. 27 (F.B.); N. F. in *Muhammad Hussain* v. *Sanwal Das,* 1934 All. 397=148 I.C. 951 (F.B.).

[49] 1932 P.C. 207=138 I.C. 779=59 I.A. 376=7 Luck. 442 (Followed in *Mool Chand* v. *Chittar,* 1935 Lah. 948=(1936) 160 I.C. 1068.

[50] 1923 All. 1=69 I.C. 981=45 All. 27 (F.B.).

[1] *Muhammad Hussain* v. *Sanwal Das,* 1934 All. 397=148 I.C. 951 (F.B.).

[2] Pal's Limitation Act, p. 658.

[3] See notes under S. 78, *ante.*

[4] *Raghpat Rai* v. *Mt. Wali,* (1909) 4 I.C. 956.

[5] *Kirparam* v. *Churn,* (1916) 32 I.C. 575=30 P.W.R. 1916.

[6] *Ibid.*

of any one or more half-yearly payments or on the expiry of the period of three years, is **not an instalment bond**; and, therefore, Art. 75 does not apply to it. The bond does not fall under Arts. 67 and 68 of the schedule, but belongs to the category of bonds mentioned in Art. 80, on which the cause of action arises when the bond becomes due on default.[7]

**Not instalment bond.**

(3) Where the **bond** amount was payable within six months and was **to bear** a certain rate of **interest,** payable month by month, and compound interest in default, and the plaintiff was given an option to wait till the expiry of the period of the bond before suing on **default in payment of interest,** held, that the bond in suit did not provide for the repayment of money in instalments, and there was no right of waiver in the present case to which Art. 75 could not be applied.[8]

(4) In the case of a **money-bond** where interest is payable from year to year, and the whole amount of principal with interest is payable within a period of seven years, with liberty to the lender to demand **repayment of the entire sum due on** the happening of **default in payment of interest** for any two consecutive years, or after the expiry of the period of the bond, it was held that the bond becomes payable under Art. 80 of the Limitation Act when the creditor chooses to enforce payment under either of two remedies provided for, and that the suit was not governed by Art. 66.[9]

**Not instalment bond.**

(5) A bond provided for payment of the money at the end of five years, but on default of payment of interest for two years, empowered the creditor to realise the whole of the amount due to him. *Held,* that the suit brought within six years of the period fixed for payment was not barred by time under Art. 80, read with Art. 116, Limitation Act.[10]

**Promissory note.**

(6) A document which recites "I shall pay you whenever you may demand after you attain the majority", is a promissory note; and a suit on the note is governed by Art. 80; limitation starts running from the time of demand after the creditor has attained majority.[11]

**Surety bond.**

(7) A suit by the payee against the acceptor or drawer of a bill dishonoured by non-payment: and a suit on surety's bond to pay on the disposal of a pending appeal, held, governed by Art. 80, Sch. I, Limitation Act.[12]

**Hypothecation bond.**

(8) A suit on an unregistered bond, hypothecating certain moveable property in the debtor's possession held to fall under Art. 80.[13]

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[7] *Ball* v. *Stowell,* (1879) 2 All. 322; also see *Shibdyal* v. *Meharban,* 45 All. 27 (F.B.).

[8] *Pherai* v. *Pudai Ram,* 1925 Oudh 502=85 I.C. 280=27 O.C. 318; cf. *Durga* v. *Tota Ram,* (1913) 19 I.C. 738=16 O.C. 45.

[9] *Hori Lal* v. *Thamman Lal,* (1922) 70 I.C. 85=9 O.L.J. 416=1923 Oudh 19=26 O.C. 121; Followed *Durga* v. *Tota Ram,* 19 I.C. 738=16 O.C. 45.

[10] *Shiam Lal* v. *Tehariya Lakhmichand,* (1920) 58 I.C. 278=18 A.L.J. 476; Relied on *Gaya Prasad* v. *Sher Ali,* 39 I.C. 574=15 A.L.J. 313 and *Makrand* v. *Kallu,* 50 I.C. 640=17 A.L.J. 647=41 All. 581.

[11] *Kuttiassan* v. *Suppi,* 3 M.L.J. 199.

[12] *Ibid.*

[13] *Vitla* v. *Kala Kara,* 11 Mad. 153.

(9) A suit on a **dishonoured bill** payable at a fixed time after date, which was presented only for *payment* and not for acceptance is governed by this article.[14]

(10) In the case of **instalment bonds** where there is **no default, and no question of waiver,** Art. 75 cannot apply. Where the plaintiff refused to accept an instalment which the defendant was willing and ready to pay, Art. 80 was applied.[15]

**War-bond.**

(11) A war-bond is a promissory note within the meaning of the Negotiable Instruments Act or the Limitation Act. In a suit on war-bond, governed by Art. 80, Limitation runs from date of presentment at the specified place.[16]

**Promissory note with writing restraining suit.**

(12) A promissory note in favour of the bank, executed by the defendant was accompanied by letter of same date stating that the sum borrowed from the bank would be paid, principal and interest within one year; and if the payment was not paid within the time specified, then the bank may realize (the money) in any way they pleased was a "*writing restraining or postponing the right to sue*".[17] An agreement in writing executed along with a promissory-note postponing the time for payment within the meaning of Art. 73, is enforceable. Time, therefore, begins to run from the *expiry of the period fixed in* the agreement, and the suit would be governed by Art. 80, Limitation Act.[18]

(13) Where a promissory note was executed for a loan, and the defendant had applied to the plaintiff bank on printed loan forms stating the period for re-payment, which the bank accepted, *held* that the application to bank was admissible to fix the date of payment, and limitation started on the expiry of the period mentioned in the application; and that the suit was governed either by Art. 69 or Art. 80.[19]

(14) Where under an instalment-bond principal was payable after three years, and interest was payable monthly, and the default clause entitled the creditor to sue for the whole amount at once, if principal and interest were not paid, it was held by Bhide, J., that the suit fell under Art. 80, as both Arts. 74 and 75 were not applicable.[20] However, the construction of the bond was not taken to mean principal or interest, but that the whole amount would become payable at once, only if there was a default as regards the payment of principal *and* interest. Accordingly, it was held that the cause of action for the whole amount did not arise at time of first default of payment of interest.[21]

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[14] *Ramchand* v. *Shadiram,* 19 P.R. 1888.

[15] *Sitarama Chetty* v. *Krishnasami,* (1913) 21 I.C. 24=38 Mad. 374.

[16] *Secretary of State* v. *Kunhi Krishna,* 1933 Mad. 376=142 I.C. 286=64 M.L.J. 172.

[17] *Jawala Prasad* v. *Shama Charan,* (1919) 42 All. 55=17 A.L.J. 950=52 I.C. 235.

[18] *Annamalai Chetty* v. *Velayudan,* (1916) 32 I.C. 869=39 Mad. 129 (F.B.).

[19] *Ponnuswami* v. *The Vellore Commercial Bank,* (1920) 56 I.C. 384=38 M.L.J. 70.

[20] *Shamsundarlal* v. *Babulal,* 1933 Lah. 548=142 I.C. 851=34 P.L.R. 145; Reversed, on appeal in *Babulal* v. *Shamsundarlal,* 1935 Lah. 557.

[21] *Ibid.*

(15) Where **a bond payable in two years** contains a clause providing that the creditor can sue for the full amount either on the **failure to pay the monthly interest or on failure to pay the principal** amount and **default in payment of interest** is committed, the clause gives an **option exclusively in favour of the creditor,** who is entitled to the benefit **of the investment for the full term originally provided,** and need not sue until that term expires even if there is a default in the payment of interest.[22]

**1469. STARTING POINT OF LIMITATION.**—The expression "becomes payable" has been explained in the Full Bench case of *Shib Dayal* v. *Meharban,*[23] but this decision has been overruled by their Lordships of the Privy Council in *Lasa Din* v. *Gulab Kunwar,*[24] a ruling as to the interpretation of Art. 132 of the Limitation Act. But, the principle of this ruling has been recently followed in Lahore High Court, in the case of *Mool Chand* v. *Chittar.*[25]

When a cheque is given upon a bank in which the drawer has no funds, statute runs from the time when the cheque was given,[26] the rule being that when a cheque is drawn upon a bank where the maker has no funds, it is due without presentment and demand.[27] But, when the drawer of cheque has funds in bank, the statute does not run until it has been presented for payment and payment refused.[28] When a bond or other obligation is given, payable on death of a person named, statute runs only on such person's decease.[29] As to illustrative cases, bearing on the question of starting point of limitation under Art. 80, Limitation Act, see *Illustrations* Nos. 1, 2, 6, 11, 15 of para. 1468, above.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 81. | By a surety against the principal debtor. | Three years. | When the surety pays the creditors. |

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[22] *Moolchand* v. *Chhittar,* 1935 Lah. 948=160 I. C. 1068 (Beckett, J.); Relied on *Lasa Din* v. *Gulab Kunwar,* 1932 P.C. 207=138 I.C. 779=59 I.A. 376=7 Luck. 442 (P.C.) (Relates to a failure to pay interest in suit on mortgage-deed); also see *Premsingh* v. *Mulamal,* 10 P.R. 1883.

[23] 45 All. 27 (42)=1923 All. 1 (F.B.) (*Held,* that where a mortgage suit is barred upon failure to pay instalments, personal remedy is also barred)—O.R. in 1932 P.C. 207 (P.C.).

[24] 1932 P.C. 207=138 I.C. 779=59 I.A. 376=7 Luck. 442 (P.C.).

[25] 1935 Lah. 948.

[26] Wood, 4th Edn., p. 751; Rustomji, p. 463.

[27] *Ibid.* p. 752.

[28] *Ibid.*

[29] *Ibid.*

### SYNOPSIS.

1470. Corresponding provision.
1471-74. **Article explained.**
1471. Definition of "surety" and "principal debtor".
1472. Right of re-imbursement—S. 145, I.C.A.
1473. Right of indemnity, S. 125, I.C.A.
1474. "Payment," defined.
1475. **Starting point of limitation.**
1476. Deposit in Court—Starting point, date of deposit or withdrawal.

### NOTES.

1470. **CORRESPONDING PROVISION.**—This article is same as Art. 81 of Act XV of 1877, and Art. 82 of Act IX of 1871. Under Act XIV of 1859, also the plaintiff surety's cause of action, to recover from the principal debtor, the amount paid to the creditor by the surety, arose when the plaintiff paid the money.[30] Under **English Law,** in cases between principal and surety, the statute begins to run against the latter, from the time of his first payment in case of the principal.[31] Under a contract of indemnity, the cause of action arose when the damage was actually suffered to cover which the indemnity was given.[32]

1471. **ARTICLE EXPLAINED.**—A **"contract of guarantee"** has been defined in S. 126 of the Indian Contract Act IX of 1872, as a contract to perform the promise or discharge the liability of a third person in case of his default. **The surety is** also called the **"guarantor".** The person who gives a guarantee is called the **"surety"**; the person in respect of whose fault the guarantee is given is called the **"principal debtor"**; and, the person to whom the guarantee is given is called **"the creditor".**

**Surety and principal debtor.**

1472. The surety's right against the principal debtor rests on grounds of equity, independently of the original contract with the creditor, and is based on payment made in discharge of the common obligation, for which the principal debtor was primarily liable to the creditor, and has no existence till that payment is made.[32-a] The liability of the principal debtor to indemnify the surety is provided for by **S. 145 of the Contract Act,** and is in no way dependent upon the existence of his original liability to the creditor.[33] Where a surety keeps his liability to the creditor alive by

**Right of reimbursement.**

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[30] *Bhugeeruth* v. *Tarinee Chunder,* 15 W.R. 413.

[31] Chitty on Contract, 17th Edn., p. 903.

[32] *Reynolds* v. *Doyle,* (1840) 1 M. and Gr. 753; *Collinge* v. *Heywood,* (1839) 9 A. and E. 633.

[32-a] *Wolmershausen* v. *Gullick,* (1893) 2 Ch. D. 514, p. 529; 62 L.J. Ch. 773; and *Gardner* v. *Brooke,* (1897) 2 Ir. R. 6; 3 Ir. L. R. 288.

[33] *Raghavendra* v. *Mahiput Krishna,* (1925) 86 I.C. 883=1925 Bom. 244=49 Bom. 202.

*bona fide* payments of interest, and after such creditor's claim has become barred by limitation against the principal debtor he obtains a decree against the surety and the surety pays the amount under the decree, the payment must be treated as a sum rightfully paid under the guarantee within the meaning of S. 145 of the Contract Act, and the surety is entitled to recover the sum from the principal debtor.[34] Even in the absence of any express stipulation to that effect; the surity is entitled, as against the principal, to be indemnified for all losses incurred by him which are directly due to the default of the principal, and therefore to interest on monies paid on his account and for his benefit as principal debtor.[35] The principle underlying this right of the surety against the principal debtor is

> "that it is not merely the gain resulting to the principal debtor from the act of the surety, but **the loss which the surety has sustained by the default of the principal debtor,** which entitles the surety **to sue the** principal debtor for the recovery of the amount by way of contribution".[36]
>
> "It will be noted that the **surety's right is to recover from the principal debtor** whatever sum the former paid to the creditor, which sum ought to have been paid by the principal debtor. **The principal debtor being bound to indemnify the surety,** it is obvious that the cause of action cannot be merely the procuring, by the surety of the principal debtor's exoneration from liability to the creditor, but also the surety being himself damnified".[37]

**The right of indemnity.**

**1473.** The right of indemnity referred to in S. 145, Indian Contract Act, and the connected Ss. 126, 131, 133-147, inheres in a person who contracts with the promisee himself expressly and solely as surety; in such a case the right to indemnity is **implied, S. 145.** *Next,* there is the case of a person who is a principal joint promisor as between himself and the promisee, but as between himself and another, the joint promisor is (expressly or impliedly) only a surety, the promisee not being a privy to the contract of the suretyship between the promisors *inter se.* **(S. 132.)** *Thirdly,* there is the case of an **express contract** of indemnity **(S. 124)** as distinct from a promise to indemnify implied by S. 145 in a contract of guarantee.[38] A sum is *"rightfully"* paid within the meaning of S. 145 of the Indian Contract Act when the surety has been compelled to pay it as a result of the principal's default and without any mistake or want of prudence on his own part.[39] But, a surety who discharges the mere moral obligation of his principal has no legal right to be indemnified by his principal, and the surety cannot therefore recover from principal debtor the money that he had paid to the creditor for debt barred as against principal.[40] But, this was expressly dissented from in *Raghavendra* v. *Mahipat*,[41] by Shah, C.J. The implied rights possessed by a surety are available, when the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise, since no one can make himself the creditor of another by volunteering to discharge the obligations.[42] Under **S. 140,** Indian Contract Act, "where a guaranteed debt has become due, . . . the surety, *upon payment,* . . . . is invested with all the rights which the creditor had against the principal debtor," and under **S. 145** "*in* every *contract of guarantee* there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has *rightfully paid* under the guarantee".[43] The liability of the principal debtor to pay the surety arises not merely from a mere implied promise to indemnify the surety contained in S. 145, Indian Contract Act, but must be the result of a contract between the surety and the creditor to which the debtor also is a party.[44] The authorities are not all consistent, but the weight of opinion, as noticed in comments under Art. 65, is that the omission of the creditor to sue the principal debtor within the statutory period of limitation does not discharge the surety.[45] The **Punjab Chief Court** held in *Abdul Samad* v. *Raja Sir Indar Kishore*,[46] that the mere act of the creditor in allowing the debt to become time-barred does not impair the eventual remedy of the surety himself against the principal debtor, no limitation beginning to run as against the surety until the date of the payment to the credior. If then the surety is compelled to pay the debt, though the creditor's remedy against the principal debtor may be barred, the surety's right of re-imbursement against the debtor is not lost.[47] However, there cannot be a contract of guarantee, for a liability enforceable at law, where the debt which is sought to be guaranteed has already become time-barred, at the date of the contract of surety.[48]

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[34] *Raghavendra* v. *Mahiput Krishna,* 86 I.C. 883=49 Bom. 202=1925 Bom. 244.

[35] *Madar Baksh* v. *Ahmad Ali,* 98 P.R. 1881.

[36] Per Bhashyam Ayyangar, J., in *Narayanamurthi Ayyar* v. *Marimuthu Pillai,* (1902) 26 Mad. 322.

[37] *Ibid,*

[38] Per Tyabji, in *Abraham Servai* v. *Raphael Muthirian,* (1915) 27 I.C. 337 (342)=39 Mad. 288.

[39] *Suja* v. *Pahlwan,* 30 P.R. 1878.

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[40] *Suja* v. *Pahlwan,* 30 P.R. 1878.

[41] (1924) 49 Bom. 202=86 I.C. 883=1925 Bom. 244.

[42] *Muthuraman Chetty* v. *Chinna Vellayan,* (1916) 33 I.C. 508=39 Mad. 965=30 M.L.J. 369; also see *Barkat-un-nissa Begum* v. *Mahboob Ali Mian,* (1919) 52 I.C. 684=17 A.L.J. 1068=42 All. 70 (Where a surety has paid off the whole debt, he is entitled to stand in the place of the creditor).

[43] *Ibid.*

[44] *Ibid.,* (1916) 33 I.C. 508=39 Mad. 965=30 M.L.J. 369.

[45] *Subramania Aiyar* v. *Gopala Aiyar,* (1910) 7 I.C. 898=33 Mad. 308=20 M.L.J. 633; *Hazarimal* v. *Krishnarav,* 5 Bom. 647; *Sankara Kalana* v. *Virupakshapa,* 7 Bom. 146; *Kristo Kishore* v. *Radha Mohan,* 12 Cal. 330; cf. *Ranjit Singh* v. *Nanbat,* 24 All. 504, to the contrary.

[46] 136 P.R. 1892 (Benton and Rivaz, JJ.).

**"Payment."**

**Madras and Nagpur view.**

**1474.** The word "payment" in S. 145 of the Indian Contract Act, means a **payment in money or by transfer of property** which is taken as equivalent of money, and not merely an incurring of pecuniary obligation in the shape of bond, promissory note, or acknowedgment of liability.[49] Accordingly, the fact that the principal debtor has been released and the liability of the surety has been adjudged by a decree does not amount to a payment within the meaning of the Contract Act.[50] The word "pays" in Art. 81 of Sch. I of the Limitation Act has the same meaning as in the Contract Act.[1] The amount whch the surety can recover under S. 125 of the Contract Act is the amount which has been paid, whether under the compulsion of an adjudication, or under the terms of a proper compromise of the suit.[2] A suit brought by a surety under S. 125 of the Contract Act, on a contract of indemnity is premature where the surety has made no payment and has consequently, not been damnified.[3] The **Lower Burma Chief Court,** has however, taken the view that it makes no difference if the payment is made by incurring a fresh obligation to the same creditor, and the amount was not actually handed over by surety and paid by him to the creditor.[4] In *Vinayak Rao* v. *Shripat Rao,*[5] the execution of a new mortgage was held to amount to payment, and hence damnification.

**1475. STARTING POINT OF LIMITATION.**—The third column gives the date "when the surety *pays* the creditor," as the starting point of limitation for a suit by the surety against the principal debtor. The meaning of "*payment*" has been explain-to sureties who have not *paid* the creditor,[7] but merely incurred payment in cash or money-equivalent.[6]

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[47] Mitra's Limitation Act, Vol. II, p. 1275; citing *Abraham* v. *Raphael,* (1914) 39 Mad. 288=27 M.L.J. 746; *Manju Mahadev* v. *Shivappa,* (1918) 42 Bom. 444; *Raghavendra* v. *Mahipat,* (1924) 49 Bom. 202=86 I.C. 883=27 Bom.L.R. 178; compare *Subramania Aiyar* v. *Gopala Aiyar,* (1909) 33 Mad. 308=20 M.L.J. 633; and *Bhup Singh* v. *Zainul Abdin,* (1886) 9 All. 205 (210); also see *Salig Ram* v. *Latchman Das,* (1927) 50 All. 211.

[48] *Manju Mahadev* v. *Shivappa,* (1918) 46 I.C. 122=42 Bom. 444.

[49] *Anwar Khan* v. *Gulam Kasam,* (1919) 50 I.C. 611 (612)=15 N.L.R. 78; Relied on *Putti Narayanamurthi* v. *Marimuthu Pillai,* 26 Mad. 322; also see *Nur Samad Khan* v. *Fagja,* (1923) 76 I.C. 759=1924 Lah. 657 (2).

[50] *Ibid.*

[1] *Ibid.*

[2] *Ibid.*

[3] *Ibid.*

[4] *Shive Zan U* v. *Shwe Pru,* (1917) 39 I.C. 432.

[5] (1926) 97 I.C. 185=1926 Nag. 429=9 N.L.J. 107.

This article gives three years as the period for a suit by a surety against his principal, running from the time when the surety pays the creditor. This article should, therefore, be restricted to sureties who have paid the creditor, and not construed as extending to sureties who have not *paid* the creditor,[7] but merely incurred some fresh obligation to him, which the surety may or may not pay.[8] But the payment of old liability, by a substituted obligation is taken by some High Courts to amount to payment.[9]

**Deposit in Court —Starting point.**

**1476.** The principal debtor is liable to be sued for, under the article, for three years only after the payment has been made by the surety to the creditor.[10] The **Oudh Judicial Commissioner's Court** has held that where money is deposited by the surety for the creditor in Court, it could not be regarded as *payment* to creditor if the latter was *not entitled to withdraw* the money immediately it was deposited by the plaintiff.[11] On the other hand, if the money was definitely placed to creditor's credit in Court, just as if it had been *paid into his credit* at his bank, the date of deposit, and not the date of withdrawal, would be considered as the date of payment for purposes of this article according to **Upper Burma Court.**[12] It is clear that there is no bar of limitation for an application to withdraw money standing to a party's credit in Court, so that even fifteen years after, the money could be withdrawn.[13] Consequently, unless deposit starts limitation running, the principal debtor's liability could be indefinitely extended by the *neglect* of the decree-holder to take the money out of Court.[14] But as pointed out above, it is not in every case that the payment must be regarded from

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6. *Putti Narayana* v. *Marimuthu,* 26 Mad. 322; Followed in 50 I.C. 611 (612) and 76 I.C. 759=1924 Lah. 657 (2).

7. *Madar Baksh* v. *Ahmad Ali,* 98 P.R. 1881; also see *Kunj Lal* v. *Gulab Ram,* 67 I.C. 365=55 P.L.R. 1922 (Art. 81, and not Art. 61 applied, where a *gomashta* of plaintiff firm stood surety for a judgment-debtor, and he satisfied decree to save property of firm from attachment, and later sued for recovery of the sum which the firm had paid for the judgment-debtor).

8. 26 Mad. 322, *supra.*

9. *Schwe Zan* v. *Shwe Pru,* (1917) 39 I.C. 432 and *Vinayakrao* v. *Shripatrao,* (1926) 97 I.C. 185=1926 Nag. 429=9 N.L.J. 107.

10. *Yunke Supaya* v. *Maung Kin,* (1921) 60 I.C. 23 (Limitation held to start from date of deposit).

11. *Mohammad Nagi* v. *Hargulal,* (1924) 82 I.C. 1011=1925 Oudh 93=28 Oudh Cas. 113=11 O.L.J. 660 (Limitation held to start from date of withdrawal).

12. *Yunke Supaya* v. *Maung Kin,* (1921) 60 I.C. 23.

13. *Apurba Krishna* v. *Chundermoney,* 10 C.W.N. 354.

14. *Ibid.*

the point of view of the surety's parting with his money and crediting it to decree-holder's account.[15] The two authorities, properly considered, are not in conflict, though they appear to hold opposite views, under a different set of circumstances.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 82. | By a surety against a co-surety. | Three years. | When the surety pays any thing in xecess of his own share. |

### SYNOPSIS.

1476. Corresponding provision.
1477. Article explained.

### NOTES.

**1476. CORRESPONDING PROVISION.**—This article corresponds to Art. 83 of Act IX of 1871: and Art. 82 of Act XV of 1877. Under Act XIV of 1859, this class of suits would be governed by the general rule of six years' limitation under S. 1, cl. 16.

**1477. ARTICLE EXPLAINED.**—The claim between co-sureties rests upon the doctrine of contribution. A claim to contribution is based on principles of equity, justice and good conscience.[16] It does not arise from contract. When one discharges a common liability, he can recover the excess over his share from the others and each is liable in proportion to his share of the common debt or liability.[17] In *Wolmershausen* v. *Gullick*,[18] it was held that a surety against whom a judgment was obtained by the creditor, might, in equity, take proceedings against his co-surety, making the creditor also defendant, and would be entitled to a declaration of his right to contribution, and to an order upon a co-surety to pay his proportion to the principal creditor. In India, a prospective declaration could not be worked out but a suit is competent to get back by way of contribution from the co-surety whatever the plaintiff has paid in excess of his failure.[19] A suit for contribution between joint promisors (there being no express contract for indemnity between the joint promisors), must be governed by **Ss. 42-44 of the Indian Contract Act,** the effect of which may be briefly stated as follows:—

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[15] *Mohammad Nagi* v. *Hargulal*, (1924) 82 I.C. 1011=1925 Oudh 93 (The decree holder was not entitled to withdraw money pending a review application by surety against decree in favour of creditor).

[16] *Registered Jessore Loan Co. Ltd.* v. *Gopal*, 94 I.C. 159=1926 Cal. 657=30 C.W.N. 366; also see *Matungini Debi* v. *Brojeswara*, (1915) 27 I.C. 22=20 C.L.J. 205.

[17] *Ibid.*

[18] (1893) 2 Ch. 514.

[19] *PuttiNarayana Murthi* v. *Marimuthu*, (1903) 26 Mad. 322 (329) and cf. *Ram Pershad Singh* v. *Neerbhoy Singh*, 11 B.L.R. 76.

> "Where two or more persons have made a joint-promise, in the absence of a contract to the contrary,
>
> (1) as between the joint-promisors and the promisee,
>
> (*a*) all the joint-promisors must fulfil the promise, (S. 42),
>
> (*b*) the promisee may compel any one to perform the whole promise (S. 43),
>
> (*c*) a release by the promisee of one joint-promisor does not discharge the other or others [S. 44, Cl. (1)],
>
> (2) As amongst the joint-promisors themselves, each joint-promisor may compel every other joint-promisor to contribute equally with himself to the performance of the promise [S. 43, Cl. (2)].
>
> "Three incidents connected with the right of contribution are expressly laid down:
>
> (*a*) if any one joint-promisor makes default in contributing, the others must bear the loss [S. 43 (3)],
>
> (*b*) Section 43 does not derogate from the rights of a surety to recover from his principal payments made on behalf of the principal, and
>
> (*c*) the release of a joint-promisor by the promisee does not free the joint-promisor so released from responsibility to the other joint-promisor or joint-promisors [S. 44 (2)].
>
> "The duty to contribute is clearly distinct from the duty to pay to the promisee. The first is to the promisor, the second to the promisee: the right of each joint-promisor to claim indemnity does not consist merely of being subrogated to the right of the original promisee: for though the promisee's rights may have been released, the responsibility to the joint-promisor is not annulled (S. 44)".[20]

**1478. STARTING POINT OF LIMITATION.**—If the surety makes **partial payments** in excess of his proportionate liability, Art. 82 would run as to each payment from the time it is made.[21] Under the general law the party seeking contribution has a cause of action to enforce contribution, at any rate as a personal obligation, as soon as he has made *any* payment in excess of his share and he need not wait till he makes the whole payment, if he means or is able to do so.[22] Therefore, each time that an amount is paid by or levied from him in excess of his share he has a right of suit for contribution in respect of such payment and when he brings the suit after making several such payments he really unites several causes of action in one and the same suit, and the law of limitation (under Art. 99) will apply separately to each of such causes of action from the date of the respective payments and the claim for contribution in respect of such payments as were made more than three years before date of suit would be barred by limitation.[23]

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[20] Per Tyabji, J., in *Abraham Servai* v. *Raphael Muthurian,* (1915) 27 I.C. 337 (340).

[21] 25 Cycl., p. 1116.

[22] *Davies* v. *Humphreys,* 6 M. and W. 153; Relied in *Raja of Vizianagram* v. *Setracherla,* 26 Mad. 686 (716).

As a general rule, a defendant in a suit for contribution cannot escape liability on a plea that at the time when contribution is sought as against him, the right of the original credior had become barred by time.[24] In *Mt. Kaniz Fizza Bibi* v. *Sheo Narain,*[25] the principle governing suits for contribution was thus stated by Chamier, J.:—

> "The appellant and the respondent were in the position of joint-promisors *qua* the superior proprietor and the right of joint-promisor and contributor *inter se* does not depend upon S. 69 of the Contract Act, but upon the broad principle recognised in Courts of Common Law and Equity alike that where several persons are co-debtors for the same debt which as between themselves is payable in several shares and one is compelled to *pay* the whole or a part greater than his share, he is entitled to recover from each of the others a contribution or proportion of the excess beyond his own share."

The giving of a new security, however, does not amount to a payment which entitles a plaintiff to demand contribution.[26] Where, therefore, the plaintiff in a suit for contribution had been obliged to execute a fresh security for the money due under one of the earlier bonds, it was held that as no money had been actually paid by the plaintiff, the suit was not maintainable.[27] Similarly, where a surety having discharged a bill and guaranteed by him and another as co-surety, sued the latter for contribution, it was held that time ran not when the bill was dishonoured, but when the surety took it up and paid it.[28]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run |
|---|---|---|---|
| 83. | Upon any other contract to indemnify. | Three years. | When the plaintiff is actually damnified. |

SYNOPSIS.

1479. Corresponding provision.
1480. **Scope and application.**
1481. Contract to indemnify.
1482. Contract express or implied.

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[23] *Raja of Vizianagram* v. *Setracherla,* 26 Mad. 686 (717).

[24] *Sardha Bahsh Singh* v. *Durga Baksh Singh,* (1914) 22 I.C. 263=16 O.C. 285.

[25] 8 I.C. 1102=1910 M.W.N. 839=9 M.L.T. 212.

[26] *Jagannath Kuar* v. *Sheo Singh,* (1916) 35 I.C. 439=19 O.C. 44 =3 O.L.J. 441.

[27] *Ibid.,* 35 I.C. 439=19 O.C. 44=3 O.L.J. 441.

[28] (1869) 1 A.H.C. 100.

1483. Right to indemnify.
1484. Covenant for title and quiet enjoyment.
1485. Contract of guarantee.
1486. Starting point of limitation.

## NOTES.

**1479. CORRESPONDING PROVISION.**—This article corresponds to Art. 84 of Act IX of 1871, and Art. 83 of Act XV of 1877.

**1480. SCOPE AND APPLICATION.**—The general Art. 83 would be excluded by specific Arts. 79 and 81, providing for some special cases of contract of indemnity. Insurance is a contract of guarantee, specially provided for in Art. 86, Limitation Act.[29] In the case of a registered contract to indemnify, Art. 116 would apply.[30] If such a registered contract also creates a provision, in respect of the claim to be indemnified, for a charge upon immoveable property, Art. 132 would apply.[31]

**Special articles.**

**1481.** A contract to indemnify the plaintiff **against any misbehaviour** of the promisor or of a third person, *e.g.*, an act of embezzlement, comes under this article, and the period of limitation would start from the date when plaintiff is actually damnified.[32] A stipulation in a contract of sale whereby the vendee agrees **to discharge an existing incumbrance** on the property sold is in the nature of an indemnity. A suit by the vendor for loss or damage caused to him by the defendant's breach of contract to discharge such incumbrances is governed by Art. 83, and not by Art. 116.[33] But Art. 61 and not this article applied where defendant purchased goods and got goods entered in plaintiff's name; and there was a decree against plaintiff by vendor; after which the plaintiff before paying the decree amount sued the defendant for the amount.[34]

**Contract to indemnify.**

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[29] *See* Mitra's Limitation Act, Vol. II, p. 1279.

[30] *Srinivasaraghava* v. *Rangaswami,* (1908) 31 Mad. 452=18 M.L.J. 477; *Venkatachelam* v. *Krishnaswami,* (1919) 50 I.C. 673 (Mad.); *Venkataramayya* v. *Ramabrahman,* (1918) 35 M.L.J. 124=47 I.C. 924; also see *Ratnabai* v. *Shashiram,* 33 Bom.L.R. 1092; and *Ram Barai* v. *Sheodevi Singh,* (1912) 16 C.W.N. 1040=16 I.C. 73; and *Abdul Aziz Khan* v. *Muhammad Baksh,* (1921) 2 Lah. 316; Followed in *Abdul Kadir* v. *Mt. Bilas Kaur,* 14 Lah. 646=1933 Lah. 793=144 I.C. 362.

[31] *Ramaswami* v. *Kuppuswami,* 1921 M.W.N. 472=1921 Mad. 514=66 I.C. 554=14 M.L.W. 89; also see *Rama Rayanimgar* v. *Venkatalingam,* 1933 M.W.N. 486=38 L.W. 818=66 M.L.J. 4.

[32] *Shapurji Jehangir* v. *The Superintendent of Poona City Jail,* (1875) 12 B.H.C.R. 238.

[33] *Kaliyammal* v. *Kolandavelu,* (1918) 38 I.C. 188=5 L.W. 228.

[34] *Desraj Hukamchand* v. *Lachhi Ram Prabhdayal,* 1933 Lah. 404=147 I.C. 57.

Article 83 applies only to personal contracts of indemnity, and not to a case of indemnity arising under a charge.[35]

**Right to indemnity—implied.**

**1482.** This article assumes the existence of a *contract* of indemnity, express or implied. Such a contract may be implied from circumstances which create an obligation to indemnify by operation of law. As pointed out in Leake upon Contracts,

> "a debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or contract for payment may then in general be implied in law without any actual agreement to that effect".[36]

However, the circumstances may disclose such a situation as was described by their Lordships of the Privy Council in *Ram Tuhulsingh* v. *Biseshwar Lal Sahoo*,[37] where they had to consider a converse case, and say:—

> "It is not in every case in which a man has benefited by the money of another that an obligation to re-pay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation expressed or implied to re-pay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debt."

*Illustrations.*

**Money borrowed for use of defendant.**

(1) Where **S borrowed money on a bond from R,** and *S* was the sole obligor of the bond, but the money was in fact borrowed **for the use of, and paid to, M.** The original bond was repeatedly renewed, and ultimately *R* sued upon the last bond and obtained a decree against the heirs of *S*. The defendants compromised the suit with *R*, and made payments in pursuance of the compromise. Subsequently, they instituted a suit against *M*, to recover the amount so paid and costs. *Held,* that *S* was not a surety for *M*, but the principal debtor, although the money was borrowed for his benefit; that the payments made in pursuance of the compromise were not gratuitous, and the heirs of *S*, were entitled to recover from *M*, the sum of money paid, with interest, but not the costs of suit, in respect of which the suit was barred.[38]

**Request to pay for defendant.**

(2) If a man **requests** another **to pay** money for him, there is an implied contract to re-pay the amount for which an action will lie.[39] A man who is entrusted with a sum of money with **instructions to pay** the same to another person, to whom the person depositing the money is liable, keeps the money left with him at his peril. If he fails to pay up, or delays payment beyond a reasonable time, he is liable for damages as for a breach of contract to the extent of the loss which the

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[35] *Rama Rayanimgar* v. *Venkatalingam,* 1933 M.W.N. 486=66 M. L.J. 4=38 L.W. 818.

[36] *See* per Maule, J., in *Lewis* v. *Campbell,* (1849) 8 C.B. 545.

[37] (1875) 2 I.A. 131 (P.C.).

[38] *Girraj Singh* v. *Mulchand,* (1907) 29 All. 627.

[39] *Shaik Joreeb* v. *Nubboo,* (1867) 7 W.R. 386.

person depositing the money has suffered by reason of such failure or delay. The limitation for a suit to recover damages in such a case is that provided by Art. 83 of Sch. I of the Limitation Act. The damage in such a case accrues when the plaintiff pays off the person to whom the money had to be paid.[40]

(3) Where a person **purchases an equity of redemption subject to a mortgage** and pays merely for the value of that equity, he contracts to protect the vendor from the obligation of the mortgage. The buyer's contract with the mortgagor is that the debt shall not fall upon him. It is a contract of indemnity and the buyer would be bound, without any specific contract, to indemnify the seller. Article 83 furnishes the period of limitation for the vendor's suit.[41]

**Vendor and purchaser.**

(4) Where the defendants borrowed from the plaintiff a certain sum of money upon a registered bond, and they subsequently **sold** their **properties to *D*, making him responsible to pay off plaintiff's dues,** and plaintiff had acknowledged and accepted this arrangement with *D*, a suit by plaintiff against *D* to recover the amount due to him under the bond from the defendants, was held maintainable and governed by Art. 83, Limitation Act.[42] The principle applied was the observation of Lord Hatherly, L. C., in *Touche* v. *Metropolitan*[43]: "The case comes within the authority that, where a sum is payable by *A.B.* for the benefit of *C.D.*, the latter can claim under the contract as if it had been made with himself."

(5) In a contract between vendor and purchaser, where the **vendee promises to pay the vendor's creditor,** but fails to pay, and no time is mentioned for the performance of the promise to pay money to a third person, the undertaking is to pay on demand. If demand is made and ignored, there is cause of action for a suit by vendor against vendee, in which limitation begins to run from the time when the promise is damnified, or in other words, when the promisee pays the third person.[44]

(6) If a portion of the purchase-money is left with a vendee for payment to a creditor of the vendor, and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time. On default the vendee is liable to indemnify the vendor for any damage sustained by the latter. Time starts for a suit under Art. 83, from date of plaintiff being damnified.[45]

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[40] *Kedarnath* v. *Hargobind,* (1926) 95 I.C. 913=24 A.L.J. 550=1926 All. 605.

[41] *Ram Borai Singh* v. *Mohendra Prosad Singh,* (1912) 16 I.C. 73=16 C.W.N. 1040; Relied in *Harak Chand* v. *Sumati Lal,* 33 Bom. L. R. 1200; also see *Gulzarimal* v. *Maghimal,* 14 Lah. 380=141 I.C. 435=1933 Lah. 109=34 P.L.R. 156 (Art. 116 read with 83 or 61).

[42] *Deb Narain Dutt* v. *Ram Sadhan Mandal,* (1913) 20 I.C. 630=41 Cal. 137; Relied on *Gregory* v. *Williams,* 17 R.R. 136=36 Eng. Rep. 224; *Touche* v. *Metropolitan,* (1870) 6 Ch. App. 671 (677) and *Gandy* v. *Gandy,* (1885) 30 Ch. D. 57 (67)=54 L. J. Ch. 1154.

[43] (1870) 6 Ch. App. 671 (677).

[44] *Ram Ratan Lal* v. *Abdul Wahid Khan,* (1927) 101 I.C. 691=49 All. 603; also see *Mt. Rajbansi* v. *Narayan Singh,* (1928) 12 P.L.T. 211 (Case of entrustment of money to pay plaintiff's debts).

[45] *Kunwar Unkar Singh* v. *Kashi Prasad,* 55 All. 490; Relied in *Abdul Wahid* v. *Sher Muhammad,* 1935 All. 463.

**Right to indemnity.**

1483. A right to indemnity apart from contract may arise from particular relations between the parties, *e.g.*, as principal and agent; trustee, and *cestique* trust.[46]

*Illustrations.*

**Commission agents.**

(1) Where a **commission agent** buys goods for a principal, but through the latter's default in paying for the same, they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses, must be brought within the period of limitation prescribed by Art. 83, Limitation Act. The starting point in such a case is the *date of the payment* made on behalf of the principal, and not the date of the sale.[47]

(2) In *Manghi Ram* v. *Ramsaran Das*,[48] it was held that the right given to the agent by S. 222 of the Contract Act to be recouped by his principal in respect of losses sustained in the agency was a direct consequence of the agency contract, and that the suit was thus one upon a contract to indemnify. A suit by an agent to recover money due to him from the principal on transactions entered into on behalf of the latter is governed by Art. 83 and not by Art. 61 of the Limitation Act.[49] The **Madras High Court** took a different view in the case of *Kandaswami Pillai* v. *Avayambal*,[50] but this was dissented from in *Manghi Ram's* case by a Division Bench of the Punjab Chief Court. The latter judgment has been followed in several cases by the **Lahore High Court.**[1] In *Bhagatram-Anantram* v. *Harjas-mal-Mehrchand*,[2] the Lahore High Court held that a suit by a commission agent who has been buying and selling on behalf of his principal, to recover amounts due to him from his principal is governed by Art. 83 of Sch. I to the Limitation Act, and not by Art. 85, and limitation begins to run from the dates of the payments made by the agent on behalf of the principal. Where a commission agent sues his principal for loss incurred on re-sale of goods, Art. 83, Limitation Act, applies and limitation in such a case operates from the date of payment made on behalf of the principal and not from the date of sale.[3]

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[46] *Eastern Shipping Co.* v. *Quah Beng Kee*, 1924 A.C. 177 (P.C.).

[47] *Kadari Pershad* v. *Har Bhagwan*, (1922) 66 IC. 900=3 L.L.J. 65; Relied on *Kandaswami Pillai* v. *Avayambal*, 7 I.C. 399=34 Mad. 167 =20 M.L.J. 989 (Agent held damnified on date of payment).

[48] 26 I.C. 415=23 P.R. 1915=100 P.L.R. 1915=218 P.W.R. 1914 (Art. 83 applied); also see *Harak Chand* v. *Sumati Lal*, 33 Bom. L. R. 1200; cf. *Kandasami* v. *Avayambal*, (1910) 7 I.C. 399=34 Mad. 167 (Art. 83 not applied to obligation imposed by operation of law).

[49] *Ganesh Das* v. *Narsingh Das*, (1929) 115 I.C. 767=30 P.L.R. 35.

[50] 7 I.C. 399=34 Mad. 167=1910 M.W.N. 316=20 M.L.J. 989= 8 M.L.T. 194.

[1] (1929) 115 I.C. 767=30 P.L.R. 35.

[2] (1928) 112 I.C. 719=1928 Lah. 424; Relied on 26 I.C. 415=23 P.R. 1915; 46 I.C. 541=59 P.L.R. 1918; 66 I.C. 100=1921 Lah. 167; 73 I.C. 143=1923 Lah. 473; 92 I.C. 595=1926 Lah. 152; and 106 I.C. 40 =1927 Lah. 826=9 L.L.J. 493.

[3] *Kirparam-Lachmandas* v. *Sawanmal Gopichand*, 1927 Lah. 826= 29 P.L.R. 61=106 I.C. 40=9 L.L.J. 493.

(3) Where plaintiffs as **commission agents** entered into certain transactions with third parties on behalf of defendants, and sued the latter for the recovery of sums which they alleged to be due on account of actual losses, *arhat, dalali, dharman, stamp charges*, carriage hire and wages for labour, and a re-draft paid for defendants, *held,* that the claim so far as the **losses and re-draft** were concerned was governed by Art. 83, Limitation Act.[4]

**Covenant for title and quiet enjoyment.**

1484. A clause in a sale-deed saying "we (vendors) are in enjoyment of this house as its owners, and if any one were to obstruct you in the enjoyment of the house we would remove the obstruction so as to put you to no trouble", was not a contract of indemnity. It was held to be at most a covenant for title and quiet enjoyment. Article 83 was held inapplicable, and the case fell under Art. 97, as a suit to recover money upon an existing consideration that failed.[5] In the case of a registered bond, containing an implied covenant for good title, Art. 116 has to be applied, and not Art. 83.[6] Where a sale-deed recited that the property was sold free from all debts or liabilities, and contained a covenant that in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor would be liable to make it good together with damages and costs, it was held that a suit by the plaintiff vendee to recover the sum paid by them under a mortgage decree, to which the property was liable on basis of a mortgage executed by the defendant, was governed, by Art. 116 of the Limitation Act, as a breach of covenant of title under the registered sale-deed.[7] A provision in a deed of sale of the nature of an indemnity clause, was construed as a continuing covenant in *Parvataneni Venkataramayya* v. *Lanka Rambrahman,*[8] and where the plaintiff vendee, who on attempting to obtain possession was resisted by the tenants asserting occupancy rights in the land sued for cancellation of sale and damages, Art. 115 was applied to the suit.

**Contract of guarantee.**

1485. The Contract Act draws a distinction between contracts of indemnity and contracts of suretyship; the **contracts of suretyship** unlike contracts of indemnity, **require the concurrence of three persons,** namely the principal debtor, the creditor, and the surety, the surety undertaking his obligation at the request, express or implied of the principal debtor.[9] There can be no contract of guarantee as distinguished from a contract of indemnity unless there is privity between the principal debtor and the surety as it is difficult to speak of an implied promise between persons between whom there is no privity of contract.[10] The English Law is thus stated in Halsbury's Law of England, (Hailsham Edn.), Vol. XVI, para. 111, at p. 101 :—

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[4] *Uttam Singh* v. *Ramkanwar-Ganesh Das,* (1917) 42 I.C. 72=149 P.W.R. 1917 (Claim for value of empty bags not returned, fell under Art. 49; claim for counter-fees, was governed by Art. 115).

[5] *Tulsiram* v. *Murlidhar,* (1902) 26 Bom. 750; Relied upon 19 Cal. 123 (P.C.); cf. *Ratanbai* v. *Ghasi Ram,* 55 Bom. 565=134 I.C. 1157=33 Bom. L. R. 1092 (Breach of covenant for indemnity—Right to damages).

[6] *Venkatachellam Pillai* v. *Krishnaswami,* (1919) 50 I.C. 673 (Mad.); also see *Sukmoney Sarkar* v. *Shashi Bhushan,* (1911) 10 I.C. 486.

[7] *Ramdulari* v. *Hardwari Lal,* (1918) 48 I.C. 18=40 All. 605=16 A.L.J. 706.

[8] (1918) 47 I.C. 924=35 M.L.J. 124.

> "The implied rights possessed by the surety against the principal debtor are not identical with those which the creditor has against the latter, but, are somewhat similar to those possessed by one surety against another. They are available whenever the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise. Since no man can make himself the creditor of another by volunteering to discharge the latter's obligations, when once, however, such request has been obtained a right of indemnification becomes attendant upon the suretyship, and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the surety under the guarantee as money paid to the use of the principal debtor."[11] "In a contract of guarantee there is an expectation that a third person will perform the promise or discharge the liability and the promise of the guarantor or surety is *conditional* on the default of this third person. In a contract of indemnity, the promisor engages *unconditionally* to save the promisee from loss *independently* of the question whether a third person makes default or not."[12]

Such suits would either fall under Art. 65, as suits for compensation for breach of a promise to do anything upon the happening of a specified contingency, or Art. 83 if taken as contracts to indemnify.

**1486. STARTING POINT OF LIMITATION.**—The limitation for a suit under this article starts from the date when the plaintiff is *actually damnified.*[13] For instance in the case of a suit to recover damages for a breach of contract to pay a third person under instructions from plaintiff, the cause of action accrues when the plaintiff pays off the person to whom the money had to be paid.[14] Similarly, where the vendee fails to pay the vendor's creditor, limitation begins to run from the date when the promisee vendor pays the third person and is damnified.[15] In the case of suits by commission agents against principal for loss incurred on defendant's behalf on re-sale of goods, the starting point is the *date of the payment* made on behalf of the principal, and not the date of sale.[16] In a suit upon a covenant in an *ekrarnama* brought by the plaintiffs for the purpose of obtaining from the defendants contribution in respect of a debt which had been realised by the sale of the property mortgaged by the father of the plaintiffs, it was held that the cause of action arose when the plaintiffs were damnified, *i.e.*, when they paid the mortgage-debt.[17] **The onus** is on the plaintiff, in such a suit to prove that the damnification occurred within three years of the suit.[18]

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[9] *Periyamanna Marakkayar* v. *Banians & Co.*, (1926) 95 I.C. 154 =49 Mad. 156=1926 Mad. 544.

[10] *Ibid.*, 95 I.C. 154 (158).

[11] *Periyamanna Marakkayar* v. *Banians & Co.*, (1926) 95 I.C. 154 (159).

[12] Mitra's Limitation Act, 6th Edn., Vol. II, p. 1279.

[13] *Putti Narayanamurthi* v. *Marimuthu*, (1902) 26 Mad. 322; *Abraham* v. *Raphael*, (1914) 39 Mad. 288=27 M.L.J. 746; *Ram Dulari* v. *Hardwari*, (1918) 40 All. 605; *Anwar Khan* v. *Gulam Kasam*, (1918) 50 I.C. 611=15 N.L.R. 78; also see *Seetamma* v. *Narayana*, (1919) 57 I.C. 982=38 M.L.J. 470 and *Sivasubramania* v. *Somasundaram*, (1913) 21 I.C. 442=25 M.L.J. 422.

[14] *Kadarnath* v. *Hargovind*, (1926) 95 I.C. 913=1926 All. 605.

However, when a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf, such other person may compel the contracting party, *before actual damage is done,* to place him in a position to meet the liability that may hereafter be cast upon him.[19] This principle has been enunciated in *Rutnessur* v. *Hurrish.*[20] In a certain class of cases, even before an injury is done or damage takes place, the plaintiff may bring **an action** in order **that the person making the covenant may place him in a position to meet the liability** he has undertaken on the latter's behalf.[21] Such a suit may be brought for damages subsequent to the injury sustained.

"The causes of action in the two classes of cases are different. In the one there is a right to bring an action to have the plaintiff put in a position to

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[15] *Ram Rattan Lal* v. *Abdul Wahid Khan,* (1927) 101 I.C. 691=49 All. 603; also see *Kaliyammal* v. *Kolandavelu,* (1918) 38 I.C. 188=5 L.W. 228 and *Mt. Rajbansi* v. *Bishundeo Narayan Singh,* 1931 Pat. 271=132 I.C. 104=10 Pat. 451=12 P.L.T. 211; cf. *Raghunatha* v. *Sadagopa,* (1911) 12 I.C. 353=36 Mad. 348=21 M.L.J. 983=10 M.L.T. 300 (Consideration of assignment to be paid to third person—Vendee's default to pay—Vendor's right is not merely to be indemnified by the vendee against the creditor's claim).

[16] *Kedari Pershad* v. *Harbhagwan,* (1922) 66 I.C. 900=3 L.L.J. 65; *Kirparam Lachmandas* v. *Sawanmal Gopichand,* 1927 Lah. 826=106 I.C. 40=9 L.L.J. 493.

[17] *Kumar Nath* v. *Nobo Kumar,* (1898) 26 Cal. 242 (245) (Art. 120 was appled in this case).

[18] *Munshi Ram* v. *Bhagwan,* (1925) 7 L.L.J. 596=1926 Lah. 152=92 I.C. 595.

[19] *Kumar Nath* v. *Nobo Kumar,* (1898) 26 Cal. 241 (245); Relied on *Loosemore* v. *Radford,* (1842) 9 M. & W. 657; *Lethbridge* v. *Mytton,* (1831) 2 B. & Ad. 772.

[20] (1884) 11 Cal. 221.

[21] See Mayne on Damages, 9th Edn., p. 319; *Veerappa Chetty* v. *Arunachellam,* (1924) 47 M.L.J. 168=1924 P.C. 192=86 I.C. 259=4 Rang. 48 (P.C.); *Chiranji Lal* v. *Narain,* (1919) 41 All. 395=51 I.C. 158=17 A.L.J. 399; also see *Meyappa* v. *Kolandavelu,* (1925) 92 I.C. 715=1926 Mad. 597.

**meet the liability cast upon him; in the latter to be indemnified after the plaintiff has met his liability."[22]**

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 84. | By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid. | Three years. | The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance. |

## SYNOPSIS.

1487. Corresponding provision.
1488-1491. **Scope and application.**
1488. "Suit" does not cover applications.
1489. "Attorney or vakil".
1490. "Costs of a suit."
1491. Business.
1492-1495. **Starting point of limitation.**
1492. Termination of suit.
1493. Order for taxation.
1494. Execution proceedings.
1495. Compromise.

## NOTES.

**1487. CORRESPONDING PROVISION.**—This is the same as Art. 85, Sch. II of Act IX of 1871, and Art. 84, Sch. II, Act XIV of 1877. Under English Law, the solicitor cannot generally sue for his costs until the suit or business is ended, or where his client is dead. The solicitor cannot sue for his costs while the suit is progressing, although he may refuse to proceed for want of funds.[23] The contract by a solicitor to conduct a suit is *entire*, and suit will not be barred for business relating to suit not actually transacted within *six years* prior to suit, if the suit has ended *within* six years.[24]

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[22] *Kumar Nath* v. *Nobo Kumar,* (1898) 26 Cal. 241 (245); cf. *Mt. Rajbansi* v. *Narayan Singh,* 12 P.L.T. 211; also see and cf. *Pragi Lal* v. *Maxwell,* (1885) 7 All. 284 (A case of claim for damages by way of set-off).

[23] 7 Exch. 691.

[24] *Harris* v. *Osborne* 2 Cr. & M. 629; *Martindale* v. *Falkner,* 2 C.B. 706; *Harris* v. *Quine,* L.R. 4 Q.B. 653, cited in Pal's Limitation Act, p. 662.

**(i) "Suit" does not cover applications.**

1488. **SCOPE AND APPLICATION.**—This article applies to a *suit* "by an attorney or vakil". An *application* (under Rules of the High Court, Bombay), by an attorney, that his client should show cause why he should not pay the balance shown by the taxing Master's *allocatur* to be due in respect of his bill of costs, and why, in default of such payment, attachment should not issue against the person and property of the client, is *not a "suit"* within the meaning of the Limitation Act.[25] Such an application as the above is **not barred by any law of limitation** now in force in British India.[26] Proceedings in contempt are very rare, and they are not an appropriate remedy as against representatives of the client who themselves never entered into any undertaking at all to the attorney.[27] The word suit is now defined in the Limitation Act,—*see* S. 2 (10), Limitation Act (**S. 57, p. 61,** *ante*).

**(ii) Attorney, or vakil.**

1489. An English or Irish Barrister, enrolled as an advocate in the High Court, and in the Courts subordinate thereto, can neither sue for recovery of, nor be sued for the return of the fees for professional services. They are mere *honoraria.*[28] A suit by a "Mukhtar" or "Revenue Agent" may be governed by Art. 56 or Art. 115.[29]

**(iii) Costs of a suit.**

1490. The word *"costs of a suit"*, in Art. 84 of the Limitation Act are not confined to "out of pocket expenses" alone of the practitioner, but includes also the remuneration payable to him.[30] Where the fees are not settled beforehand, and the suit is one for remuneration for work done, the Court will assess the amount, thus performing the functions of the taxing officer in England.[31] Such a suit is governed by Art. 84, Limitation Act.[32] A suit for pleader's fees, upon a *vakalatnamah* which is in the form of a mere power of attorney, and is not a written contract, is barred by limitation, if not brought within three years.[33] In the absence of evidence of any express agreement as to when the fees are to be paid, the implied agreement must be taken to be for payment at the time when the case is decided.[34] In the case of an express agreement for professional fee, under S. 3, Legal Practitioners (Fees) Act XXI of 1926, referring to the time of payment, this article will not apply, but Art. 115 or 116 would.[35]

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[25] *Abba Haji Ishmail* v. *Abba Thara,* (1876) 1 Bom. 253 (Proceedings treated in contempt). See In re *Woodhouse,* 2 C.B. 290; also see *Wadia, Gandhi & Co.* v. *Purshotam Sivji,* (1907) 32 Bom. 1=9 Bom. L. R. 508; *Bai Manekbai* v. *Manek Ji,* (1880) 7 Bom. 213; also see *Ramhari Sahu* v. *Madan Mohan,* (1895) 23 Cal. 339; *Raja Narendar Lal* v. *Tarubala Dassi,* (1920) 25 C.W.N. 800 (805)=66 I.C. 209=48 Cal. 417; cf. *Srimati Lakhimoni* v. *Dwijendranath,* 23 C.W.N. 473=46 Cal. 249=51 I.C. 941 (Art. 84 might apply by analogy).

[26] *Ibid.*

[27] *Assur Purshotam* v. *Rutton Bai,* (1891) 16 All. 152 (155).

[28] *Ross-Alston* v. *Pitambar Dass,* (1903) 25 All. 509; see and cf. (1928) 52 Mad. 92 (As to the powers of newly enrolled advocates).

[29] Mitra's Limitation Act, Vol. II, p. 1283.

[30] *Maharaja of Vizianagram* v. *Narasinga Row,* (1915) 29 I.C. 763 (Mad.).

[31] *Ibid.*

[32] *Ibid.*

**"Business".**

**1491.** In *Watkins* v. *Fox*,[36] Hill, J., has held that a proceeding under S. 24 of the Procedure Act XV of 1859, was not a *suit*, but a *"business"*, within the meaning of Art. 84, Limitation Act. The word "business" would include also work done in respect of applications and appeals.[37]

**Termination of suit or business.**

**1492. STARTING POINT OF LIMITATION.**—In many proceedings of which administration suits are an example, the so-called final decree is very far from being the *termination of* the the suit.[38] The termination of the suit mentioned in Art. 84, Limitation Act, means the date when judgment is given.[39] Subsequent proceedings taken in connection with the taxation of an opponent's costs are not part of the suit or application itself.[40] Where a firm of attorneys brought a suit against their client to recover the costs of an application to the High Court, it was *held*, that limitation began to run from the date of the judgment in the application.[41]

**Issue of a decree.**

In *Narayana Chetti* v. *Champion*,[42] the **Madras High Court** ruled that, until costs are taxed and inserted in the decree and a decree has issued, a suit has not terminated within the meaning of Art. 84, Limitation Act.

**Or giving of judgment.**

In the case of *Balkrishna Pandurang* v. *Govind Shivaji*,[43] the Bombay **High Court** held following *Harris* v.

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[33] (1866) 5 W.R. 297.

[34] *Ibid.*

[35] Mitra's Limitation Act, Vol. II, p. 1283.

[36] (1895) 22 Cal. 943 ("Suit" is confined to such proceedings as under that description are directly dealt with by the Code of Civil Procedure, or such as by the operation of the particular Acts which regulate them are treated as suits).

[37] *Ibid.*, 22 Cal. 943 (949).

[38] *Mt. Attormani Dossi* v. *Ramesh Chunder Bose*, 1930 Cal. 651= 129 I.C. 787=52 C.L.J. 147.

[39] *Balkrishna Pandurang* v. *Govind Shivaji*, (1883) 7 Bom. 518.

[40] *Watkins* v. *Fox*, (1895) 22 Cal. 943.

[41] *Ibid.*; Relied on *Rothery* v. *Munnings*, (1830) 1 B. & Ad. 15.

[42] 7 Mad. 1.

[43] 7 Bom. 518.

*Quine,*[44] that a suit terminates with the judgment of the Court in which it is commenced. When an appeal is brought, and the same vakil or attorney continues to conduct the suit in appeal, that will be a continuation of the original suit, and time will not run until the disposal of the appeal.[45]

**Suit for solicitor's costs—Order for taxation.**

**1493.** The effect of an order directing an attorney to have his costs taxed does not stay any suit by him for enforcing payment of his costs. This was the view taken in two English cases of *Lumley* v. *Brooks*[46] *and Coburn* v. *Colledge,*[47] which have been followed by the **Calcutta High Court** in *Makhanlal Mukerjee* v. *Nalin Chandra Gupta.*[48] Art. 84 of the Limitation Act is applicable to such a case: Harrington, J., held that an order for taxation can only affect the right to institute a suit if it relates to something which is a condition precedent to the bringing of a suit.[49] In the case of an attorney's costs, the cause of action arises when the work for which he was retained is completed, and limitation begins to run from that time.[50] But, where decree directed that the client should personally pay to the other parties certain costs to be taxed, it was held that the attorney's authority continued after judgment, and covered, the taxation of these costs, and the retainer was not at an end until the issue of the *allocatur.*[1]

**Execution proceedings.**

**1494.** A *suit* can ordinarily be said to have terminated, when there is nothing more to be done in it, except execution. In a suit brought on an attorney's bill of costs, the suit could not be said to have continued pending execution proceedings in which the attorney may have to appear. This contention, if accepted as correct, would postpone the attorney's remedy for twelve years.[2]

**Compromise.**

**1495.** A compromise between the decree-holder, and the judgment-debtor, settling matters in dispute between them without the knowledge of the solicitor, but not made through or certified to the Court which passed the decree, is not a *"termination"* within the meaning of this article.[3]

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[44] L.R. 4 Q.B. 653.

[45] *Harris* v. *Quine,* (1869) 4 Q.B. 653 (658).

[46] (1889) 41 Ch. D. 323.

[47] (1897) **1 Q.B. 702.**

[48] (1907) 35 Cal. 171.

[49] *Ibid.*

[50] *Atul Chunder Ghose* v. *Lakshman,* (1909) 36 Cal. 609.

[1] *Ibid.*

[2] *Administrator-General of Bengal* v. *Chunder Cant Mookerjee,* (1895) 22 Cal. 952-n.

[3] *Hearn* v. *Bapu Saju Naikin,* 1 Bom. 505.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 85 | For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties. | Three years. | The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. |

## SYNOPSIS.

1496. Corresponding provisions.
1497. Act IX of 1871.
1498. Scope and application.
      Old law.
1499-1504. **Article explained.**
1499. Open account.
1500. Mutual account—The theory.
1501. Mutual account defined.
1502. Test of an independent obligation.
1503. Test of a shifted balance, inconclusive.
1504. Reciprocal demands.
1505. **Article applied**—Illustrative cases.
1506. Article not applied—Illustrative cases.
1507. **Starting point of limitation.**

## NOTES.

### 1496. PREVIOUS HISTORY.—

**Act XIV of 1859.** **Under Act XIV of 1859,** S. 8, made the corresponding provision as follows:—

> "In suits for balances of accounts current *between merchants and traders* who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from *the close of the year* in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts."

No particular period was mentioned for such a suit, and this section simply defined the starting point of limitation. To determine the question of limitation applicable, it was necessary to consider the nature of the transactions between the parties and their position.[4] This section was enacted to give effect to the principle of *Catling* v. *Skoulding,*[5] as between merchants and traders, which was stated by Lord Kenyon in these terms:—

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[4] *Luchmee Narain* v. *Choomun Meah,* (1870) 14 W.R. 184.

[5] (1795) 6 T.R. 189.

"It has long been decided that a **promise, either express or implied,** within six years from the issuing of the writ, will avoid the limitation of the statute, although the original cause of action would otherwise have been barred. Now, where there is **an open unliquidated account** between the parties, there **is evidence of such a promise** because the credit is given on either side on the faith of such account, and **every new transaction amounts to an implied acknowledgment of the prior existing debt,** each article on the account on one side **being equivalent to a part payment** of the bill on the other, **and promise to pay the balance",**

and Lord Kenyon said further that where there are mutual items of account,

"every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained: and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute".

After Lord Tenterdon's Act, it was incumbent on the plaintiff to show a part-payment in cash or what is equivalent to it, to take the case out of the statute. The principle in *Catling* v. *Skoulding* rested not so much on the exception as to merchant's account but because the adoption of the later items was held to be a new promise to pay the whole balance due of the account over whatever period of time it might have extended.[6] And, after the statute, the principle of *Catling* v. *Skoulding,*[6-a] was no longer applicable in England.[7]

**1497.** **Act IX of 1871.** "Act IX of 1871, followed the English Act of 1856 in giving effect to an acknowledgment if in writing and signed by the party's agent, and it further followed English Law in giving effect to a payment of interest by the party liable or his agent, though in the case of part payment of principal it required the debt to have arisen from a contract in writing and it required the fact of payment to appear in the handwriting of the person making the same on the instrument or in his own books or in the books of the creditor."[8]

Holloway, Ag. C.J., in *Hirada* v. *Gadigi,*[9] dealing with S. 8, Limitation Act of 1859, gave **a definition of mutual dealings** which has often been referred to and accepted as correct both under that Act and under the subsequent Limitation Acts:

"To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligation".

In Act IX of 1871, the corresponding provision to present Art. 85, was made in Art. 87, where time would begin to run from

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[6] *Inglis* v. *Haigh,* (1841) 8 M. and W. 769 (777)=10 L.J.Ex. 406.

[6-a] (1795) 6 T.R. 189.

[7] Per Tindal, C.J., in *Cottam* v. *Partridge,* (1842) 4 M. and W. 271=11 L.J.C.P. 161.

[8] Per Rankin, C.J., in *The Tea Financing Syndicate* v. *Chandra Kamal Bez Barua,* (1931) 133 I.C. 801 (808)=1931 Cal. 359=58 Cal. 649=52 C. L. J. 314=34 C.W.N. 1175.

[9] (1871) 6 M.H.C.R. 142.

"the time of the last item admitted or proved in the account". This was followed by Art. 85 of Sch. II of Act XV of 1877 which has been re-enacted as present Art. 85 of Act IX of 1908.

**1498. SCOPE AND APPLICATION.**—It would be noticed, that S. 8, Act XIV of 1859, was restricted to suits between merchants.[10] Some light upon the principle which the Indian Limitation Act of 1859 applied to merchant's accounts and which later statutes of limitation applied quite generally, is to be found in the English authorities in *Catling* v. *Skoulding,*[11] *Williams* v. *Griffiths,*[12] *Inglis* v. *Haigh*[13], and *Cottam* v. *Partridge,*[14] which have been noticed by Rankin, C.J., in the recent Calcutta case of *The Tea Financing Syndicate* v. *Chandra Kamal Bez,*[15] and, by Fox, C.J., in *Ebrahim Ahmed Mehter* v. *Abdul Haq.*[16]

**Old law.**

In *Hirada Basappa* v. *Gadigi,*[17] Holloway, C.J., adversely commented upon a provision having been adopted in India when a similar provision in an old English statute had been repealed, by Lord Tenterden's Act (S. 9 of the Mercantile Law Amendment Act, 1856). The provision in the Act of 1859 seems to clearly point to cases in which two merchants or traders, who are all supposed to keep accounts, had accounts against one another. "The **Act of 1871** referred to **one account** only which must be that of plaintiff who sues, but this does not necessarily exclude the view that the article applied only to cases in which each party has kept an account against the other. This Act **extended** a provision, which had previously applied to accounts between merchants and traders, **to accounts between every description of persons,** but the phraseology which has given rise to so much discussion was adopted".[18]

The source of the phraseology, "mutual" and "reciprocal demands" must have been the English law, as observed by Fox, C.J.

In *Phillips* v. *Phillips,*[19] V. C. Turner said:—

> "I understand **a mutual account** to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account."

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[10] *Kunhya Lall* v. *Bunsee,* 1867, Agra F.B. 94.

[11] (1795) 6 T.R. 189.

[12] (1885) 2 Cr. M. and R. 45=4 L.J.Ex. 129.

[13] (1841) 8 M. and W. 769 (777)=10 L.J.Ex. 406.

[14] (1842) 4 M. and G. 271=134 E.R. 111.

[15] 58 Cal. 649=133 I.C. 801=1931 Cal. 359.

[16] (1925) 27 I.C. 879=8 Bur.L.T. 116=8 L.B.R. 149.

[17] 6 M.H.C.R. 142.

[18] *Ebrahim Ahmed Mehter* v. *Abdul Haq,* (1915) 27 I.C. 879 (881) —Per Fox, C.J.

[19] (1852) 9 Hare 471 (473)=68 E.R. 596.

In *Padwick* v. *Hurst,*[20] Sir John Romilly said:

> "**Mutual accounts** appear to me accurately defined by Sir George Turner in *Phillips* v. *Phillips;*[21] they are not constituted by a person receiving moneys for and paying and lending moneys to his principal, or where the accounts simply consist in receipts and payments by the agent on behalf of and to the principal. If the principal were also on his side, paying moneys on behalf of the agent, so that there would be accounts to be taken on both sides, then there would be **cross-demands,** or a case of mutual accounts".

The remarks of Pontifex, J., in *Hajee Syud Mahomed* v. *Mussamat Ashrufoonissa,*[22]

> "unless each party could have said to the other, 'I have an account against you', I do not see how these could be mutual accounts",

appear to be in accord with English cases.

**1499. ARTICLE EXPLAINED.**—An open account is one which is **continuous, or current, uninterrupted or unclosed by settlement or otherwise,** consisting of a series of transactions.[23] Art. 85

**Open account.**

> "is intended to apply to cases where an account has been going on between two parties, and balances have been struck from time to time, showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account".[24]

An open account is one, where there are current dealings between the parties, and the account is kept open because of some **contemplated future dealings.**[25] Such is an account never settled between the parties, with reciprocal demands between them.[26] An account settled with a balance struck, which the defendant agrees to pay may give rise to a new cause of action amounting to a fresh contract on which the suit can be based.[27] Although there may have been a mutual and current account between the parties, if it is not open and current at the time of the suit, it will not be governed by Art. 85 of Sch. I, to the Limitation Act. A suit regarded as one for money payable for money found to be due on an account stated would be governed by Art. 64 of Limitation Act.[28] However, **an account**

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[20] (1854) 18 Beav. 575=52 E.R. 225.

[21] (1852) 9 Hare 471, at p. 473.

[22] 5 Cal. 759=6 C.L.R. 112.

[23] *Ram Pershad* v. *Harbans,* (1907) 6 C.L.J. 158 (160); also see *Abdul Haq* v. *Shivji Ram Khemji,* (1923) 71 I.C. 259=1922 Lah. 338; and *Rupchand Jiwansingh* v. *Poho Nathumal,* 1923 Lah. 347.

[24] *Laljee Sahoo* v. *Boghoonudan Lall,* (1880) 6 Cal. 447.

[25] 25, Cycl., p. 1044; Rustomji, p. 471.

[26] *Sitayya* v. *Rangareddi,* (1887) 10 Mad. 259.

[27] *Marimuthu* v. *Saminatha Pillai,* (1897) 21 Mad. 366 (Partnership business,—accounts settled and balance struck).

[28] *Gurdas Ram-Kotu Ram* v. *Bhagwan Das,* (1922) 68 I.C. 815=1922 Lah. 182.

**does not become closed whenever a balance is struck**; *e.g.*, where a fresh item had been borrowed, or a fresh payment made since the striking of the last balance.[29]

*Illustrations.*

(1) In *Jawala Das* v. *Hukamchand*,[30] **where** there were mutual dealings **between the parties,** though balances were struck from time to time, **these were merely acknowledgments and not agreements to pay,** and the case was held to be not of a stated account but of a mutual, open and current account, where there have been reciprocal demands between the parties. The case was therefore, governed by Art. 85, and not Art. 64, Limitation Act.

(2) Similarly, in a Bombay case, where the debits and credits were numerous, and it was not possible to contend that all the credits, *i.e.*, the payments by the defendants to the plaintiffs, were mere part payments of the advances already made, the accounts which were kept from year to year extending over a long period, in which balances had been drawn every year regularly, **but no formal adjustment** had been made at any time between the parties, was treated as a mutual, open and current account within the meaning of Art. 85, Sch. I, Limitation Act.[31]

(3) An open account is one which is continuous or current, uninterrupted or unclosed by a settlement or otherwise, consisting of a series of transactions.[32] Where, therefore, an account has been deliberately interrupted and closed, the mere adding later on, in order to avoid limitation at the end of the new dealings the old balance will not make it an open account.[33]

(4) In *Bhagwandas-Kanhayalal* v. *Nandsingh Harisingh*,[34] the balance was ascertained, but deliberately not carried over and even after the new account was started, the plaintiff firm insisted on payment of the old account as a separate account. Art. 85, was accordingly held applicable to the suit.

(5) But, where the cash transactions between the parties are conducted primarily on the basis of a relationship of debtor and creditor, and the plaintiffs also act as commission agents of the defendants for the sale of goods, but the account shows that after obtaining credit for the price of the goods consigned by them, the defendants always remained debtors of the plaintiff, and where on a certain date the defendants strike a balance in favour of the plaintiffs and agree to pay interest on the sum found to be due by them, the account between the parties becomes an account stated within the meaning of Art. 64, Limitation Act.[35]

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[29] *Jawala Das* v. *Hukam Chand*, (1922) 66 I.C. 387=1922 Lah. 316; also see *The Tea Financing Company* v. *Chandra Kamal*, 1931 Cal. 358 (2) (372) ("An account is open when the balance is not struck or though struck is not accepted or acknowledged to be correct by the parties concerned, and an account is current when it has been going on as a continuing account between the parties").

[30] *Ibid.*, 66 I.C. 387 (389)=1922 Lah. 316; Relied on *Jas Ram* v. *Attar Chand*, 30 I.C. 491=16 P.R. 1916=178 P.L.R. 1915.

[31] *Satappa Jakappa* v. *Annappa Basappa*, (1923) 76 I.C. 115=1923 Bom. 82=47 Bom. 128=24 Bom.L.R. 1284.

[32] *See* 6 C.L.J. 158 (160); and 71 I.C. 259=1922 Lah. 33
Lah. 347, *supra*.

[33] *Bhagwandas-Kanhayalal* v. *Nand Singh-Harisingh*, 1
(2)=28 P.L.R. 146=100 I.C. 815.

[34] 1927 Lah. 848 (2)=28 P.L.R. 146=100 I.C

[35] *Milkhi Ram-Hemraj* v. *Rupchand Lachm*
32 P.L.R. 65=131 I.C. 292; Relied on *Ishar D*
35 I.C. 577.

(6) **An account which is settled is not an open account. An account which is closed is not a current account.** On the other hand it is not absolutely necessary for an open current and mutual account that the balance should actually shift from one side to the other.[36]

(7) Where there is a settlement of mutual account and the defendant accepts the result as correct, and promises to pay, the plaintiff has a good cause of action against him. It is not even necessary for the plaintiff to prove that the balance found is correct, provided it is accepted as correct by the defendant.[37] If the settlement of account is made and agreed to, it cannot be re-opened in the absence of an allegation of fraud, coercion and so on.[38]

(8) When an account between a principal and his agent shows that balance is due from either party at different times but is never finally settled, it is a running account,[39] *i.e.*, unsettled, or unclosed.[40]

(9) However, where plaintiff advanced loans to defendant from time to time, and in re-payment defendant occasionally passed grain to plaintiff, which the latter sold, and credited to the former's Court, and after some months the accounts were examined and a balance struck in plaintiff's favour a suit to recover the balance averring an oral agreement for re-payment of balance with interest, was held to be a suit on a closed account (Art. 64) and not on an open account (Art. 85), Limitation Act.[41]

**Mutual account—The theory.**

**1500.** We have noticed in S. 1498, *ante* that mutual accounts, as understood in English Law, are accurately defined by V.-C. Turner, as

"meaning, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account".[42]

"**The theory** upon which the doctrine as to mutual accounts rests is that there is a mutual understanding between the parties, either express or implied, that they will continue to credit each other until one signifies a contrary intention, when the balance, being ascertained, becomes due and payable."[43]

The advantage of bringing an account under the head of mutual accounts is that an item *upon either side,* within the statutory period, draws after it all other items beyond that period.[44] If the last item of an account is not barred, the *whole* account is saved, though all the items are against one party.[45] Where the dealings are not mutual, each item in the account starts limitation for that particular item from its respective date.[46]

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[36] *Premji Virji* v. *E. I. Sassoon,* (1927) 102 I.C. 225=1927 Bom. 225=29 Bom.L.R. 375.

[37] *Maung Chit U* v. *Maung Pya,* 1928 Rang. 304=6 Rang. 538=117 I.C. 572.

[38] *Ibid.,* 1928 Rang. 304.

[39] *Prem Kuar* v. *Mohanlal,* 10 P.L.R. 426.

[40] *Ram Pershad* v. *Harbans Singh,* (1907) 6 C.L.J. 158 (160).

[41] *Ishar Das* v. *Harkishan Das,* (1910) 35 I.C. 577=148 P.W.R. 1916=7 P.L.R. 1917; Relied on *Jas Ram* v. *Attar Chand,* 30 I.C. 491=16 P.R. 1916=178 P.L.R. 1915=118 P.W.R. 1915.

[42] *Phillips* v. *Phillips,* (1852) 9 Hare 471 (473).

[43] Wood, 4th Edn., p. 1427; Rustomji, p. 471.

[44] *Ibid.,* p. 1432; Rustomji, p. 472.

**Mutual accounts defined.**

**1501.** A mutual account is, when *each* has a demand or a right of action against the other,[47] and, therefore, unless the defendant could at any time have said:—"I have an account against you, the banker," and, during nearly the whole of that time the banker could have said: "I have an account against you, the defendant," there could not be mutual accounts.[48] The decision in *Ram Pershad* v. *Harbans Singh,*[49] lays down general principles applicable to the consideration of the provisions of Art. 85 of the Limitation Act, smmarised by the headnote which is to the following effect:—

> "An **open account** is one which is continuous or current, uninterrupted, or unclosed by settlement or otherwise, consisting of a series of transactions."
>
> "An **account current** is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or, can be ascertained."[50]
>
> "**Mutual accounts** are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits."
>
> "An account under which one party has merely received and paid monies on account of the other, is not a mutual account, properly so called. Each party must receive and pay on account of the other."
>
> "*A shifting balance,* sometimes in favour of one side, sometimes in favour of the other, is a **test of mutuality,** but its absence is not conclusive proof against mutuality."
>
> "The mere circumstance that on one solitary occasion there was a sum to the credit of the defendants in the book of the plaintiffs, does not make the account between the parties a mutual account in which there have been **reciprocal demands** between the parties".[1]

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[45] Wood, p. 1445; Rustomji, p. 472.

[46] *Ibid.*, p. 1432=25 Cycl. p. 1121; Rustomji, p. 472.

[47] Wood, 4th Edn., p. 1430.

[48] *Hajee Syed Mahomed* v. *Mt. Ashrafunnissa,* (1880) 5 Cal. 759 =6 C.L.R. 112.

[49] 6 C.L.J. 158.

[50] ["An account current, means a running account, that is an account which is continued, and not stopped or closed"—See *Karsondas Dhunjibhoy* v. *Surajbhai Ramrijpal,* 145 I.C. 630=35 Bom. L. R. 929=1933 Bom. 450]; also see *The Tea Finance Syndicate* v. *Chandra Kamal,* 1931 Cal. 359 (372). [An account is open when the balance is not struck or though struck is not accepted, or acknowledged to be correct by the parties concerned and an account is current when it has been going on as a continuous account between the parties].

[1] *Ram Pershad* v. *Harbans Singh,* 6 C.L.J. 158; also see *Karsondhas Dhunjibhoy* v. *Surajbhan Ramrijpal,* 145 I.C. 630 (Bom.).

**Independent obligations.**

**1502.** As a **general rule** payments made on account by one party and credited by the other, whether in money or goods, do not render the account mutual so as to defer the operation of the statute to the date of the last item.[2] The High Courts of **Allahabad,**[3] **Bombay,**[4] **Lahore,**[5] **Madras**[6] and **Patna**[7] are agreed in accepting the **Calcutta** view, in the leading case of *Ram Pershad* v. *Harbans Singh,*[8] that for a mutual account there must be **independant obligations on both sides.** This **test of a mutual account** is set forth among other authorities, in the Punjab Chief Court case of *Ratanchand Jawahirdas* v. *Asasingh Boghasingh,*[9] which has been followed in later Lahore cases: The view taken in this case as to acknowledgment not being a cause of action in itself has, however, been corrected in later decisions of *Kahanchand Dularam* v. *Dayaram Amritlal,*[10] and *Fatehchand* v. *Gangasingh.*[11] The **Madras High Court,** in *Govinda Nadan* v. *Ramasami,*[12] and the **Allahabad High Court,** in *Mihunlall* v. *Marguerite,*[13] have likewise held that an account is mutual when there are transactions on each side creating independent obligations on the other, and, where the transactions create obligations on one side only those on the other being merely complete or partial discharges of such obligations, the account is not mutual. To prove a mutual account it is necessary to establish mutual dealings between the parties, with a right to demand the fulfilment of certain obligations.

**Mutual accounts are thus made up of matters of set off,** or in other words, an account between parties, who have a mutual and alternate cause of dealings under an implied agreement that one account may and shall be set off against the other *pro tanto.*[14] There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set off of mutual debts.[15] Thus, the article requires that there must be **cross-claims** arising out of a course of dealing which evidences or is referable to an **intention to set off.**[16]

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[2] *Shive Gowda* v. *Fernandez,* (1910) 8 I.C. 141=34 Mad. 513=21 M.L.J. 391.

[3] *Chattar Mal* v. *Biharilal,* (1909) 32 All. 11=6 A.L.J. 921=4 I.C. 261; *Dau Dayal* v. *Peareylal,* (1928) 50 All. 645=1928 All. 236.

[4] *Ganesh* v. *Gyamu,* (1897) 22 Bom. 606; also see *Kursondas Dhunjibhoy* v. *Surajbhan,* 145 I.C. 630 (Bom.).

[5] *Abdul Haq* v. *Shivji Ram-Khemchand,* (1922) 71 I.C. 259 (263)=1922 Lah. 338; *Rupchand Jiwan Singh* v. *Ichomal-Nathumal,* (1923) 73 I.C. 916=1923 Lah. 347.

[6] *Shive Gowda* v. *Fernandez,* (1910) 8 I.C. 141=34 Mad. 513=21 M.L.J. 391; *Hirada Basappa* v. *Gadgi Mudappa,* 6 M.H.C.R. 142.

[7] *Gopal Rai* v. *Harchand Ram-Anantram,* (1922) 66 I.C. 30 (Pat.).

[8] 6 C.L.J. 158.

[9] 59 I.C. 669=26 P.W.R. 1921; Followed in *Thakurdas* v. *Bishundas,* (1924) 79 I.C. 998=1923 Lah. 636 (No independent obligations: Art. 57 applied); *Gauda Singh* v. *Bhanaram,* 111 I.C. 791 (Lah.).

[10] 10 Lah. 745.

[11] 10 Lah. 748.

[12] (1925) 92 I.C. 106=1926 Mad. 224.

[13] 132 I.C. 420=1932 All. 38.

**Test of a shifting balance, inconclusive.**

**1503.** The oldest Madras case bearing on this point is *Hirada Basappa* v. *Gadigi Mudappa,*[17] and followed in *Velu Pillai* v. *Ghose Mahomed.*[18] The **Lahore** view supports this principle,[19] that the **test of mutuality is not the existence of a shifting balance** (which is important evidence of mutuality, but not conclusive), but to quote Holloway—

> "to be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being complete or partial discharges of such obligations".

This view was followed by the **Bombay High Court** in *Ganesh* v. *Gayani.*[20]

The test of a shifting balance was first suggested in *Ghaseeram* v. *Manoher Dosse,*[21] and accepted by the **Allahabad High Court** in *Khushalo* v. *Beharilal,*[22] and by the **Calcutta High Court** in *Hajee Syud Mahomed* v. *Mahomed Ashrafunnissa.*[23] The same test was adopted by Sir C. Sargent in *Narrandas* v. *Vishandas,*[24] with the important qualification that the dealings should be such as may possibly lead to such a shifting balance. This was the interpretation put up on Sir C. Sargent's judgment by the **Madras High Court,**[25] and by the **Bombay High Court.**[26] As the **Calcutta High**

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[14] Wood on Limitation Act, Vol. II, p. 1428; Mitra's Limitation Act, Vol. II, p. 1288; Angell, para. 149.

[15] *Rupchand* v. *Pohomal,* (1923) 73 I.C. 916 (918)=1923 Lah. 347; Relied *Ram Pershad* v. *Harbans Singh,* 6 C.L.J. 158; and *Rupchand-Jiwansingh* v. *Ichomal-Nathumal,* (1923) 73 I.C. 916=1923 Lah. 347.

[16] *The Tea Financing Syndicate* v. *Chandra Kamal,* (1930) 58 Cal. 649 =1931 Cal. 359=133 I.C. 801; also see *Mihunlal-Jawala Pershad* v. *Marguerite Dairy Farm,* (1931) 132 I.C. 420=1932 All. 38.

[17] 6 M.H.C.R. 142.

[18] 17 Mad. 293.

[19] *Abdul Haq* v. *Sludji Ram-Khemchand,* (1923) 71 I.C. 259=1922 Lah. 338; and *Ramdhan* v. *Malik Md. Dootkhan,* (1931) 12 Lah. 420=1931 Lah. 241.

[20] (1897) 22 Bom. 606; Followed in 47 Bom. 128.

[21] 2 Ind. Jur. (N.S.) 241.

[22] 3 All. 523.

[23] 5 Cal. 759.

[24] 6 Bom. 134.

[25] *Velu Pillai* v. *Ghose Mahomed,* 17 Mad. 293.

[26] *Mangalore Krishnappa* v. *Rukmanibai,* B.P.J. 1890 p. 295.

**Court** has observed, the mere fact that the balance was on some occasions in favour of the defendant is not always sufficient to constitute by itself a mutual, open and current account. In *Imrat Lal* v. *Lalchand,*[27] the balance was shifted frequently, and so also in *Govinda* v. *Ramasami,*[28] but this was not taken as conclusive of the mutuality of accounts. The **Nagpur Court,** also holds that a shifting balance is not necessarily a conclusive test of mutual dealings between the parties. It is the nature of the dealings which is the true criterion, and the nature of the dealings may establish mutuality without the balance ever having shifted at all, or may negative mutuality even where there is a shifting balance.[29] Article 85, is intended to apply to cases, where an account has been going on between two parties, and balances have been struck from time to time showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account.[30]

**Reciprocal demands.**

1504. In *Bhawan Singh* v. *Tikanram,*[31] the **Allahabad High Court** held that Art. 85, applies to a case where the course of business has been of such a nature as to give rise to reciprocal demands between the parties. If the dealings between the parties are such as to create independent obligations in favour of one party against the other, the account between them is a mutual account. Mutual accounts are such as consist of reciprocity of dealings between the parties, and do not embrace those having items on one side only, though made up of debits and credits.[32] An account under which one party has merely received and paid monies on account of the other is not a mutual account, properly so-called.[33] Each party must receive and pay on account of the other. In the

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[27] 7 I.C. 715=75 P.R. 1910=99 P.W.R. 1910=124 P.L.R. 1910.

[28] (1925) 92 I.C. 106=1926 Mad. 224; Relied on *Shiva Gowda* v. *Fernandez,* 8 I.C. 141=34 Mad. 513; also see *Kunhi Kutti Ali* v. *Kunhammad,* 1923 Mad. 278=44 M.L.J. 184.

[29] *Gokuldas Radha Kishen,* 1933 Nag. 50=142 I.C. 123=29 N.L.R. 20; Relied on 58 Cal. 649=1931 Cal. 359=133 I.C. 801; and 6 M.H.C.R. 142.

[30] *Lalji Sahoo* v. *Lalla Sahoo,* (1880) 6 Cal. 447; Referred in *Shiva Gowda* v. *Fernandez,* (1910) 8 I.C. 141=34 Mad. 513.

[31] A.W.N. (1896), p. 186; also see *Seth Gokuldas* v. *Radhakisan,* 15 N.L.J. 105.

[32] *Abdul Haq* v. *Shivram-Khemchand,* (1923) 71 I.C. 259=1922 Lah. 338; also see *Dau Dayal* v. *Peareylal,* 1928 All. 236=50 All. 645; and *Gopal Rai* v. *Harchandram,* (1922) 66 I.C. 30 (Pat.); *Seth Gokuldas* v. *Radhakisan,* 15 Nag.L.J. 105.

[33] *Ibid.,* 71 I.C. 259=1922 Lah. 338; also see *Ramdhan* v. *Malik Md. Dost Khan,* 1931 Lah. 241=134 I.C. 513=12 Lah. 420.

**leading Calcutta** case of *Haji Syud* v. *Ashrafunnissa,*[34] Pontifex, J., **held** "that besides the account being mutual, open and current, **there** must have been reciprocal demands between the parties". This is also the view of Madras High Court. The **Bombay High Court,** has held in *Satappa* v. *Annappa,*[35] that in determining whether an account is mutual, open and current, within the meaning of Art. 85, **the test is, what was the nature of the dealings between them.** If the dealings are such that the balance might have been in favour of either party, that will suffice to treat the account as one under Art. 85. It is not essential that the balance should in fact have been in favour of one party at some stage.

In *Sitaya* v. *Runga Reddi,*[36] it was held that **the amount of mutuality is immaterial.** One or two transactions of a proper kind are sufficient to render it mutual. Though the mere circumstance that on one solitary occasion there was a sum to the credit of the defendants in the books of the plaintiff was held not to make the account between the parties a mutual account in which there have been reciprocal demands between the parties.[37]

**The general principle** of law, is that once an account is mutual, it continues so as long as the account continues.[38] The mutual dealings between the parties may cease, and thenceforth, the account ceases to be mutual. It is no doubt possible for parties to change the character of their dealings so that what was once a mutual account may become an ordinary one.[39] In order to prove a mutual open and current account, it is sufficient to prove mutual dealings between the parties consisting of sales made, or services performed by each party to or for the other, creating mutual duties or reciprocal demands.[40] The rule may be briefly stated thus:—When there are transactions between two merchants, or other persons, on each side creating independent obligations on the other, and the balance is liable to being shifted from one side to the other, the account is a mutual, open and current account. The proper article to apply to such a case is Art. 85, and not Art. 62.[41] However, "the question whether an account can be held to be a mutual, open and current with reciprocal demands between the parties as contemplated by Art. 85, Limitation Act, must depend upon the nature of the account in each case; it is not possible to lay down any hard and fast rule of general application.[42] The **Bombay High Court** says that the question of the applicability of Art. 85 is a pure question of fact, depending on the nature of the dealings between the parties, nature of the entries and other relevant circumstances.[43]

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[34] 5 Cal. 759=6 C.L.R. 112; *Sowcar Bapu Sahib* v. *Isoct Ismail & Co.,* (1914) 24 I.C. 128 (Mad.).

[35] 76 I.C. 115=47 Bom. 128.

[36] 10 Mad. 259.

[37] *Abdul Haq* v. *Shivram-Khemchand,* (1923) 71 I.C. 259=1922 Lah. 338; Relied on 6 C.L.J. 158; also see *Namberumal* v. *Kottayya,* (1913) 21 I.C. 773 (Mad.).

[38] *Thakoor Pershad* v. *Moheshlal,* 24 W.R. 390.

[39] Mitra's Limitation Act, Vol. II, p. 1289; see *Narayandas Hemraj* v. *Kishandas Hemraj,* (1881) 10 Bom. 134 (138).

[40] *Kunhi Kutti Ali* v. *Kunhammad,* 1923 Mad. 278=44 M.L.J. 184.

[41] *Appa Dada Patil* v. *Ramakrishna Vasudeo,* 1930 Bom. 5=53 Bom. 652; Relied on *Santappa* v. *Annappa,* 1923 Bom. 82=47 Bom. 128; and *Ganesh* v. *Gayanu,* 22 Bom. 606.

This will be made clearer by the illustrative cases in the next two paragraphs.

### 1505. ARTICLE APPLIED—ILLUSTRATIVE CASES.—

(1) In *Ganesh* v. *Gyanu*,[44] the dealings between the plaintiff and defendant consisted of **loans from one to the other.** Interest was charged on such loans. The parties were, besides, partners in certain transactions, and the share of profit and loss falling to each partner's share was debited and credited in their accounts. A suit to recover balance due to plaintiffs in respect of dealings for nearly six years, the last being within 3 years before suit, were held to be within time under Art. 85.

(2) An account consisting of entries of payments made by one party in reduction of his debt to the other, and of payments made by the latter on behalf of the former party for the same party is not a mutual account within the meaning of Art. 85, Limitation Act.[45]

(3) Where a plaintiff makes **cash advances** to a defendant, and also makes **purchases** on his behalf, and the latter consigns goods to the former for sale on commission, and interest is charged both on the credit, and debit side, the account between the parties is a mutual, open and current account within the meaning of Art. 85, Sch. I, Limitation Act.[46]

(4) Similarly, where the plaintiff **advanced moneys** to the defendant, and the latter **consigned goods** to the former for sale on commission, it was held that there were independent obligations on each side, and the account between the parties falls under this article.[47]

(5) Where the plaintiff sued to recover on a *khata* or account of dealings between the parties, which were of the nature of **advances** of money by plaintiff to defendant to buy cotton, which was ginned and pressed by the plaintiff, the charges being debited to the plaintiff, and after that the cotton was sent to Bombay through the plaintiff, and sold, the plaintiff being credited with the sale-proceeds as against the advances made by him to

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[42] *Milkhi Ram-Hemraj* v. *Rupchand-Lachmandas,* 131 I.C. 292=1931 Lah. 233=32 P.L.R. 65.

[43] *Kursondas Dhunjibhoy* v. *Surajbhan Ramrijpal,* 145 I.C. 630 (Bom.).

[44] 22 Bom. 606.

[45] *Velu Pillai* v. *Ghose Mahomed,* (1893) 17 Mad. 293=4 M.L.J. 140; Relied on 6 Bom. 134; 5 Cal. 759; and 6 M.H.C.R. 142.

[46] *Abdul Haq* v. *Shivji Ram-Khanchand,* (1923) 71 I.C. 259=1922 Lah. 338; also see *Ratanchand Jawaladas* v. *Asasingh Boghasingh,* 59 I.C. 669=31 P.L.R. 1919=26 P.W.R. 1921.

[47] *Namberumal Chetty* v. *Kotayya,* (1913) 21 I.C. 773; Relied on *Watson* v. *Aga Mehedee,* 1 I.A. 346 (P.C.).

the defendant, *held,* that the account between the parties was mutual, open and current, and that Art. 85 applied.[48]

(6) "The most obvious case of mutual dealing is where *A* supplies *B* one kind of goods or work, and obtains from him another kind, debiting him with the cost of the former and crediting him with the value of the latter."[49]

In *Srinath Das* v. *Park Pitar,*[50] where the defendant was a general merchant, and he employed the plaintiffs as his agent to get goods from London on indent, and the plaintiffs on the other hand, as merchants, ordered some goods from defendants which they supplied, this was held to be mutual dealings.

(7) Plaintiff sued for recovery of a certain sum of money alleged to be due on a *bahi* account. The plaintiff supplied defendants on occasions not merely with money but with various articles, the values of which were given in the account and debited against the defendants. There were mutual demands between the parties on balances struck up to a certain date, and the account was not closed even on that date, but the balance was carried forward. It was held that looking at the dealings as a whole, the accounts between the partners were mutual, open and current, and that the suit was governed by Art. 85.[1]

(8) When a man lends money in one capacity, and in another capacity acts as agent for the borrower, and the two accounts are put together, there is a mutuality of dealing between the parties, although the money may have been lent for the express purpose of enabling the borrower to provide business as commission-agent to the lender. In such a case Art. 85 applies.[2]

(9) Where there was an obligation, on the one hand, to pay a salary, and an obligation on the other hand, to account for, and to pay over to the principal the amounts that may yearly be found due on balance to the principal, it was *held* that this is a mutual account.[3]

(10) A suit by an agent against the principal for balance due on an account falls within Art. 85 of the Limitation Act.[4] Where the plaintiff a commission agnt, had purchased goods under instructions of their principals who refused to pay for them and take delivery, and the plaintiff resold the goods and brought a suit for the balance due, it was held that Art. 85, and not Art. 61, applied.[5]

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[48] *Madhav Motiram* v. *Jairam Sakharam,* (1922) 63 I.C. 950=23 Bom.L.R. 540=1921 Bom. 451; Followed in *Dan Dayal* v. *Peareylal,* 50 All. 645=1928 All. 236.

[49] Stirling on Limitation Act, p. 171.

[50] (1870) 5 B.L.R. 550 (Two transactions of a proper kind in an account may be sufficient to render it mutual).

[1] *Dogar Mal* v. *Mula,* (1920) 54 I.C. 453=17 P.W.R. 1920=9 P.L.R. 1920; Followed *Imrat Lal* v. *Lal Chand,* 7 I.C. 715=75 P.R. 1910=99 P.W.R. 1910=124 P.L.R. 1910.

[2] *Dan Dayal* v. *Pearey Lal,* (1928) 50 All. 645=1928 All. 236; Relied on *Sheo Pratap Singh* v. *Brij Kishore,* 1922 Lah. 188=4 L.L.J. 217=62 I.C. 898.

[3] *Kunbi Kuttiali* v. *Kunhammad,* 1923 Mad. 278=44 M.L.J. 184.

[4] *New East Press Co.* v. *Rameshvar,* 34 Bom. L. R. 1410.

[5] *Babasa Bakale* v. *Hombanna,* 140 I.C. 624=34 Bom. L. R. 1268 =1932 Bom. 593.

(11) The defendant firm was depositing money with the plaintiff bank from time to time and the plaintiff bank was allowing them to draw money in excess of the deposits with the result that the balance was frequently shifting in favour of one or the other party. It was *held* that the account was a mutual, open and current one.[6]

### 1506. ARTICLE NOT APPLIED—ILLUSTRATIVE CASES.—

(1) Where plaintiffs advanced money to defendants from time to time, and the loan bore interest, and a further charge called a commission, and the defendants sent periodical consignments of coffee to plaintiffs, which the latter sold, crediting the proceeds to defendant's account, it was held that the case was not governed by Art. 85, as there was **no mutuality, and reciprocity** between the parties, the consignments of coffee having been made simply and solely on account of the antecedent loans and with a view to reduce the balance thereunder.[7]

(2) Similarly, this article would not apply where certain jewels were sold by the plaintiffs on the defendant's behalf and the defendant credited with the proceeds.[8]

(3) Where the plaintiff firm was employed by the defendant firm to buy grain, and sell at a profit on behalf of the latter; the plaintiff firm was to supply funds for making these purchases, the defendant firm making a few advances in the beginning by way of a margin-money, *held,* that a suit by plaintiff firm to recover a certain amount as balance due from the defendants' firm on the transactions was not a mutual account within Art. 85, as the balance of the account had never been in defendants' favour.[9]

(4) Where the transactions between the parties were those of creditor and debtor, and the defendants borrowed money from the plaintiff, and sent them commodities, the proceeds of which were applied to repaying cash loans, and the accounts disclosed no independent obligations on both sides or occasions for mutual demands, it was *held* that the account was not a mutual one within the meaning of Art. 85 of the Limitation Act; and that the case was governed by Art. 57 of the Limitation Act.[10]

(5) Similarly, in a suit for recovery of money on a *bahi* account it was found that the dealings between the parties were simple money loans as between creditor and debtor, and the defendant borrowed money from the plaintiff from time to time, made payments to him occasionally, and struck balance in his favour, it was held that the transactions created obligation on one side only, those on the other being merely complete or partial discharges of such obligation, and the account was not mutual in any sense of the term, there being no reciprocal demands between the parties.[11]

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[6] *Punjab United Bank, Ltd.* v. *Mahomed Hussain,* 15 Lah. 652=152 I.C. 626=36 P.L.R. 325=1934 Lah. 358.

[7] *Shive Gowda* v. *Fernandez,* (1910) 8 I.C. 141=34 Mad. 513.

[8] *Hargopal Premsukhdas* v. *Abdul Khan,* 9 B.H.C.R. 429.

[9] *Rupchand-Jiwan Singh* v. *Ichomal Nathumal,* (1923) 73 I.C. 916 =1923 Lah. 347.

[10] *Thakur Das* v. *Bishun Das,* (1924) 79 I.C. 998=1923 Lah. 636; Followed in *Ganda Singh* v. *Bhana Ram Salig Ram,* (1928) 111 I.C. 791 =1928 Notes 71 (*d*).

[11] *Ram Dhan* v. *Malik Muhammad Dost Khan,* 1931 Lah. 241=12 Lah. 420 (Art. 57, applied).

(6) Where *bahi* accounts between the plaintiffs and defendants were closed by a balance, which was followed by two items on each side, on which interest was added, and a second balance was struck, a suit for recovery of amount due with interest was held not a mutual, open and current account within the meaning of Art. 85, but a suit on an account stated within Art. 64.[12]

(7) Similarly, where the defendants who were dealers in grain and other articles used to send their goods to the shop of plaintiffs, their commission agents who, after deducting the commission and other charges, credited the balance of the price to the defendants in their account, and a balance was struck in favour of plaintiffs on which interest was charged: and this balance was followed by only four items on credit side, and a similar number on debit side, it was *held* that the account between the parties was an account-stated within meaning of Art. 64, Limitation Act.[13]

(8) Where the dealings between the parties were simple transactions between principal and agent, and accounts were stated showing a certain amount due to plaintiffs with interest, *held,* that the suit was governed by Art. 64, and not by Art. 85.[14]

(9) Where during the long course of dealings between the parties, the balance was always in favour of the plaintiffs, and the adjustments were not signed by the defendant, but they admitted a certain sum being found against them in the last balance, *held,* that Art. 85 was inapplicable, and could not be invoked.[15]

(10) Where the accounts consisted entirely of sums advanced by plaintiffs, which were repaid, from time to time, by the defendants, and only on two occasions a slight overpayment had shifted a balance in defendants' favour, it was held that the suit was not mutual, within meaning of Art. 85, Limitation Act.[16]

(11) Similarly, where plaintiff alone has been advancing money, and receiving payments from time to time, and the balance has always been in plaintiff's favour, the account could not be said to be a mutual account.[17]

(12) Where the defendants made part-payment from time to time of the price of goods supplied to him by the plaintiff; and the amount of payments did not at any time exceed the amount due to the plaintiff, the case was held to fall under Art. 52.[18]

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[12] *Jesaram Diwan Chand* v. *Lachhmandas,* (1931) 130 I.C. 570=1931 Notes 19 (*a*).

[13] *Milkhi Ram-Hemraj* v. *Rupchand-Lachhmandas,* (1931) 131 I.C. 292=1931 Lah. 233=32 P.L.R. 65; cf. *Ratan Chand-Jawala Das* v. *Asasingh-Bogha Das,* 59 I.C. 699=1921 Lah. 369=26 P.W.R. 1921 and 62 I.C. 898=1922 Lah. 188=4 L.L.J. 217; but see *Khanchand Dulachand* v. *Dayaram Amritlal,* 10 Lah. 745=115 I.C. 764=1929 Lah. 263 and *Fateh Chand* v. *Ganga Singh,* 115 I.C. 853=1929 Lah. 264=10 Lah. 748=30 P.L.R. 226.

[14] *Dasaundhi Ram* v. *Mool Chand,* (1932) 140 I.C. 187.

[15] *Radha Mohan* v. *Amin Chand,* 1933 A.L.J. 1283.

[16] *Gokul Das* v. *Radha Kishin,* 1933 Nag. 50=142 I.C. 123=29 N.L.R. 20.

[17] *Budh Ram* v. *Ralli Ram,* 103 P.W.R. 1916=37 I.C. 300; also see *Bank of Multan, Ltd.* v. *Kamta Prasad,* 39 All. 33=35 I.C. 199=14 A.L.J. 949.

[18] *Lalji* v. *Ghasi,* 7 O.W.N. 420=1930 Oudh 287 (288)=128 I.C. 276.

**1507. STARTING POINT OF LIMITATION.**—In *Ganeshlal* v. *Sheogolam,*[19] it was held that the period of limitation under Art. 85 starts from the *close* of the year in which the last item was admitted or proved. The date of the adjustment of account is not material, as time runs according to this provision of law from the *end* of the year. There is a bar of suit in respect of previous items in a mutual account, where no fresh item within three years of the previous items is shown. In *Govind Ram* v. *Jawala Ram,*[20] where all the other items in a mutual, open and current account, prior to the last entry of amount which was advanced to the defendant within limitation were entered before the close of the year, it was held that the suit for the amount due on the account had therefore become barred under Art. 85 before the last entry was made, and the making of that entry could not revive the period of limitation. This view is very doubtful. As explained in the *Tea Financing Syndicate* v. *Chandra Kamal,*[21] the last item draws after it those of longer standing.

Thus, a continuous account between a principal and an agent with debts and credits on each side of it, and containing several items which bring down the mutual dealings to a date which is within the prescribed period of limitation falls within this article. That is, items in a mutual account even though dated more than three years before the institution of the suit would not be barred by limitation.[22] The words *"last item admitted or proved"* in Art. 85, mean such item on the defendant's side of the account;[23] because after the striking of the last balance, there cannot be any reciprocal demands between the parties. However, this ruling is open to the criticism, as pointed out by Mitra, in his work on limitation, that the wording of the article is not 'last reciprocal item', but only the 'last item admitted or proved'. Wood, takes the view that an action for the whole amount on a book account would not be barred until after expiry of the statutory period after the latest item of the whole account even though all the items are against *one party*.[24] The "last item admitted or proved," implies that the item has been proved to have been entered with the knowledge and authority of the defendant in a mutual, open and current account. The plaintiff cannot, it would seem, bring his suit within limitation by entering items without the assent or knowledge of the defendant. The last item relied upon as saving limitation must have been either

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[19] 5 C.L.R. 211.

[20] 1 Lah. 12=55 I.C. 872.

[21] 1931 Cal. 358 (2) (372).

[22] *Watson* v. *Aga Mebde,* (1874) 1 I.A. 346 (P.C.) (A case under S. 8, Act XIV of 1859).

[23] *Hajee Syud* v. *Mt. Ashruf-un-nissa,* (1880) 5 Cal. 759.

[24] Mitra's Limitation Act, Vol. II, p. 1294; Wood's Limitation, S. 280 (*b*) (*i*).

*admitted* as an actual payment by the defendant, or *proved* to have been a payment by the defendant, *i.e.*, with his knowledge, or authority, or privity.[25]

**Close of the year.**

The close of the year, is taken as the starting point, because that is the normal time when, in the ordinary course of a regular business, a balance will be struck, to be carried forward to a new year's account.[26]

The *year,* is not necessarily the English, or the Bengali, or the Fasli year, but such conventional year, when the books are closed, when regularly made up, in the course of the plaintiff's business, *e.g.*, a *sambat* year.[27] The year is to be computed as in the account.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 86. | On a policy of Insurance, when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers. | Three years. | When proof of the death or loss is given or received to or by the insurer, whether by or from the plaintiff, er any other person. |

**SYNOPSIS.**

1508. Corresponding provision.
1509. Policy of insurance.
1510. Scope and application.
1511-1512. Starting point of limitation.
1511. Special agreements.
1512. Proof of death or loss.

**NOTES.**

**1508. CORRESPONDING PROVISION.**—This article is same as Art. 86 of Sch. II of Act XV of 1877; and Art. 88 of Sch. II of Act IX of 1871. The corresponding provision in Act XIV of 1859, was made by S. 1, Cl. 10 of that Act.

**1509. POLICY OF INSURANCE.**—A '**Policy of Insurance**' is a contract to pay a given sum on a certain event, *e.g.*, the death of an individual, etc., and when such event has occurred and the assurers are certified of it, an action lies for the stipulated amount"—*See* Shephard's Limitation Act, 1878, Edn., p. 29. A contract of Insurance could be made without any policy, whatever the meaning of 'policy' is; and it would become valid from the moment of payment of the premium.[28] In practice, a printed document in common form called a "policy", with details adopted to the particular contract written in is almost invariably employed. In England, under the Assurance Companies Act, 1909 (9 Edw. 7, c. 49) S. 30 (*a*), a policy of Life Insurance is required to be in writing, or at least to be evidenced by writing. There is no corresponding provision as regard Fire Insurance business. Under Indian Law, a Policy of Sea Insurance, Fire Insurance, Life Insurance, etc., if drawn singly, or in duplicate, require a particular stamp duty under Art. 47 of the Indian Stamp Act II of 1899.

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[25] Mitra's Limitation Act, Vol. II, p. 1294; also see *Gobind Ram* v. *Jawala Ram,* (1919) 1 Lah. 12=55 I.C. 872; Wood on Limitation, Vol. I, S. 116 (*e*), p. 595.

[26] *Srinath Das* v. *Park Pitter,* (1870) 14 W.R. O.J. 41; also see *Ganesh Lal* v. *Sheo Gulam,* (1879) 5 C.L.R. 211.

[27] *Ganesh Lal* v. *Sheo Gulam,* (1879) 5 C.L.R. 211; also see *Tea Financing Syndicate* v. *Chandra,* 58 Cal. 649=1931 Cal. 359=133 I.C. 801 =34 C.W.N. 1175.

A '*Policy of Insurance*', as defined in S. 2, Cl. (19) of that Act, "includes—

> (*a*) any instrument by which one person, in consideration of a premium, engages to indemnify another against loss, damage or liability arising from an unknown or contingent event;
>
> (*b*) a life-policy, and any policy insuring any person against accident or sickness, and any other personal insurance."

This definition has been enlarged so to include policies of all kinds.

A *Policy of Insurance*, according to Stephen's Laws of England,

> "is an instrument by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation if and when the event shall happen by which the loss is to accrue".
>
> " 'Insurance' is a contract by which a person, company, or society, in consideration of a gross sum, or of a periodical payment, undertakes to pay a larger sum, on the happening of a particular event. The consideration is termed *the premium*, or premiums; the party entering into the undertaking the *assurer or insurer;* the party for whose benefit it is entered into the *assured or insured;* the happening of the event *the risk;* and the instrument containing the contract, *the policy*."—Smith's *Mercantile Law.*

**1510. SCOPE AND APPLICATION.**—This article covers all the various kinds of Policies of Insurance when the sum assured is "payable immediately after proof of the death or loss" has been given to or received by the insurers. The starting point of limitation in column 3, shows that notice in case of death or loss is not essential, and the limitation would start, from the date of proof of death or loss, "whether given by, or from the plaintiff, or any other person". However, it has been held in *Narotamdas* v. *Dayabhai,*[29] that liability would arise on the receipt of a notice of loss as in English Law. In English Law, even, there is in general no condition that notice in case of loss or death must be given unless it is made a condition precedent in express terms.[30] This article does not apply when custom allowed a certain *time of grace,* and the sum assured is not payable immediately from the date when the insurers receive proof of death or loss from the plaintiff, or from any other person.[31]

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[28] Re *Norwich Equitable Fire Insurance Society,* (1887) 57 L.T. 241 (243).

[29] (1869) 6 B.H.C.R. 34.

[30] Pal's Limitation Act, p. 674, citing *Stoneham* v. *Ocean Ry. and*

## 1511-1512. STARTING POINT OF LIMITATION.

**Special agreements.**

**1511.** In some policies of insurance, an agreement is made that a claim made and rejected cannot be the basis of an action or suit, unless the same is commenced within *three months* after such rejection.[32] The condition in the policy that all benefits under the policy shall be forfeited if no suit is brought within three months of the rejection of a claim is valid and enforceable.[33] This condition has the result of making the claim no longer enforceable in spite of a period of three years provided by Art. 86 of the Sch. I to the Limitation Act.

**Proof of death or loss.**

**1512.** There is no reported decision on the subject, but Stirling, in his commentaries on the Limitation Act, has observed as follows:—

> "This article makes limitation run from the date when the *proof* of the loss is given. At some time or other this expression will have to be interpreted by the Courts in India. If the underwriter admits *proof* has been given to him of the loss, then limitation will run from the date at which it was given, but he will probably be estopped from disputing the loss. If, on the other hand, he alleges that no proof was given to him, then the limitation has never begun to run."

The purpose of the contract of insurance being to indemnify the assured or the assignee against loss by fire or death, etc., the assured or the assignee is not entitled to recover upon his policy

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*Gen. Acc. Insurance Co.,* (1887) 19 Q.B.D. 237; Re *Coleman's Depositories, Ltd.,* (1907) 2 K.B. 798; *Hiddla* v. *National Fire and Marine Insurance Co., Ltd.,* 1896 A.C. 372; *Dawson* v. *Wrench,* (1849) 3 Ex. 359.

[31] *Narotamdas* v. *Dayabhai,* (1869) 6 B.H.C.R. 34.

[32] *Baroda Spinning Co.* v. *Satyanarayan Insurance Co.,* 38 Bom. 344=21 I.C. 694 (696).

[33] *Rainey* v. *The Burma Fire and Marine Insurance Co.,* 3 Rang. 383; also see *Girdhari Lal* v. *Eagle Star and British Dominions Insurance Co., Ltd.,* 27 C.W.N. 955 and cf. *Hirabhai Narotamdas* v. *The Manufacturers' Life Insurance Co.,* (1912) 14 Bom. L. R. 741=16 I.C. 1001 (*Held,* that a clause limiting the time within which the insured may enforce his rights under the policy, would be void under S. 28). See also *South British Insurance Co.* v. *Brojo Nath,* 36 Cal. 516=2 I.C. 573=13 C.W.N. 425.

against the insurers, unless he is able to show that he has in fact suffered the loss, or death of the assured has occurred, within the terms of the Policy. If the dispute comes to Court, and the fact of death or loss is a fact in issue, it could only be said to be *proved* "when after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." But it is not clear that for the purpose of giving a start to limitation against the assured of the assignee, the word *proof* in column 3 of this article is used in the strict sense of a *belief* in the existence of a disputed fact, or a fact in issue, apart from *evidence* of the fact necessary to base a claim against the insurers, which has to be given to, or received by the insurers. The proof, it is submitted, implies such *prima facie* proof, or evidence, which the Insurers may be entitled to demand under terms of the Policy of Insurance, before admitting or rejecting a claim, which admission or rejection is the basis of, and affords a cause of action for the suit.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 87. | By the assured to recover premia paid under a policy voidable at the election of the insurers. | Three years. | When the insurers elect to avoid the policy. |

## SYNOPSIS.

1513. Corresponding provisions.
1514. Scope of the article.

## NOTES.

**1513. CORRESPONDING PROVISIONS.**—This article is same as Art. 89 of Act IX of 1871; and re-enacts Art. 87 of Act XV of 1877. Section 1, cl. 10 of Act XIV of 1859 governed suits of this nature.

**1514. SCOPE OF THE ARTICLE.**—This article makes a special provision for the return of the premium, if the policy never takes effect, or after taking effect, ceases to be operative. In such cases the assured loses in consequence his right to be indemnified, and there may be a total or partial failure of consideration which entitles him to a return of the whole or a portion of the premium paid. The remedy of the assured claiming a return of premium is by an action for money had and received, and not by an action on the Policy.[34] If an action on the Policy fails on the ground that the risk never commenced, the assured is, nevertheless, entitled to a return of premium.[35]

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[34] *Castelli* v. *Boddington,* (1852) 1 E. & B. 66 [Affirmed (1853) 1 E. & B. 879 Ex. Ch.]

[35] *Penson* v. *Lee* (1800) 2 Bos. & P. 330 (Marine insurance).

Premium is to be returned when no risk is run by the insurers, and the insurers can never incur any *liability* under the Policy. There is, therefore, a failure of consideration, which affords a ground in law for the return of the premium.[36]

The cases in which the assured is entitled to a return of premium on this ground may be classified as follows, namely:—

(1) There may have been a mutual mistake or fraud or breach of faith of the insurers, in consequences of which the policy is *void ab initio, e.g.*, if the parties have never been *ad idem*, and there has never been a contract between them; or the subject-matter of insurance may have already been destroyed at the date of the policy; or the subject-matter of insurance may be incapable of identification; or where the contract is otherwise void for uncertainty, or *ultra vires* of the insurance company. This is not covered by Art. 87, Limitation Act.

(2) The assured may have been guilty of innocent misrepresentation or concealment, in consequence of which, the policy is avoided as from its inception by the insurers. Where the policy is voidable at the election of the insurers, and if they elect to avoid it, they must return the premium on the ground that the consideration for which it was paid has failed.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 88. | Against a factor for an account. | Three years. | When the account is during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. |

## SYNOPSIS.

1515. Corresponding provisions.
1516. **Article explained—**A factor.
1517. **Scope of article.**

## NOTES.

**1515. CORRESPONDING PROVISIONS.**—Art. 88 of the present Act IX of 1908 is the same as Art. 88 of Sch. II, Act XV of 1877. The corresponding provision in Act IX of 1871 was made by Art. 64. But, the starting point of limitation under that article was the date when the account was demanded, or where no such demand was made, when the agency terminated. The words *"during the continuance of the agency"*, and the words *"and refused"* after the word demanded, were introduced for the first time in Act XV of 1877.

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[36] Welford and Otter-Barry's Fire Insurance, 2nd Edn., pp. 195, 196.

Under **English law,** if goods are consigned to a factor for sale, an action does not lie against him for not accounting until after demand made for the purpose. Consequently the statute runs in such a case only from the time of demand.[37]

**1516. ARTICLE EXPLAINED.**—A factor is an agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation commonly called factorage or commission.[38] The position of a factor is stated in the judgment of Cotton, L.J., in *Stevens* v. *Biller,*[39] as

**A factor.**

"an agent entrusted with the possession of goods for the purpose of sale."[40]

When, therefore, it is found that in the contract and the dealings between the parties there was something outside the mere entrusting of goods for sale and the sale by agent, *e.g.,* if there are other elements like advances from time to time by the plaintiff to the defendant and credit for the goods sold on the defendant's behalf, these elements are quite sufficient to bring the case under Art. 85 for the balance due on a mutual, open and current account, and Art. 88 has no application.[41]

The word "factor", in India, as in England, means an agent entrusted with the possession of goods for the purpose of selling them for his principal.[42] A factor is entitled under S. 171 of the Contract Act to retain as security for a general balance of account, any goods bailed to him. He may buy and sell either in his own name or in that of the principal, though "he usually sells in his own name, without disclosing that of his principal". The factor is said to have a special property in the goods consigned to him.[43] In the case of secretaries and treasurers of a joint stock company who have made advances and disbursements to and, on behalf of the company, there is no general lien under S. 171 of the Contract Act, and no particular lien under Ss. 217 or 221 of the Contract Act. Such secretaries and treasurers who have incurred expenses on behalf of the company in the conduct of its business, are not factors.[44] Similarly, a Banian in Calcutta has no lien as a factor for a general balance of account in the absence of an express contract to that effect.[45] A factor advancing money for sale has a right of *lien* conferred on him, but not a right *to sell* in the absence of an express or implied contract.[46]

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[37] Pal's Limitation Act, p. 676, citing *Topham* v. *Braddick,* (1809) 1 Taunt 572; *Turner* v. *Burkinshaw,* (1867) L.R. 2 Ch. 488 (492).

[38] *Stevens* v. *Biller,* (1883) 25 Ch. D. 31 (37).

[39] 25 Ch. D. 31.

[40] *Bapu Sahib Yousuff* v. *Isac Ismail & Co.,* (1915) 29 I.C. 462= 1915 M.W.N. 519.

[41] *Ibid.*

[42] *E. H. Parakh* v. *Emperor,* (1926) 92 I.C. 744=1 Luck. 133= 1926 Oudh 202 (Motor-car dealer entrusted with car for sale committed no offence by refusing to return the car to the Court of Wards, without payment of his account).

[43] Pollock and Mulla, Limitation Act, p. 540, citing *Baring* v. *Corrie,* (1818) 2 B. & Ald. 137 (143, 148).

**1517. SCOPE OF ARTICLE.**—Art. 88 applies to a suit against an agent of a particular description styled a factor. The next Art. 89, is more general. It applies to a suit against an agent generally, for moveable property to be accounted for by him. Art. 90 applies to suits by principals against agents, not in the matter of accounts, as in Arts. 88 and 89, but arising out of agents' liability for neglect or misconduct. It is in fact a suit for damages. Where the cause of action in a suit by a principal against his agent is of a mixed character, more than one article may be applicable.[47] The liability of an agent for a specific sum in his hands, such as pecuniary benefit or any other money earned or stolen by him in his capacity as agent which the law makes him liable to pay over to his employer whether fraud enters into the cause of action or not, is money which could be recovered from the agent as money had and recieved to the use of the plaintiff under Art. 62, Limitation Act. A cause of action arising out of mixed considerations may come within Art. 90.[48]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run |
|---|---|---|---|
| 89. | By a principal against his agent for moveable property received by the latter and not accounted for. | Three years. | When the account is during thecontinuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates. |

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44. In re *Bombay Saw Mills,* (1889) 13 Bom. 314 (320).

45. *Peacock* v. *Baij Nath,* (1891) 18 Cal. 573=18 I.A. 78 (P.C.).

46. *Jafferbhoy* v. *Charlesworth,* (1893) 17 Bom. 520 (542).

47. *Puran Mal* v. *Ford Macdonald & Co.,* (1919) 41 All. 635=52 I.C. 373=17 A.L.J. 805.

48. *Ibid.,* 52 I.C. 373 (378)=41 All. 635.

## SYNOPSIS.

1518. Corresponding provisions.
1519. **Scope of the article.**
1520. (*i*) Suits between principal and agent.
(*ii*) Suits by or against regal representatives.
1521. Suit for account and money.
1522. Applicability of Arts. 115 and 116.
1523. Cases of misappropriation.
1524. Suit to enforce a charge.
1525. **Starting point of limitation.**
1526. (*i*) Demand and refusal.
(*ii*) Termination of agency.
1527. Completion of business of agency.
1528. General or special agent.
1529. **Death of principal or agent.**

## NOTES.

**1518. CORRESPONDING PROVISIONS.**—Art. 89 of the present Act is the same as Art. 89 of Sch. II of Act XV of 1877. The corresponding provision in Act IX of 1871, was made by its Art. 90, where the commencement of the period was from the time *when the account was demanded and refused.*

Under Act XIV of 1859, a suit by a principal against an agent to recover money received by the latter during his agency, and not accounted for, was subject to the limitation for six years. In case of fraud, the period of limitation run from the time of knowledge or means of knowledge of the fraud.[49] In the case of a suit against the heirs of a deceased *gomashta,* for moneys drawn by the agent, and not accounted for, the cause of action accrued from the time of his death, and not from the time when the agent drew the moneys.[50] The word "account" was used in its legal sense as not confined merely to rendering an account of what he has done with the moneys, but as including the payment of any balance which might be due from him upon taking the accounts.[1] In *Hossein Baksh* v. *Syud Tussuduck Hossein,*[2] S. 9 of Act XIV of 1859 was held applicable to a suit against an agent to recover money received by him, and concealed from the principal.

**1519. SCOPE OF THE ARTICLE.**—This article applies to a **suit by a principal against his agent.** Art. 89 does not apply to a suit where there is no relation of principal and agent between the parties, *e.g.,* where there is a suit for possession, accounts and profits on a resulting trust between two **joint purchasers of pro-**

**Suits between principal and agent.**

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[49] *Radhanath Dutt* v. *Gobind Chunder,* (1865) 4 W.R.S.C.C.R. 19.

[50] *Kalee Kishen Paul* v. *Mt. Juggut Tara,* (1869) 11 W.R. 76.

[1] *Ibid.*

[2] (1874) 21 W.R. 245.

perty, the defendant taking a long time in paying up his quota of purchase-money, costs, etc.[3] But, it applies where the defendant was acting as the agent of the plaintiff in respect of money paid by the plaintiff to the defendant to be used in a joint-purchase of the property.[4] Similarly, where the plaintiff and defendant were agents, the one for the other, in dealing with their joint estate, and a cross-suit brought by the defendant against the plaintiff for an account was held governed by Art. 89, Limitation Act.[5] The relation between one co-sharer and another, who manages any property or business on behalf of another was held to be one of agency.[6] A claim by a member of a Hindu joint family against the manager of the joint property in respect of certain family outstandings alleged to have been collected and misappropriated by the latter is governed by Art. 89.[7] Similarly, where the parties were originally members of a joint Hindu family, who became separated under a consent decree, but remained in joint cultivation of certain land, and their cattle, and money-lending transactions, a suit for partition, so far as it concerned the claim to an account in respect of money-lending transactions was held governed by Art. 89, Limitation Act.[8] The position of the members of a joint Hindu family after division in status and before division of property by metes and bounds or allocation or collection of outstandings is not the same in all cases. Each case will depend upon the intention and conduct of the members. The principle applicable to such cases may be put thus: If *A* collects what belongs to *B*, knowing that it belongs to *B*, he is absolutely liable to *B* for the amount collected without deduction for expenses, charges, etc. *A* has no duty to collect *B's* money, and being a volunteer, cannot claim an account. Where *A* and *B* are jointly entitled to a specific sum, if *A* collects the whole without being *B's* agent implied or express, there is a presumption that he does so for *B's* use and Art. 62 would apply. Where *A* and *B* are entitled to several outstandings and *A* collects some and *B* collects the others before they are allocated to *A* or *B*, neither *A* nor *B* can be said to collect for the other's use and a suit for account is the proper form of action, and Art. 62 would not apply. In such a case Art. 89 would be held applicable.[9]

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[3] *Muhd. Habibullah Khan* v. *Safdar Husain,* 7 All. 25=4 A.W.N. (1884), 219; also see *Srinivasa Ayyangar,* v. *Municipal Council,* Karur, (1899) 22 Mad. 342 (The chairman of a municipal council was not liable as agent, for the embezzlement of manager).

[4] *Jetharam* v. *Mengharam,* (1916) 33 I.C. 438.

[5] *Asgharali* v. *Khurshedali,* (1901) 24 All. 27 (P.C.).

[6] *Chandra Madhub* v. *Nabin Chandra,* (1912) 40 Cal. 108=17 C.L.J. 103.

[7] *Mudanna Virayya* v. *Mudanna Adenna,* 1930 P.C. 18; 1925 Mad. 922 (reversed).

[8] *Merla Venkana* v. *Merla Agastriah,* (1922) 27 C.W.N. 725 (P.C.).

Art. 89 applies to a suit by a principal against his agent for an account and for any money that may be found due on the taking of such account.[10] **This article is not confined to suits for accounts only.** A suit by principal against the agent for recovery of certain sum misappropriated by him is governed by Art. 89, and not by Art. 62.[11] When an agent agrees to submit yearly accounts to his principal, a suit for account against the agent is governed by Art. 89, Limitation Act.[12] In this case, by an oral agreement one **tenant in common** was left in possession as the agent of the other tenants-in-common, and it was held that Art. 89 applied to a suit by one of them for an account.[13] Where **after a dissolution of partnership** an agreement was entered into by the partners to the effect that the two partners, as mentioned in the agreement, were to collect the outstandings of the partnership as trustees, and to deposit the amount in a bank after paying off the partnership liabilities and to share it equally, the relation between the two partners was that of a **principal and agent,** and a suit for rendition of accounts of the partnership moneys realized as per agreement was held governed by Art. 89, and not by Art. 106, Limitation Act.[14] Similarly, where in a partition suit, the parties agreed to divide the house half and half, and it was left to them to effect the partition by mutual agreement or enforce their rights by a separate suit, the claim of the plaintiff with regard to the rent and the recoveries of the mortgage-debt was not barred by limitation, as it was governed by Art. 89, and not by Art. 62, Limitation Act.[15] However, in a Nagpur case, a suit by one partner for partnership accounts (without a prayer for dissolution of partnership) based on an express agreement between the partners to render accounts, and to distribute the profits annually was held governed not by Art. 89, or Art. 100, or Art. 116, but Art. 120 was applied to the same.[16] A suit by a plaintiff against their step-mother for recovery of their father's property which she was managing on behalf of the family was held governed, as regards moveable property, by Art. 89 or 90; and, by Art. 120 or 144, in respect of immoveable property.[17]

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[9] *Yerukola* v. *Yerukola,* (1923) 71 I.C. 117=45 Mad. 648=1922 Mad. 150=42 M.L.J. 507=15 M.L.W. 595=30 M.L.T. 279 (F.B.).

[10] *Kursondas Dhunjibhoy* v. *Surajbhan Ramrijpal,* (1933) 145 I.C. 630=35 Bom.L.R. 929=1933 Bom. 450; also see *Motilal* v. *Radheylal,* 1933 All. 642=1933 A.L.J. 1009; and *Shib Chandra Roy* v. *Chandra Narain,* (1903) 32 Cal. 719; Relied on *Jogendra Nath Roy* v. *Debnath Chatterji,* (1903) 8 C.W.N. 113.

[11] *Khondkar Mahomed Amirul Islam* v. *Mahomed Abdul Hamid,* 60 Cal. 1347=149 I.C. 996=38 C.W.N. 211=1934 Cal. 238.

[12] *Annu Avathanigal* v. *Somasundara,* 54 Mad. 654=131 I.C. 165=1930 M.W.N. 1199=33 L.W. 1=1931 Mad. 1856.

[13] *Ibid.*; also see *Hafezuddin Mandal* v. *Jadunath Saha,* (1908) 35 Cal. 298=7 C.L.J. 279=12 C.W.N. 820 (Art. 89 applies even where the agreement to submit yearly accounts is registered).

[14] *Ruplal* v. *Gianchand,* (1931) 134 I.C. 527=1931 Lah. 300; cf. 1922 P.C. 115 (P.C.).

[15] *Govinddas Rajaramdas* v. *Ganpatdas Narothamdas,* 1928 Bom. 365=30 Bom.L.R. 912=113 I.C. 173.

**Suits by or against representative of principal or agent.**

**1520.** The **Allahabad High Court** has held that Art. 89 is not confined to suits by a principal himself, and extends also to suits by the successors-in-title of a principal.[18] To hold the contrary would be reading Art. 89 in a very restricted sense. An agency terminates on the death of an agent, but if the argument should hold good that the suit by the principal against the representatives of the agent is not a suit against the agent, "any suit by the *quondum* principal, on the termination of the agency would not be a suit by the principal". But, the opposite view is supported by the Allahabad decision in the case of *Bindaraban Behari* v. *Jamuna Kunwar,*[19] where it was held in the converse case of the death of an agent, not only that a fresh cause of action arose, when, upon the death of the father, the money came into the defendant's hands, but, further, that the suit against the son would not fall under Art. 89 of the Limiation Act, because the suit was not against the agent but against his legal representative. Similarly, in *Rao Girraj Singh* v. *Rani Raghubir Kunwar,*[20] it was held that a suit by principal against the legal representatives of a deceased agent, did not fall within Art. 89, Limitation Act, as the defendants were in no sense the agents of the plaintiff.

**(*ii*) Madras.**

The **Madras High Court** has applied Art. 89 to a suit by the legal representatives of the principal or against the legal representatives of the agent.[21] Where on the death of a pleader who had been employed by a Zemindar to conduct certain summary suits for him, the Zemindar sued his legal representatives for recovery of certain amounts received by the pleader and not accounted for by him, it was held that the death of the pleader did not give rise to a fresh cause of action against his legal representative.[22] An opposite view taken in *Natesayyan*

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[16] *Brijraj* v. *Kisanlal,* 141 I.C. 277 (2)=29 N.L.R. 34=16 N.L.J. 10=1933 Nag. 127.

[17] *Kally* v. *Dukhee,* 5 Cal. 692.

[18] *Mahadeo Prasad* v. *Suraj Prasad,* (1925) 85 I.C. 704 (All.).

[19] 25 All. 55=A.W.N. (1902) 191.

[20] (1909) 31 All. 429 (439) (Art. 120).

[21] *Appa Rao* v. *Subba Rao,* (1927) 50 Mad. 249=1927 Mad. 157=51 M.L.J. 804=99 I.C. 456.

[22] *Ibid.,* 50 Mad. 249.

v. *Ponnuswami,*[23] was overruled in *Mallesam Naidu* v. *Jugala Panda,*[24] the view in which is also supported by *Periasami* v. *Seetharama,*[25] and, there is direct authority in *Arunachellam Chetty* v. *Raman Chetty,*[26] where it was held that on the death of the agent there is no separate cause of action against the sons, that is to say, the action against the sons is not different from that against the father, and as it was barred against the father, after his life it was also barred against the sons.

**(*iii*) Calcutta.**

The **Calcutta High Court** has taken the view in *Kumedacharan Bala* v. *Asutosh Chattopadhya,*[27] that as legal representatives are not mentioned in Art. 89, that article can have no application to a suit by principal against legal representatives of deceased agent for moneys not accounted for. An agency is terminated by the death of the principal, and the agent does not continue to be the agent of the heirs of the deceased principal as he was before his death, but if the agent continues to work for the heirs, a new agency is created by implication and, if under such new agency the parties agree that accounts should be submitted from year to year, a suit for accounts would be governed by Art. 89, and not by Art. 115, Limitation Act.[28] In *Mohendranath Ghoshal* v. *Jadunath Mullick,*[29] the view was expressed that Art. 89 is applicable to a suit by the *principal* against his agent, and it was not applicable to a suit where the particular agency had terminated by the death of the plaintiff's father. In *Shib Chandra* v. *Chandra Narain,*[30] the point is not directly touched, and S. 209 of the Contract Act no doubt gives certain remedies of suit to the legal representative of the deceased principal, but this will not make the suit of the legal representative a suit by the principal. In *Chandra Madhab Barua* v. *Nabinchandra Barua,*[31] it was held that a co-sharer who manages a property on behalf of himself and his co-sharers, is an agent of his co-sharer. The relationship of principal and agent continues up to the death of the co-sharer on whose behalf the property is managed. And if the property is managed even after his death, the manager would be considered as the agent of the representatives of the deceased co-sharer. Therefore, a suit for account against the manager by the representatives was held governed by Art. 89 of the Limitation Act. But, in *Jhapa Jhanessa* v. *Bama Sundari*,[32] a suit for accounts not against the agent but against his legal representatives was held to be governed not by Art. 89, but by Art. 115, or Art. 116. Similar view was taken by Prinsep and Pigott, JJ., in *Harendra Kishore* v. *The Administrator-General.*[33] But Wilson, J., in an earlier case, was inclined to apply Art. 89, to a suit against the representatives of a deceased agent on the theory that on the death of an agent, a *fresh* right to an account accrues to the employer as against his representatives.[34] The Calcutta view in *Kumeda Charan* v. *Asutosh*,[35] above noticed is in direct conflict with the Madras decision in *Arunachallam* v. *Raman*,[36] but is supported by the view taken in *Mahendranath* v. *Jadunath*,[37] and in *Sarashibala* v. *Chunilal.*[38] In view of this conflict of opinion, a decision of the Privy Council, would have settled the point, but in *Nobin Chandra Barua* v. *Chandra Madhab Barua*,[39] where the Judicial Committee applied Art. 89 to a suit by the sons of a deceased principal, against their deceased father's agent, the question whether the suit by the legal representatives of the deceased principal can be said to be a suit by the principal within the meaning of Art. 89, was not raised or discussed. However, their Lordships held that in the absence of evidence of a demand and refusal of account during the father's lifetime or after his death, the sons would be entitled to demand an account commencing from a period of three years prior to the father's death under Art. 89 of the Limitation Act and their Lordships apparently did not read Art. 89 in the restricted sense taken by the Calcutta High Court and the Madras view, though not noticed, has been assumed to be the correct view as regards suits by the legal representatives of the deceased principal. However, in *Bir Bikram Kishore* v. *Jadab*,[39-a] Mukerji and Ghose, JJ., have recently applied Art. 89 to a suit for accounts brought by a principal against his agent as also to a suit brought by the legal representatives.

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[23] 16 Mad. 99=3 M.L.J. 1=5 Ind. Dec. (N. S.) 776.

[24] 23 Mad. 292=8 Ind. Dec. (N. S.) 606 (F.B.).

[25] 27 Mad. 243=14 M.L.J. 84 (F.B.).

[26] 27 I.C. 807=16 M.L.T. 614=1915 M.W.N. 23; also see *Parthasarathi* v. *Turlapati,* 47 M.L.J. 483=1924 Mad. 840.

[27] 16 I.C. 742=17 C.W.N. 5=16 C.L.J. 282 (Art. 115 or 120); Relied on *Sethchand Mal* v. *Kalian Mal,* 96 P.R. 1886—a suit against the representatives of an agent is not a suit against the agent (Art. 62, or 120); also see *Fatima* v. *Intiazi,* 1 P.R. 1912=13 I.C. 930 (Art. 120); and *Rameswari* v. *Narendra,* 5 P.L.T. 355=1923 Pat. 259 (Art. 62, or 115 applied).

[28] *Madhusudan Sen* v. *Rakhal Chandra,* (1915) 30 I.C. 697=43 Cal. 248=19 C.W.N. 1070=22 C.L.J. 552.

[29] (1908) 9 C.L.J. 107.

[30] (1905) 1 C.L.J. 232=32 Cal. 719.

[31] (1913) 18 I.C. 735=40 Cal. 108=17 C.L.J. 103 [s.c. on appeal, 1916 P.C. 148=36 I.C. 1=44 Cal. 1 (P.C.)].

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32. (1912) 16 C.W.N. 1042=16 C.L.J. 288.
33. (1885) 12 Cal. 357.
34. *Lawless* v. *The Calcutta Landing and Shipping Company*, (1881) 7 Cal. 627.
35. (1912) 17 C.W.N. 5=16 I.C. 742=16 C.L.J. 282.
36. (1915) 16 M.L.T. 614.
37. 9 C.L.J. 107.
38. (1921) 26 C.W.N. 320.
39. (1916) 44 Cal. 1=1916 P.C. 148=36 I.C. 1 (P.C.).
39-a. 40 C.W.N. 245.

1521. **SUITS FOR ACCOUNTS: AND MONEY.**—"An agent is bound to render proper accounts to his principal on demand."[40] This duty is elementary, and will be enforced at need by following in the agent's hand property representing money for which he ought to have accounted.[41] It is irrespective of any contract to that effect. It is not discharged by merely delivering to the principal a set of written accounts without attending to explain them and produce the vouchers by which the items of disbursements are supported.[42] It is the first duty of an agent to be constantly ready with his accounts.[43] But as pointed out by Sir Barnes Peacock in *Kalee Kishen Paul* v. *Mt. Juggut Tara,*[44] when the law imposes an obligation on the agent to render an account of his agency and to account for the monies of the principal, the word "account" is used in its legal sense and is not confined merely to rendering an account by the agent of what he has done with the monies, but also includes the payment of any balance, which might be found due from him upon taking the accounts. This is substantially in accordance with the observations of Lord Esher in *Harsant* v. *Blaine,*[45] that the duty of the accounting party is not merely to be constantly ready with his accounts, but also, if the accounts show that he has money to pay over, to be constantly ready to pay. In this view of the matter, it has been held, by the **Calcutta High Court**, in *Shib Chandra Roy* v. *Chandra Narain Mukerjee,*[46] that a suit by a principal against his agent for an account, and for payment of money found due upon an account being taken is governed by Art. 89 of the Limitation Act. This followed the decision in *Jogendra Nath Roy* v. *Deb Nath Chatterjee.*[47] Now, it has been held by the Judicial Committee in the case of *Asghar Ali* v. *Khurshed Ali,*[48] that the words "moveable property", in Art. 89, includes money: thus, this article will cover a suit, the object of which is to obtain an account of the monies in the hands of the agent as also to recover the sum due under S. 218, Indian Contract Act, an agent is under the additional duty, subject to such deductions as he is entitled to claim, "to pay to his principal all sums received on his account". A suit for accounts against the agent in respect of money alleged to have been improperly advanced by him to counsel for the purpose of litigation of the principal is governed by Art. 89, and agent is bound to account for the same.[49] A suit by a principal against an agent to recover a specified sum of money lent by the agent to persons to whom he was not authorised to lend the money is really a suit for mere money falling under Art. 89.[50]

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[40] Section 213, Indian Contract Act, IX of 1872.

[41] *Chedworth* v. *Edwards,* (1802) 8 Ves. 46; 6 R.R. 212: Pollock and Mulla, p. 604.

[42] *Ibid.*; *Annoda Persad* v. *Dwarkanath,* (1881) 6 Cal. 754=8 C.L.R. 321; also see *Lawless* v. *Calcutta Landing and Shipping Coy.,* (1881) 7 Cal. 627.

[43] *Pearse* v. *Green,* (1819) Jac. and W. 135=R.R. 258.

[44] (1868) 11 W.R. 76; also see *Mt. Fatima* v. *Mt. Imtiaz Jan,* 1 P.R. 1912=13 I.C. 930 (The rendition of accounts by an agent means something more than merely sending accounts or making over account-books to the principal; it means and includes explaining accounts and paying over balances).

[45] (1887) 56 L.J.Q.B. 511=3 T.L.R. 689.

[46] (1905) 32 Cal. 719 (722, 725).

[47] (1903) 8 C.W.N. 113.

[48] (1901) 24 All. 27=28 I.A. 227 (P.C.); also see *Madhub Chunder Chuckerbutti* v. *Debendra Nath Dey,* (1901) 1 C.L.J. 147; *Hafezuddin*

In *Hurrinath Rai* v. *Krishnakumar Bakshi*,[1] where a continued agency, or employment as Dewan, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a specific sum, or balance, stood against the defendant, having been misappropriated by him, their Lordships of the Privy Council agreed with the view of the High Court that the suit was virtually for an account. In such a case the agent is *prima facie* liable for what he has received, and is bound to discharge himself, by proving settled account, or that the accounts, when taken would be in his favour. In that particular case the agent had denied his accountability altogether, which was shown to be a false defence. But, where in a suit for money the defendant admitted that there had been money dealings between him and the plaintiff, but averred that the taking of the account would show that the plaintiff was indebted to him, it was held that the defendant was not precluded from suing for an account during the pendency of the plaintiff's suit.[2]

**Applicability of Art. 115, 116.**

**1522.** A suit for an account and money against an agent falls appropriately under Art. 89 and, the better view is that a suit for an account and for money due on taking the account is not a suit for compensation for breach of contract. When a principal sues his agent for an account, he sues for money which he hopes to obtain as the result of accounting. The Privy Council in *Rahimbhoy Habib Bhoy* v. *Turner*,[3] have stated that a decree for the taking of an account implies that, if a balance is due from the defend-

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v. *Jadunath*, 35 Cal. 298; and *Pran Ram* v. *Jagadish*, 49 Cal. 250 (252)=1922 Cal. 355.

[49] *Fox* v. *Beni*, 13 C.W.N. 212=4 I.C. 556.

[50] *Muthiah* v. *Alagappa*, 41 Mad. 1.

[1] (1886) 14 Cal. 147=13 I.A. 123 (P.C.).

[2] (1897) 20 Mad. 418; also see *Annu* v. *Somasundara*, 54 Mad. 654 =131 I.C. 165=1931 Mad. 185 (188).

[3] (1891) 15 Bom. 155=18 I.A. 6 (P.C.).

ant he must pay it. But, their Lordships have also held in *Hurrinath Rai* v. *Krishnakumar Bakshi,*[4] that

> "nothing could prevent the defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the plaintiff claims it if a larger sum than he specifies should be found due to him".

An agent when sued as a defendant for an account can get a decree for the balance of the account if anything is found due to him, even though he has not claimed it in his pleadings.[5]

A view has been taken in some cases, that a suit for an account by a principal against his *gomashta,* or agent, appointed on the basis of terms of a registered or unregistered contract, under which he was to render accounts from the end of each year, would be governed by Art. 116, or Art. 115, according as the agreement is registered or unregistered.[6] These cases have proceeded on the ground that a suit for an account can be called, and considered as a claim for compensation or damages arising out of a breach of contract. This argument, even if correct to a certain extent, ignores the point of view that Art. 89 is a special article applicable to a suit by the principal against his agent for account, and for money found due, which would exclude the operation of the more general Arts. 115 and 116. This aspect has been fully brought out in the Calcutta case of *Shib Chandra Roy* v. *Chandra Narain Mukerjee,*[7] and in the recent Madras case of *Annu Avathanigal* v. *Somasundaram,*[8] and the better view is that a suit for an account and for money due on taking the account is not a suit for compensation for breach of contract. Article 89, and not the more general Art. 115 has been applied by the **Allahabad,**[9] **Bombay,**[10] **Calcutta,**[11]

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[4] (1887) 14 Cal. 147=13 I.A. 123 (P.C.).

[5] *Parmanand* v. *Jagat Narain,* (1910) 32 All. 525=6 I.C. 163; *Rain Charan* v. *Bulaquai,* 1924 All. 854=83 I.C. 880=46 All. 858; also see *Ramalinga Chetti* v. *Raghunath Rao,* (1897) 20 Mad. 418 (Recognized practice in India and England); compare *Narasimha Rao* v. *Zemindar of Tiruvur,* (1919) 42 Mad. 873=53 I.C. 234.

[6] *Motilal Bose* v. *Amnichand,* (1905) 1 C.L.J. 211; *Easin Sarkar* v. *Baroda Kishore,* (1910) 5 I.C. 186=11 C.L.J. 43; *Jogesh Chandra* v. *Benodelal,* (1910) 5 I.C. 59=14 C.W.N. 122; and *Bhagirath* v. *Pram Chand,* (1913) 16 I.C. 852; Cf. *Harendra* v. *Administrator-General,* 12 Cal. 357; *Mathura* v. *Chhedu,* 39 All. 355.

[7] (1905) 32 Cal. 719.

[8] (1930) 54 Mad. 654=1931 Mad. 185 (2).

[9] *Asghar Ali* v. *Khurshed Ali,* (1901) 24 All. 27=28 I.A. 227 (P.C.).

[10] *Gabu* v. *Ziрru,* (1920) 45 Bom. 313.

[11] *Mahomed Faiz* v. *Upendra Lal,* (1909) 2 I.C. 597 (Cal.); *Bhabatarini* v. *Sheikh,* (1919) 53 I.C. 675=30 C.L.J. 90; *Madhusudan* v. *Rakhal,* (1915) 43 Cal. 248 (255, 256); also see *Jogendranath* v. *Debnath,* (1903) 8 C.W.N. 113; and *Madhub Chunder* v. *Debendree,* (1901) 1 C.L.J. 147; *Pran Ram* v. *Jagodish,* 49 Cal. 250 (253)=1922 Cal. 355.

**Madras,**[12] and **Patna High Courts,**[13] in several reported cases. An agent's contract to account to his principal, whether express or implied, is specially provided for in Art. 89 of Sch. I of the Limitation Act, and it cannot be included under Art. 115 of the Act. And, in the case of *Hafezuddin Mandal* v. *Jadunath,*[14] Maclean, C.J., has applied Art. 89, even in the case of a registered contract, rather than Art. 116, where the suit was by the principal against his agent for an account. In *Jhapa Jhanessa* v. *Bamasundari,*[15] Art. 89 was held applicable to suit by principal against an agent, even though his liability arose under a registered contract, but a suit against his legal representatives was held to be governed by Art. 116. This question has been examined separately in S. 1520, *ante.*

**Cases of misappropriation.**

**1523.** Art. 89 will apply even when misappropriation is alleged.[16] A claim by a member of a joint Hindu family against the manager of the joint property in respect of certain family outstandings alleged to have been collected and misappropriated by the latter, is governed by Art. 89, as held by their Lordships of the Privy Council, reversing the Madras decision.[17]

**Suit to enforce a charge.**

**1524.** When the suit is not merely one for account, but one to enforce in plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts, the case falls within Art. 132 of the Limitation Act.[18] But Art. 132 cannot apply unless hypothecated property is sought to be sold to enforce a charge. Even where the agent has hypothecated certain properties to the principal, the suit will be governed by Art. 89, where the suit is simply for an account, and for money, without enforcement of the charge on property.[19]

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[12] *Venkatachellam* v. *Narayan,* (1914) 26 I.C. 740=39 Mad. 376=28 M.L.J. 140; *Yerukola* v. *Yerukola,* (1922) 45 Mad. 648=42 M.L.J. 507 (F.B.); and *Ramanathan* v. *Kathiresan,* (1916) 36 I.C. 804=31 M.L. J. 685; *Annu* v. *Somasundaram,* 54 Mad. 654=131 I.C. 165=1931 Mad. 185 (188).

[13] *Jogindra Narayan* v. *Chinai Muhammad,* (1924) 89 I.C. 275=4 Pat. 289=1925 Pat. 494.

[14] (1908) 35 Cal. 298.

[15] (1912) 16 I.C. 414=16 C.W.N. 1042.

[16] *Kinnatinkar* v. *Manavikrama,* 1928 Mad. 906=109 I.C. 332.

[17] *Mudanna Virayya* v. *Mudanna Adenna,* 1930 P.C. 18=121 I.C. 205=58 M.L.J. 245 (Reversed 1925 Mad. 922).

[18] *Hafezuddin* v. *Jadunath,* (1908) 35 Cal. 298; also see *Madhusudan* v. *Rakhal,* 43 Cal. 248; *Prannath* v. *Jagadish,* 49 Cal. 250 (253); and *Troilokhiya* v. *Abinash,* 24 Cal. 18=20 C.W.N. 356.

[19] *Suresh* v. *Nawab Ali,* 20 C.W.N. 356=29 I.C. 848; also see and cf. *Behari Lal* v. *Marakumar,* 21 C.L.J. 458=29 I.C. 748.

## 1525-1528. STARTING POINT OF LIMITATION.—

**Suit for an account.**

**1525. DEMAND AND REFUSAL.**—In the case of a joint suit for account by two principals, if there is no evidence of a joint demand which has been refused, time would begin to run from the termination of the agency. To such a suit it is no answer to say, that if each of the principals had brought a suit separately, each of them would have been barred by time from the date of demand for account and refusal in each particular case.[20]

**Demand and refusal must be express.**

The demand must be expressly made. But, a refusal would consist in mere neglect on agent's part to comply with the principal's demand to render account; and, a view has been taken that a refusal need not be express, but may be implied from conduct.[21] Where an agent on the demand of the principal promised to render account on a future date, but failed to do so[22]; or, where an agent submitted certain account-books to the principal, but when called upon to explain, took no further step in the matter,[23] it was held that virtually there was a *refusal* to account within the meaning of Art. 89, Limitation Act. But, their Lordships of the Privy Council, seem to have laid down in *Nobin Chandra Barua* v. *Chandra Madhab,*[24] that the refusal by an agent must be as explicit, if not more, as the demand itself. In the absence of any proof of a demand and a refusal, the accounts should be directed to be rendered for the whole period of agency, and the period cannot be limited only to three years previous to the institution of the suit,[25] as the plaintiff is entitled to accounts claimed in a suit instituted within three years, from the date of the termination of agency, which is given as the starting point in column 3 of Art. 89.[26] In *Virayya* v. *Adenna,*[27] where Art. 89 was applied by their Lordships to a claim by a member of a Hindu joint family against the manager of the joint property in respect of certain family outstandings, no demand from which under that article time would run was proved at the trial, and in their Lordships' view the defence of the statute failed.

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[20] *Jagdip Prasad* v. *Mt. Raju Kuer,* 75 I.C. 1022=2 Pat. 585=1923 Pat. 464=4 P.L.T. 531.

[21] *Hari Narain Ghose* v. *Administrator-General,* (1878) 3 C.L.R. 446; *Easin Sarkar* v. *Baroda Kishore,* (1909) 11 C.L.J. 43=5 I.C. 186 (Omission to deliver accounts as per covenant); also *Jhapajhanessa* v. *Bamasundari,* (1912) 16 I.C. 414 (417)=16 C.W.N. 1042 per Cox, J.—and *Pran Ram Mookerjee* v. *Jagadish Nath,* (1921) 49 Cal. 250 (254).

[22] *Hari Narain* v. *Administrator-General,* (1878) 3 C.L.R. 446.

[23] *Madhusudden* v. *Rakhal Chandra,* (1915) 43 Cal. 248=19 C.W.N. 1070.

[24] (1916) 44 Cal. 1=31 M.L.J. 886 (P.C.) (Reversed 40 Cal. 108).

[25] *Madhusudden* v. *Rakhal,* (1915) 43 Cal. 248=19 C.W.N. 1070.

[26] *Suresh Kanta Banerji* v. *Nawab Ali Sakdar,* (1915) 29 I.C. 848 =20 C.W.N. 356.

[27] 1930 P.C. 18=121 I.C. 205=58 M.L.J. 245.

The **Calcutta High Court** has held in *Bhabatarini Debi* v. *Sheikh Bahadur,*[28] that the mere failure of the agent to render accounts on demand does not amount to a *refusal* to render accounts within the meaning of Art. 89 of Sch. I, to the Limitation Act. The question whether the failure of the agent to render accounts amounts to refusal within the meaning of Art. 89, depends upon the circumstances of each case. The **Punjab Chief Court,** also, has taken the view in *Mt. Fatima* v. *Mt. Imtiaz Jan,*[29]

> "that the correct interpretation of Art. 89, Limitation Act, is to hold that *refusal* by the agent to render account as mentioned therein must be an express refusal on a definite date and not merely a *virtual refusal* to be inferred from the omission or the failure on his part to fulfil a promise made by him to render the account to the principal in answer to a demand by the latter".

The **Patna High Court** has followed the Calcutta view in *Bhabatarini Devi* v. *Sheikh Bahadur,*[30] that the question of agent's failure to render accounts, amounting to a refusal depends upon the circumstances of each case, and where the account was merely *"put off,"* this was equivalent to postponement, which is by no means tantamount to a refusal, on the contrary, it implies an admission that an account is due, and will be rendered.[31] A recent Calcutta case has laid down that the refusal under Art. 89 need not always be express, and may, on the other hand, be inferred from circumstances. Though the failure to comply with a definite demand may sometimes amount to a refusal, there must be a definite repudiation on the part of the defendant of a liability to account or any circumstances from which the failure or omission on his part to render accounts might be construed as a refusal.[32] A statement by an agent that he finds it inconvenient or is unable to pay the debt due to his principal is not a "refusal to pay" within the meaning of Art. 89 of the Limitation Act.[33] Where the agency is continuous, limitation under Art. 89 commences to run from the date on which the agent *refuses* to account for the moneys.[34]

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[28] (1919) 53 I.C. 675=30 C.L.J. 90.

[29] 1 P.R. 1912=13 I.C. 930=33 P.W.R. 1912=59 P.L.R. 1912.

[30] (1924) 80 I.C. 956=1924 Pat. 664=3 Pat. 546=5 P.L.T. 303.

[31] *Ibid.,* 80 I.C. 956=1924 Pat. 664=3 Pat. 546; Relied on *Nawab Choudhry* v. *Lok Nath Singh,* 43 I.C. 570 (Pat.); also see *Pranram* v. *Jagadish,* (1922) 68 I.C. 562 (Where the agent in answer to the demand promises to submit the accounts later, his conduct cannot be deemed to amount to refusal).

[32] *Abdul Latif* v. *Gobeswar Chattoraj,* 56 C.L.J. 172=1933 Cal. 204=141 I.C. 225.

[33] *Robhia Bi and Saram Bi* v. *The Official Assignee, Madras,* (1917) 37 I.C. 505 (Mad.).

## 1526. TERMINATION OF AGENCY.—

> "An agency is terminated, by the principal revoking his authority; or, by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors."

The effect of this section is modified in various ways by the provisions in Ss. 202 to 210 inclusive of the Indian Contract Act.

**Completion of business of agency.**

1527. In *Babu Ram* v. *Ram Dayal,*[35] the **Allahabad High Court** has held that, where an agent for the sale of goods receives the price, the agency does not terminate on the sale of goods, but continues until payment of the price to the principal. This view has been followed by the **Calcutta High Court** in *Fink* v. *Buldeo Das.*[36] There is a clear obligation of the agent under S. 218, Indian Contract Act, "to pay to his principal all sums received on his account": and, the business cannot terminate on receipt of the money by the agent, inasmuch as there is this subsequent obligation to account for the sums and to pay them. Similarly, the Lower Burma Chief Court, has held in *D. Hormusji* v. *Po Hmyin,*[37] that if prize money won in a lottery or sweep is held by a person as agent for the winner, he is bound to account for the money to the principal; and the cause of action for a suit under Art. 89, Limitation Act, arises when payment to the principal is refused. According to the **Madras High Court,** an agency is determined when the agent ceases to represent the principal, though his liability in respect of all acts done by him as agent may continue.[38] From this point of view, when an agent in obedience to an order sent by his principal hands over the charge to another person, his agency terminates that very day as his authority is revoked.[39] Where an agent appointed specially to carry on the principal's business at a particular place for a particular period, handed over charge to his successor appointed by the princial and left the place, and appeared before the principal some time later for getting the balance of salary due to him, and for having his accounts passed, held, that the *agent* ceased to represent the principal in respect of the agency after he handed over charge to his successor and that the period of limitation commenced to run from that date, and not from the date the agent appeared before the principal for the purpose of getting the balance of salary, and having his accounts passed.[40] The **Punjab Chief Court** has held in *The Alliance Bank of Simla, Ltd.* v. *The Amritsar Bank* (*In liquidation*),[41] that when a person employs another to collect money and remit it to him, the latter stands in fiduciary relation towards the former and may, in some respects of the money so collected, be regarded as a trustee, and, consequently the money which is held for a specific purpose does not at his bankruptcy pass to the trustee in bankruptcy as a bankrupt's property: further that, the appellant Bank having distinctly asked the Amritsar Bank to send drafts on Delhi, the special business, for which agency had been created was completed, and the agency thus terminated *ipso facto* as soon as the drafts in accordance with the instructions were despatched (*vide* S. 201, Indian Contract Act); and, the fiduciary relationship came to an end. A mere denial of fiduciary relationship is not sufficient to put an end to agency. In *Hurrinath Rai* v. *Krishna Kumar Bakshi*,[42] a continued agency, or employment as Dewan, for the purpose of drawing and expending the money of a principal, resulted in a suit by the latter, who alleged that more had been drawn than expended for him, and that a specific sum, or balance, stood against the defendant, having been misappropriated by him. The suit was held to be a suit for account and money under Art. 89, the limitation commenced from the date when the agency ceased.

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[34] *Rameshwar Singh* v. *Narendranath Das,* 71 I.C. 916=1923 Pat. 259.

[35] (1890) 12 All. 541.

[36] (1899) 26 Cal. 715 (724, 725).

[37] (1919) 51 I.C. 530 (L.B.).

[38] *Venkatachalam Chetty* v. *Narayanan Chetty,* (1915) 26 I.C. 740 =28 M.L.J. 140=39 Mad. 376; Followed in *Gordhan Das* v. *Gokal,* 1926 Sind 264=21 S.L.R. 336.

[39] *Ibid.*

In an agent's contract the fixing of a date for rendering accounts cannot stop the termination of the agency.[43] However, it has been held by the **Lahore High Court** that where a date is fixed between a principal and agent for the settlement of accounts, limitation for a suit for accounts by the principal against the agent begins to run from the date fixed and not from the date of the last transaction entered into by the agent on behalf of the principal.[44] In a suit for account between principal and agent, where there were cross-suits between two brothers, who were the agents, the one for the other, in dealing with their joint estate, the cross-suits brought within three years of the agency having terminated, were held not barred.[45] The termination of agency is **a question of fact** for the purposes of Art. 89 of the Limitation Act, and the agency must be considered as having terminated when the authority of the agent is revoked, or the agent renounces the agency, or the business of the agency is completed, which is practically another case of revocation or determination of authority.[46] In *Kuppusamy Aiyar* v. *Veerappa,*[47] it was queried whether after all dealings between a principal and agent have been closed, the agency continues till the latter accounts for money alleged to be due to the former. Where an agent throws up the agency and leaves his place of business, the agency is terminated within the meaning of Art. 89, Limitation Act. The fact that he subsequently goes back to the place, and does some business, cannot prevent the running of time as regards the first agency unless there is any acknowledgment of liability to account.[48] The question when an agency is terminated is a question of fact, and not of law.[49] An agency does not necessarily terminate on the return of the agent from the foreign place to which he was sent and the sending of a new man.[50]

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[40] *Somasundram* v. *Nachal Achi*, 1935 Mad. 707.

[41] 79 P.R. 1915=31 I.C. 215.

[42] (1886) 14 Cal. 147=13 I.A. 123 (P.C.).

[43] *Venkatachalam Chetty* v. *Narayanan Chetty*, (1915) 26 I.C. 740 =28 M.L.J. 140=39 Mad. 376.

[44] *Lakhmichand* v. *Chhajjumal-Rattanlal*, (1925) 91 I.C. 487=1926 Lah. 200.

[45] *Asghar Ali* v. *Khurshed Ali*, (1901) 24 All. 27 (P.C.).

**General, or special agent.**

1528. In Leake, on Contracts, a distinction is expressed between agents general or special, thus:—

> "Agents are distinguished in respect of authority as general and particular or special agents. The former expression includes brokers, factors, partners, and all persons employed in a business or filling a position of a generally recognised character, the extent of authority being apparent from the nature of the employment, or position; the latter denotes an agent appointed for a particular occasion or purpose, limited by the appointment."

In Lord Halsbury's Laws of England, Vol. I, p. 152, the distinction is expressed as follows:—

> "A special agent is one who has authority to act for some special occasion or purpose which is not within the ordinary course of his business or profession. A general agent is one who has authority, arising out of, and in the ordinary course of, his business or profession to do some act or acts on behalf of his principal in relation thereto, or one who is authorised to act on behalf of the principal generally in transactions of a particular kind, or incidental to a particular business."

In Parsons on Contract, the special agent is defined as one authorised "to do one or two particular things," while a general agent is one authorised

> "to transact all his principal's business or his business of a particular kind"

and in Story's work on Agency, substantially the same distinction is drawn in slightly different phraseology.

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[46] *Muthiah Chetty* v. *Alagappa Chetty,* (1918) 45 I.C. 430=41 Mad. 1; Relied on *Venkatachallam* v. *Narayanan,* 26 I.C. 740=39 Mad. 376=28 M.L.J. 140; *Pranram Mukerji* v. *Jagadish,* (1922) 48 I.C. 562 =49 Cal. 250.

[47] (1917) 37 I.C. 875=5 L.W. 375.

[48] *Palaniappa Chetty* v. *Alagappa Chetty,* (1915) 30 I.C. 691 (Mad.).

[49] *Nagappa Chettiar* v. *Chidambaram Chettiar,* (1916) 36 I.C. 812 =31 M.L.J. 687=4 L.W. 455; *Ramanathan* v. *Kasi,* 36 I.C. 804=31 M.L.J. 685.

[50] *Ibid.*

**Death of princi- or agent.**

**1529.** An agency is terminated by the death of the principal, and the agent does not continue to be the agent of the heirs of the deceased principal as he was before his death, but if the agent continues to work for the heirs a new agency is created by implication.[1] Where an agency is created between two persons and the principal dies but the agent continues in the service of his sons, and they file a suit for accounts for a period both before and after the death of their father, as the former agency terminates with the death of the father, the two periods should be separately considered and if a suit for accounts in respect of the anterior period is instituted more than three years after the date on which that agency terminated, the suit for accounts must be regarded as barred.[2] If no demand for any account has been made, or if demands were going on as long as the agency continued, the limitation will run from the termination of the agency.[3] An agency is terminated by either the principal or the agent dying, and a suit for accounts against the agent for the period during which he acted as agent under his deceased principal must be brought within three years of the death, as laid down in Art. 89, Limitation Act.[4]

The death of a principal revokes the power-of-attorney to an agent to represent a document for registration.[5] Where a power-of-attorney is given by the members of a joint Hindu family to one of them in connection with a family business, it is a question for consideration in each case whether the power comes to an end on the death of any of them or whether it is to continue even after then.[6]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 90. | Other suits by principals against agents for neglect or misconduct. | Three years. | When the neglect or misconduct becomes known to the plaintiff. |

### SYNOPSIS.

1530. Corresponding provision.
1531. Scope and application.
1532. Neglect or misconduct.
1533. Starting point of limitation.

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[1] *Madhusudan Sen* v. *Rakhal Chandra,* (1915) 43 Cal. 248=30 I.C. 697.

[2] *Bikram Kishore* v. *Jadam Chandra,* 1935 Cal. 817.

[3] *Chandra Madhab* v. *Nabin Chandra,* (1913) 18 I.C. 735 (Cal.).

[4] *Kumar* v. *Choonilal Ghose,* (1922) 65 I.C. 219 (Cal.).

[5] *Mijibunnissa* v. *Abdul Rahim,* (1900) 23 All. 233=28 I.A. 15 (P.C.).

[6] Re *Sital Prasad,* (1916) 21 C.W.N. 620=41 I.C. 288.

**1530. CORRESPONDING PROVISION.**—This article is the same as Art. 90, Sch. II, Act XV of 1877.

The corresponding article, in the Act IX of 1871, was Art. 91, under which the period would begin to run from the time *when the neglect or misconduct occurred.*

Under Act XIV of 1859, S. 1, Cl. 16, gave a period of six years for such suits. English law also gives the same period in actions for negligence framed either on contract (assumpsit), or in tort (case).

**1531. SCOPE AND APPLICATION.**—This is a residuary article for suits by the principal against the agent for neglect or misconduct. This article should be held applicable with regard to actions between principal and agent, and should be held to be applicable only if no other article can possibly be regarded as applying to the facts of the particular case.[7] The word "other" in this article shows that Art. 90, does not include suits which properly come within Art. 89. For instance a suit by the principal against an agent for the recovery of money but by the latter without due authority to another person, is governed not by Art. 90, but by Art. 89, Limitation Act.[8]

**Neglect, or misconduct.**

1532. In *Muthiah Chetty* v. *Alagappa Chetty,*[9] the **Madras High Court** has held that the expression "neglect or misconduct" appearing in the third column of Art. 90 has special reference to what is termed negligence or misconduct of the agent in the conduct of the agency. It was decided that even when what is charged includes misappropriation the proper article to be applied is only Art. 89. The word "misconduct", therefore, in that article should not be construed as including everything that may in ordinary parlance be called misconduct.

"But the (words) misconduct or negligence appearing in contradistinction to each other in the third column of that article must be construed technically as referring to what the principal charges as misconduct on the part of the agent in the business of the agency".[10]

Thus, a suit by a principal to recover from his agent unauthorized payments made by the agent and money received by the agent on account of the principal is governed by Art. 90 of the Limitation Act.[11] Similarly, this article will apply where the principal has sustained loss through agent's negligence in not recovering the sale-proceeds of the principal's property,[12] or the debts due to the principal not being sued out within time.[13] A suit in which a client claims damages for negligence of his counsel would fall within this article.[14] Where the principal paid some money to the agent, in order that it might be handed over to a third party, and the agent having defaulted, the third person recovered the money from the principal by suit, the principal's suit against the agent to recover the money paid to him, would be governed by Art. 90 of the Limitation Act, and time would not begin to run from date of payment by principal to third party,[15] but from the date "when the neglect or misconduct becomes known to the plaintiff". A suit by a banking company to recover from a Director the amount of losses incurred by the company on certain loans made by the company on the authority of the Director, in sanctioning which the latter was guilty of gross negligence is governed by Art. 90 of the Limitation Act.[16] The directors are agents for some purposes of the company and it is by the consensus of all the individuals in the company that these directors hold their rights and position as agents, as observed in an English case.[17] Where it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence, or overconfidence in the honesty of others, such misconduct on the part of the agent is actionable, and a suit by principal against the agent would be governed by Art. 90 of the Limitation Act.[18] This article was accordingly applied to a case where the accountant of a municipality was able to embezzle large sums of municipal revenues due to the misconduct of the executive officer in disregarding certain rules and instructions laid down for his guidance.[19] But, where during the tenure of his office by the chairman of a municipal council, the manager embezzled sums of money, the council was held not to be a principal with relation to the chairman as its agent, for the purpose of recovering the amount lost by reason of the embezzlement. Art. 89 and 90 of the Limitation Act were, therefore, held inapplicable, and the suit was governed by Art. 36, Limitation Act.[20] Where

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[7] *Madhavan Nair* v. *Zamorin of Calicut,* 1928 Mad. 906=109 I.C. 332.

[8] *Muthiah* v. *Alagappa,* (1914) 41 Mad. 1 (2)=45 I.C. 430.

[9] (1914) 41 Mad. 1=45 I.C. 430.

[10] *Madhavan Nair* v. *Zamorin of Calicut,* 1928 Mad. 906=109 I.C. 332.

[11] *Ardikappa Chetty* v. *Kadappa,* 36 I.C. 418=9 Bur.L.T. 130.

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[12] *Babulal* v. *Vanghan,* (1867) 2 Agra 306.

[13] *Kadiresan Chettiar* v. *Ramanathan Chetty,* 1927 Mad. 478 (486).

[14] *Sa Hla Pru* v. *Halkar,* 9 Rang. 575=135 I.C. 648=1932 Rang. 1 (2); also see (1907) 10 O.C. 95.

[15] *Rangaswami Aiyangar* v. *Srinivasa,* (1911) 9 I.C. 54=21 M.L.J. 453; Relied on 29 All. 579.

[16] *Daulat Ram* v. *Bharat National Bank,* (1924) 79 I.C. 740.

[17] *Automatic Self-cleaning Filter Syndicate, Ltd.* v. *Cunninghame,* (1906) 2 Ch. 34 (45)=22 T.L.R. 378.

[18] *A. C. Mukerji* v. *The Municipal Board, Benares,* (1924) 80 I.C. 241=22 A.L.J. 26=46 All. 175=1924 All. 467.

[19] *Ibid.,* 80 I.C. 241=46 All. 175=1924 All. 467.

[20] *Srinivasa* v. *Municipal Council,* 22 Mad. 342.

*A* gave *B* twenty loose rubies in order that *B* might give them to a goldsmith and have them made into a jewel (*olai*); and *B* did not have the *"olai"* made, but retained the rubies, it was held in a suit by *A* against *B,* for the value of the rubies, that (1) Art. 49 of the Limitation Act would apply if the suit be considered to be one for recovery of specific moveables or for compensation for wrongfully detaining the same; (2) that Art. 89 or 90 would apply if the suit be regarded as one for neglect of agent to do an act for his principal.[21]

**1533. STARTING POINT OF LIMITATION.**—Under this Art. 90, limitation begins to run when the agent's neglect becomes known to the principal, *i.e.*, the date of plaintiff's knowledge of the *negligent act* or omission, and not from the time when he comes to realise or conclude that he had a good case being run against the agent.[22] A suit for negligence in Art. 90 means a suit in respect of some negligent act or omission and the words that the limitation shall run from the time when the neglect becomes known to the plaintiff means from the time when the negligent act or omission becomes known to the plaintiff, and not from the time when he realizes or concludes that the act was negligent. Whether the act is negligent or not does not depend on the knowledge of the plaintiff, for the act or omission as a matter of fact is negligent or not negligent, whether the plaintiff was or was not aware of it.[23] The article is not happily worded, for the law knows nothing of negligence or misconduct in the abstract.[24] Where the plaintiffs had instructed the defendants who were commission-agents to purchase certain articles on account of the plaintiff; and, the defendants sold the articles making a secret profit, which fact came to knowledge of the plaintiff nearly three years after the plaintiff's knowledge of the sale of the articles by the defendants it was *held* that the plaintiff's suit was not one for damages for misconduct in that the defendants wrongfully sold his articles, but in regard to the misconduct of the defendants in that they made a secret profit, and concealed the profit from the plaintiff, and that consequently, the period of limitation for the suit began to run not from the date on which the plaintiff came to know of the sale, but from the date on which it came to his knowledge that the defendants had made the secret profit.[25] In *Anant Parshad* v. *Perbhu Narain,*[26] Art. 90 has been applied to a case of *constructive* knowledge of negligence of agent, by the plaintiff's officers who had slept over the matter. The plaintiff's constructive knowledge of the negligence in question were taken as *actual* knowledge for purposes of giving a start to limitation under Art. 90.

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[21] *Narayanasamy Thevar* v. *Aiyasami Iyengar,* (1913) 18 I.C. 921= 24 M.L.J. 184.

[22] *Janki Koer* v. *Mahabir,* (1914) 25 I.C. 706 (Cal.).

[23] *Saw Hla Pru* v. *Halkar, etc.,* 1932 Rang. 1=9 Rang. 575=135 I.C. 648.

[24] *Ibid.*

[25] *Kishorilal-Mukandilal* v. *Jauharimal,* (1927) 103 I.C. 221=25 A. L.J. 448=1927 All. 436.

[26] (1910) 6 I.C. 456 (All.).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 91. | To cancel or set aside an instrument not otherwise provided for. | Three years. | When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him |

### SYNOPSIS.

1534. Corresponding provision.
**1535-1542. Scope and application.**
1535. A residuary article.
1536. To cancel or set aside.
1537. Allahabad.
1538. Bombay.
1539. Calcutta.
1540. Madras.
1541. Lahore.
1542. Rangoon.
**1543. Article when not applied.**
1543. Cancellation non-essential.
Ancillary or incidental relief.
1544. Doctrine of subservience.
1545. Documents null and void.
*Illustrations.*
1546. Oral transfers: acts: wills.
1547. *Parties, or their representatives.*
Punjab view.
1548. Allahabad.
1549. Bombay.
1550. Calcutta.
1551. Madras.
1552. Other Courts.
1553. Voidable instrument—Election to treat as a nullity.
1554. Defence—article inapplicable to.

### NOTES.

**1534. CORRESPONDING PROVISION.**—This article is same as Art. 91 of Sch. II of Act XV of 1877.

Under Act IX of 1871, the corresponding provision was made by Art. 92, Sch. II, but the starting point of limitation in Col. 3, was from the time *"when the instrument was executed"*. The general provision in Cl. (16) of section of Act XIV of 1859, gave a period of six years for a suit to cancel or set aside an instrument.[27]

**1535. SCOPE AND APPLICATION.**—There are several other articles in the Schedule I of the Limitation Act, making specific provisions for "setting aside", or "cancelling", instruments. For example Arts. 12, 13, and 14 relate to suits for *setting aside* certain sales, orders, and official acts. Article 44 provides for suits by a ward who has attained majority to *"set aside"* a transfer made by the guardian of ward's property. Article 45 deals with suits to *contest,* or set aside, certain awards.

**A residuary article.**

Articles 48-B, 134-A, to 134-C, provide for setting aside sale of property comprised in religious or charitable endowments made by a manager; Arts. 92, 93, deal with suits for a declaration that a certain instrument is a forgery. Article 114 provides for suits for rescission of a contract. Article 125 governs suits to avoid certain alienation of property made by a Hindu or Mahomedan female having a limited or qualified estate for life, or until remarriage. Article 126, applies to suits for setting aside an alienation of ancestral property made by a Mitakshara father. This article is general in form, and applies to suits "to cancel", or "set aside", an instrument not otherwise provided for, in one of the above named specific provisions.

**"To cancel, or set aside."**

**1536.** Section 39 of the Specific Relief Act, I of 1877, deals with the cancellation of instruments. It provides that

> "any person against whom a written instrument is void, or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void, or vodiable, and the Court may, in its discretion, so adjudge it and order it to be delivered up and *cancelled*".

The expression "set aside" in this article, is in a sense synonymous with "cancel".[28]

**The suits brought under S. 39 of the Specific Relief Act, are governed by Art. 91** of Sch. I of the Limitation Act. But, this article *also* applies to other instruments which are voidable at the instance of the plaintiff, and are necessary to be set aside for grant of the relief claimed by the plaintiff. There has been a conflict of view as to the exact scope of this article. There are cases where the view has been taken that the article is restricted to cases where the cancellation, or setting aside is the only relief prayed for. For example, the **Allahabad** cases in *Hazari Lal* v. *Jadaun,*[29] *Uma*

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27. *Thakor Pathuk* v. *Ram Soornum Lall,* (1870) 2 N.-W.P. 433.
28. *Dheru* v. *Sidhu,* 56 P.R. 1903 (F.B.) (Per Chatterji, J., at p. 253).
29. 5 All. 76.

*Shanker* v. *Kalka Prasad,*[30] *Hussan Ali* v. *Nazo,*[31] and the **Bombay** decisions in *Bhagat Ram* v. *Khasetji,*[32] *Narasagounda* v. *Chawagounda.*[33] But, this view has not been shared by the **Calcutta** and **Madras** High Courts: and, the authorities are mostly agreed now that Art. 91, is generally applicable to suits for possession or other relief respecting immoveable property, provided the plaintiff cannot succeed in recovering the immoveable property without removing the obstacle from his way of an instrument of transfer which is not null and void, but has operation given to it and which would defeat his claim unless the transfer is cancelled or set aside. Where the *prima facie* title is with the defendant he ought to retain his possession until it is displaced.[34] A suit for possession has been held governed by Art. 91, in *Raghubar* v. *Bhikya,*[35] *Janki* v. *Ajit,*[36] *Mohabir* v. *Harihar,*[37] *Anantam* v. *Sankaran,*[38] *Unni* v. *Kunchi,*[39] *Sitaram* v. *Nilu,*[40] and, *Sundaram* v. *Sithamal.*[41] A different view has been entertained by the **Allahabad High Court** in *Hazari* v. *Jadaun,*[42] and by the Bombay High Court in *Jinnatboo* v. *Shanagar,*[43] *Abdul Rahim* v. *Kirparam,*[44] *Nabomir* v. *Yasinkhan,*[45] where Art. 91 has not been applied to suits seeking relief by way of recovery of land as a main or substantial prayer. But, the trend of recent decisions is in the direction of making a clear distinction between an instrument of transfer which is void, or inoperative and one which is merely voidable, and which would be operative unless successfully challenged. *See* S. 1545, *post.* The article is inapplicable to *void* instruments, which having no operation need not be set aside or cancelled, and which do not obstruct the plaintiff in getting the relief prayed for (*see* **S. 1545**). It is not applicable where the transaction though a *voidable*

**Applicable to suits for immoveable property.**

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[30] 6 All. 75.

[31] 11 All. 456.

[32] 27 Bom. 560.

[33] 42 Bom. 638 (642) (F.B.).

[34] *Jagadamba* v. *Dakhina,* (1886) 13 Cal. 308=13 I.A. 83 (P.C.) and *Malkarjun* v. *Narhari,* (1900) 25 Bom. 337=27 I.A. 216=10 M.L.J. 368 (P.C.).

[35] 12 Cal. 69.

[36] 15 Cal. 58 (P.C.).

[37] 19 Cal. 629.

[38] 14 Mad. 101.

[39] 14 Mad. 26.

[40] 1 C.P.L.R. 75.

[41] 16 Mad. 311.

[42] 5 All. 76.

[43] 11 Bom. 78.

[44] 16 Bom. 186.

[45] 17 Bom. 755 (758).

one, does not require to be set aside through the intervention of Court. This article has no application where the plaintiff is no party to the instrument sought to be avoided, or where the suit is not to *cancel* or set aside an instrument, but only to amend it by substituting some other person for the plaintiff: but it applies to all cases where the prayer for cancellation or setting aside an instrument is an essential prayer for the purpose of obtaining or successfully seeking the other relief claimed in the suit. The cases, from different High Courts, will now be noticed in detail, in separate groups, for facility of reference, before dealing with various topics bearing on the question of the exact scope and application of Art. 91 of the Limitation Act.

**Allahabad.**

1537. In some early cases it was held by the **Allahabad High Court** that Art. 91, applies where the cancelment or setting aside of an instrument is the only relief asked. In *Hazarilal* v. *Jadaun Singh*,[46] Straight, J., held that

> "Article 91, is intended to apply to suits of the kind mentioned in S. 39 of the Specific Relief Act, and to cases where a plaintiff seeks the cancellation or setting aside of some instrument he has been induced by misrepresentation, concealment of facts, or other means of the like kind, to enter into, or where the cancelment or setting aside of an instrument is the only relief asked".

And, this view was followed in *Ramautar* v. *Raghubar Jati*,[47] and in *Sobha* v. *Sahodhra*.[48] Where, in a suit for possession of immoveable property, the question was raised incidentally as to the existence of a mortgage in favour of the defendants, it was held that the avoidance of the mortgage did not necessarily involve the cancellation of the instrument, so as to make the suit of the nature of those to which Art. 91 applies.[49] In *Hasan* v. *Nazo*,[50] where a Mahomedan donor never took any steps to have the deed of gift in favour of his two daughters, set aside, but in a suit brought by his nephew, against the daughters, claiming a share in the donor's estate by right of inheritance, the cancelment of the deed, alleged to have been procured from the donor by fraud and undue influence, became a substantial and necessary incident of the claim, Art. 91 was applied to bar the suit. In *Din Dayal* v. *Harnarain*,[1] where the plaintiff sued for maintenance of possession in certain joint-family property by cancelment, so far as his interest was concerned, of a certain deed of sale by which his co-parcener had purported to convey the whole to a stranger, it was held that the suit was for a declaration that the plaintiff was not affected by the sale-deed, and the suit fell under Art. 120 and not Art. 91 of the Limitation Act. Aikman, J., held that "the prayer for cancelment of the deed to be found in the plaint may be treated as merely incidental to the main relief asked". The doctrine of subservience was also followed in *Mahammad* v. *Mango.*[2] In *Rampalsingh* v. *Balbhadar,*[3] where the relief sought in the plaint was possession of the village with mesne profits, and alternatively, a declaration that the defendant had no right under the lease beyond that of a mere lessee, and was liable to ejectment; it was held by their Lordships of the Privy Council that

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[46] (1882) 5 All. 76.

[47] (1882) 5 All. 490.

[48] (1882) 5 All. 322.

[49] *Uma Shanker* v. *Kalka Prasad*, (1883) 6 All. 75=3 A.W.N. (1883) 212.

[50] (1889) 11 All. 456.

[1] 16 All. 73.

> "no doubt the ultimate object of the appellant was recovery of possession, but that relief could not be given in this suit. It is different, therefore, from a case in which the substantial relief sought is recovery of the land, and the setting aside an instrument is merely ancillary or incidental to that relief. In the present case, the cancellation of the instrument or a declaration of its invalidity as against the appellant was the substantial relief sought, and the only relief which the Court had jurisdiction to give".[4]

In *Safdar Singh* v. *Akbarshah,*[5] where a suit was brought for declaration that a deed of gift is inoperative, it was held that the suit fell under S. 39 of the Specific Relief Act, and Art. 91 of the Limitation Act applies to it. But, where the deed of gift is void *ab initio,* in such a case no question of limitation for a suit to impeach the gift can arise.[6] There is a patent difference between deeds which are void, and deeds which are voidable.

> "Where a deed is null and void there is no necessity for the party to come to Court promptly, and have the deed actually cancelled or set aside. Where however, a deed is good but is voidable, and can be avoided at the option of the party aggrieved he must come to Court within three years to have it set aside."[7]

**1538.** It was held by the Bombay High Court, that Art. 91 (Art. 92 of Act IX of 1871), has no application to a suit to set aside a mortgage bond on the ground of fraud, and to recover possession of the immoveable property therein referred to. The article in question applies only where a bare declaration is sought regarding the cancellation of a

**Bombay.**

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2. 22 All. 90.

3. 25 All. 1 (16) (P.C.) (Article 91, or 120, according as S. 39 or S. 42, Specific Relief Act applied); also see and cf. *Jagardeo* v. *Phuljari,* (1908) 30 All. 375=5 A.L.J. 421=1908 A.W.N. 156 (A suit for a declaration that a transaction was sham, is to be distinguished from a suit for cancellation of the deed).

4. *Ibid.*

5. (1910) 5 I.C. 497=32 All. 321.

6. *Mt. Mulani* v. *Maula Bux,* (1924) 78 I.C. 222=1924 All. 370=46 All. 260=22 A.L.J. 149.

7. *Mohammad Nazir* v. *Mt. Zulaikha,* 1928 All. 267=109 I.C. 54=50 All. 510.

bond, or other instrument.[8] This article was applied only to suits brought *expressly* to cancel or set aside some instrument, and it did not apply to suits where substantial relief is prayed and where the cancellation or declaration is subservient or merely ancillory and not necessary to the granting of such relief.[9] But, in *Chanvirappa* v. *Danava,*[10] it was held that a suit to set aside a deed of partition on the ground of fraud is governed by Art. 91 or Art. 95, and must be brought within three years after the minor plaintiff has attained majority according to S. 7 of the Act. But, in *Vithal* v. *Hari,*[11] where a plaintiff sought for the cancellation of a mortgage-bond, and for possession of the mortgaged property, alleging that the mortgage was a sham transaction never intended to be operative, Art. 91 was not applied. In *Barkat Ram* v. *Karsetji,*[12] Art. 91 was held applicable to a suit brought under S. 39 of the Specific Relief Act (I of 1877), to have a bond adjudged void and to have it delivered up and cancelled. The test is "reasonable apprehension of serious injury, if the document is left outstanding".[13] But, in the Privy Council case of *Malkarjun* v. *Narhari,*[14] their Lordships of the Privy Council, in overruling the decision in *Bhagwant* v. *Kondi,*[15] held, that the doctrine of subservience which had been laid down in that case should not be favoured. Their Lordships observed that

> "The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however, seems to be the effect of **the doctrine of subservience laid down by the Bombay High Court.**"[16]

The position is now clear, with reference to what was said by the **Privy Council** in *Petherperumal Chetty* v. *Muniandy Servai,*[17] that an inoperative instrument

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[8] *Boo Jainat* v. *Shah Nagar,* (1888) 11 Bom. 78; Relied in *Bhagwant Govind* v. *Kondi,* (1889) 14 Bom. 279.

[9] *Abdul Rahim* v. *Kirpa Ram Daji,* (1891) 16 Bom. 186; also see *Nabab Mir Sayad Alamwhan* v. *Yasin Khan,* (1892) 17 Bom. 755.

[10] (1894) 19 Bom. 593.

[11] (1900) 25 Bom. 78 [Distinguished (1887) 15 Cal. 78 (P.C.)].

[12] (1903) 27 Bom. 560 (562, 563).

[13] *Kotrabassappayya* v. *Chen Virappa,* (1898) 23 Bom. 375.

[14] (1900) 25 Bom. 337 (P.C.).

[15] 14 Bom. 279 (O.R.).

[16] (1900) 25 Bom. 337 (350) (P.C.).

[17] 10 Bom.L.R. 590 (599)=35 I.A. 98=12 C.W.N. 562=35 Cal. 551 (P.C.); Followed in *Jan Mahomed* v. *Datu Jafer,* (1914) 22 I.C. 195=38 Bom. 449 (*Held,* that, where the existence of a document, if valid and binding on a party, would defeat his suit to recover possession of any

"does not bar the plaintiff's right to recover possession of his land and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims".

And, as observed in *Manchharam* v. *Pannubhai,*[18] by the **Bombay High Court,** the authorities are in accord, and quite reasonably so,

> "that where the deed or instrument which seems to stand between a plaintiff and the realization of his claim in the suit is an actual nullity, the plaintiff is entitled to bring his suit for possession within 12 years, and is not hindered by the narrower period laid down by Art. 91. The **only object of Art. 91** is to compel a plaintiff to remove out of his way some real existing obstacles; but where there is no real obstacle, the article has no scope for operation".

Art. 91 of the Limitation Act does not apply to a suit for possession, where the plaintiff alleges and proves that a sale-deed is void because it was executed by him while a minor, but does not claim expressly to have it cancelled or set aside.[19] Beaman, J., in the referring order, was of opinion that "if a man wishes to avoid his own deed (and he doubted whether Art. 91 will apply to any but a man's own deeds) as void *ab initio,* or voidable for any reason, the law declares that he must prove all facts necessary to be proved before the deed is seen to be void or voidable within three years. Batchelor, Ag. C.J., held, relying upon the Privy Council cases of *Bijoy Gopal Mukerji* v. *Krishna Mahishi,*[20] and of *Petherperumal* v. *Muniandy Servai,*[21] that Art. 91 is no bar to a suit for possession, where the transaction in question is void *ab initio,* or even if voidable transaction, the same is subsequently avoided by the election of the party interested, and there is no real obstacle at all to plaintiff getting the relief he claims. The same conclusion was suggested by *Beni Pershad Koeri* v. *Dudhunath.*[22] Kemp, J., observed that S. 39 of the Specific Relief Act is permissive, not obligatory. There is, therefore,

> "no obligation on the minor to sue under that section, and if he does not need to sue under that section, it cannot be said by not suing he loses the right which he in common with every other person possesses to the period of limitation for a suit for land".[23]

Taking a general view as to the scope of Art. 91, in his opinion,

> "Art. 91 applies to suits the main object of which is to cancel or set aside an instrument not otherwise provided for by the Act. If there be any other sub-

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property, he must sue under Art. 91 for the cancellation of that document within three years).

[18] (1915) 30 I.C. 909=40 Bom. 51=17 Bom.L.R. 698.

[19] *Narsagauda Sadantgouda* v. *Chawagauda Adgauda,* (1918) 47 I.C. 581=42 Bom. 638=20 Bom.L.R. 802 (F.B.).

[20] 34 I.A. 87=9 Bom.L.R. 602 (604)=34 Cal. 329 (P.C.).

[21] 35 I.A. 98=10 Bom.L.R. 590=35 Cal. 551 (P.C.).

[22] 26 I.A. 216 (224)=27 Cal. 156 (165) (P.C.).

[23] *Narsagauda* v. *Chawagowda,* (1918) 47 I.C. 581=42 Bom. 638 =20 Bom.L.R. 802 (F.B.).

stantial relief prayed for and the cancellation of the instrument be not actually necessary or merely auxiliary to the granting of such relief, Art. 91 does not apply. It would be otherwise if the prayer for possession in a suit be merely consequential."[24]

**Calcutta.**

**1539.** The view has prevailed in Calcutta, as in other High Courts, that where the cancellation of an instrument is not the primary relief, but is ancillary to the main relief prayed for, the period of limitation applicable will have to be determined with reference to the main relief. In *Sikhur Chand* v. *Dulputty Singh,*[25] a suit by adopted son of a minor brother in a joint Hindu family, contesting a sale by elder brothers, with sanction of Court, under Guardian and Wards Act, was held not a suit to cancel or set aside an instrument under Art. 91, Limitation Act. It was laid down in *Raghubar Dayal* v. *Bhikya Lal,*[26] that where a certain period is allowed by the law of limitation, within which an instrument affecting a person's rights or immoveable property must be impugned, and the person whose rights or property are affected fails to impugn such instrument within that period, he will not be precluded from availing himself of the longer period allowed for the recovery of immoveable property, provided that he can prove that such instrument is null and void so far as his interests are concerned. In *Jagadambha Chaudhrani* v. *Dakhina Mohan Roy,*[27] where in a suit for possession, it was necessary for the plaintiff to set aside, or rather declare void, the adoption set up, which was certainly intended to be operative against the interests of the reversioner, the shorter period governed the suit. In another **Privy Council** case, from Calcutta, it was held by their Lordships that an attempt at setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it, and that a suit brought more than three years later to have the deed set aside as being false and fabricated was barred by limitation under three years' rule.[28] But, where there had been no attempt made to enforce the instrument against the plaintiffs, their Lordships held that neither Arts. 92 or 93 of the Limitation Act, were applicable to bar the suit, to set aside an adoption sought to be supported by the *anumati patra.*[29] The view taken by Field, J., in ***Raghubar*** v. *Bhikya,*[30] that Art. 91, like Arts. 92 and 118, was particularly concerned with instruments or transactions which, if allowed to stand unchallenged once they become known, might become important evidence against the persons whose rights they purported to affect, was approved in the Privy Council decision of *Janki* v. *Ajit,*[31] where Art. 91 was applied to a suit to set aside a deed on the ground of fraud and undue influence, where the executant, found in some subsequent suits to be a man of weak intellect, he was at that time considered by the proper authorities, who had made inquiries, to be capable of managing his affairs. To the argument that the suit was essentially a suit for possession, falling within the twelve years' limitation, their Lordships replied that

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[24] *Narsagauda* v. *Chawagauda,* (1918) 47 I.C. 581=42 Bom. 638=20 Bom.L.R. 802 (F.B.).

[25] (1879) 5 Cal. 363.

[26] (1885) 12 Cal. 69.

[27] (1886) 13 Cal. 308 (P.C.).

[28] 8 Cal. 178=8 I.A. 197=10 C.L.R. 176 (P.C.).

[29] ***Harri Bhusan Mukerji*** v. *Upendralal,* (1895) 24 Cal. 1 (P.C.).

[30] 12 Cal. 69.

> "it was not a suit for possession of immoveable property in the sense to which this limitation of 12 years is applicable. The immoveable property could not have been recovered until the deed of sale had been set aside and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced. Therefore, there has been on the part of lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Art. 91 of the Limitation Act".

In *Mahabir Pershad Singh* v. *Harihur Pershad,*[32] Art. 91 was applied to the case where the *ikrarnama* that was relied upon for the defendants was intended to be operative, and so it required to be set aside. In *Shamlal* v. *Amarendro Nath,*[33] the language of Art. 91, in third column was referred to show that Art. 91 is meant to apply to instruments, which but for certain facts which may not be within the knowledge of the plaintiff at the time when the document is executed, the document would be valid. However, in *Beni Pershad Koeri* v. *Dudhunath,*[34] where the *pattah* in question was *void* as against the plaintiff, and not voidable only, their Lordships held that the suit for possession was not barred by Art. 91 of the Limitation Act, on the ground that a decree declaratory of the title to have the *pattah* cancelled might have been sued for in the lessee's lifetime under S. 39 of the Specific Relief Act. **A document which is a nullity, does not require to be set aside or cancelled,** in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands.[35] Where the deed was not validly executed, or where it was *ab initio* void, or where it was not intended to be operative, Art. 91 has no application. In determining the question whether Art. 91 of the Limitation Act applies or not, a distinction is to be borne in mind as existing between a void and voidable instrument, as Art. 91 can have no application where the instrument is void *ab initio* and does not require to be set aside.[36]

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[31] 15 Cal. 58 (P.C.).

[32] (1891) 19 Cal. 629.

[33] (1895) 23 Cal. 460 (466).

[34] (1899) 27 Cal. 156 (P.C.).

[35] *Banku Behari* v. *Krishto,* (1902) 30 Cal. 433 (437); Cf. *Chunder Nath Bose* v. *Ram Nidh Pal,* (1902) 6 C.W.N. 863 (Where the defendant was in possession under a *kobala* executed by the plaintiff); also see *Sheo Shankar* v. *Ram Shewak,* (1896) 24 Cal. 77 (Art. 91 has no application to set aside a void transfer); and *Sauni Bibi* v. *Siddik Hossein,* (1918) 23 C.W.N. 93=49 I.C. 76=29 C.L.J. 55.

> "When the instrument is *voidable,* it is presumably valid, and binding on the plaintiff, until it is set aside and any further relief which may be sought depends on the removal of the instrument from the plaintiff's path. In such a case Art. 91 applies.[37] But, if the facts alleged by the plaintiff raise a case that the instrument, whether executed by the plaintiff himself or by some third party through whom he claims is null and void *ab initio,* then, Art. 91, ceases to be applicable and the circumstances may entitle the plaintiff to the benefit of the longer period of limitation allowed by some other article such as Art. 120, or Art. 144."[39]

Similarly, it was held in *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh,*[39] that when a deed of relinquishment operating to extinguishment of the plaintiff's right to a property is not void *ab initio,* if it is not set aside by a suit brought within the period of three years prescribed by law, the plaintiff's right to the property, if any, is barred. The same view has been taken as to the scope and application of Art. 91 in *Harihar Ojha* v. *Dasarathi Misra,*[40] where a reversioner sued to recover certain property which had been alienated by a Hindu widow without necessity, or consent of her reversioners. The suit was held governed by Art. 141, and not by Art. 91 of the Limitation Act. Woodroffe, J., has explained that

> "there can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under which he claims, he must first obtain the cancellation of the instrument, and that the three years' rule enacted by Art. 91 applies to any suit brought by such person".[41] . . .
> "Where, however, the instrument is not that of the plaintiff or of any person through whom he claims, as in the case of a reversioner seeking recovery of property alienated without necessity or consent by a Hindu widow, the case appears to stand upon a different footing."[42]

The article can possibly have no application where the deed which the plaintiff challenges is one which was not executed by him, or by one under whom he claims, and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But, there is no doubt that it does apply to a case in which it is not possible for the plaintiff to get any relief until the instrument is set aside.[43]

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[36] *Chooramani* v. *Baidya Nath,* (1904) 32 Cal. 473 (477); and *Sarat Chander Gupta* v. *Kanai Lal,* 1921 Cal. 786=26 C.W.N. 479.

[37] *Sarat Chander Gupta* v. *Kanai Lal,* 1921 Cal. 786=26 C.W.N. 479.

[38] *Ibid.,* 1921 Cal. 786=26 C.W.N. 479 (Per Richardson, J.); also see *Nibaran Chandra* v. *Nirupama Debi,* 1921 Cal. 131=26 C.W.N. 517 (527) (Art. 91 has no application to a suit for possession and partition upon upon declaration that the instrument under which the defendant claims is *void*).

[39] (1903) 31 I.C. 111 (129); Followed *Raghubar Dyal* v. *Bhikya,* 12 Cal. 69 and Dist. *Shamlal* v. *Amarendro,* 23 Cal. 460.

[40] (1905) 33 Cal. 257=9 C.W.N. 636=1 C.L.J. 408; Relied upon *Narmada Debi* v. *Shoshi Bhusan,* (1904) 8 C.W.N. 802; Followed in *Brindabun* v. *Dhruba,* 1929 Cal. 606.

[41] *Harihar Ojha* v. *Dasarathi Misra,* 33 Cal. 257 (265, 266); Relied on *Unni Kunhi Amma,* (1890) 14 Mad. 26 (28) and *Sundaram* v. *Sithammal,* 16 Mad. 311 (315); also see *Janki Kunwar* v. *Ajit Singh,* (1887) 15 Cal. 58 (P.C.).

[42] *Ibid.,* 33 Cal. 257 (266).

**Madras.**

**1540.** In *Unni* v. *Kunchi*,[44] where a suit was filed on behalf of a Malabar tarwad, by some of its members to recover property improperly alienated by the *karnavan* under a *kanom* instrument, it was held that since a prayer for the cancellation of the instrument was not an essential part of the plaintiff's relief, the suit was not barred by the three years' rule in Limitation Act, Art. 91. This was explained in *Sundaram* v. *Sithammal*,[45] where in a suit to recover land, it appeared that the defendant had been in possession, since some three years, under a conveyance of the land from one of the plaintiffs. The plaint contained no prayer for the cancellation of the conveyance, which it was found had been obtained by fraud, and was supported by no consideration. It was held that the suit was not barred under Art. 91 as the substantial relief claimed was the recovery of the land. But

> "there can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument and that the three years' rule enacted by Art. 91 applies to any suit brought by such person".

A suit to cancel or set aside an instrument must, under Art. 91 of the Limitation Act, be brought within three years from the date when the facts entitling the plaintiffs to have the instrument cancelled or set aside become known to him. The facts which would entitle a person to bring such a suit are stated in S. 39 of the Specific Relief Act.[46] Where the plaintiff, in 1895, executed a sham deed of sale in favour of the defendants, neither party intending that it should be acted upon, but, in 1899, the defendants began to set up a claim to ownership on the strength of the deed, a suit brought within three years of this date was held not barred by limitation, applying Art. 91 of the Limitation Ac.[47] This article applies to a suit to set aside an instrument on the ground of undue influence. If a sale is to be rescinded, it must be by a judicial rescission or a written instrument.[48] A suit to set aside a deed of gift for undue influence is goverened by Art. 91 of the Limitation Act[49]; the limitation having no relevancy to the cessation of the undue influence, starts to run as soon as the facts entitling the plaintiff, or his predecesor, to have the instrument cancelled become known.[50] A sale of property for consideration, intended to be operative between the parties, is not void *ab initio*, even though the transaction is brought about by fraud. The title passes to the purchaser at such sale, unless the document is cancelled or set aside within the period prescribed by Art. 91, Limitation Act.[1]

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[43] *Radhika Mohan Gope* v. *Hari Bashi*, (1933) 146 I.C. 1010=1933 Cal. 812; Relied on *Janki Kuar* v. *Ajit Singh*, 15 Cal. 58=14 I.A. 148 (P.C.) and *Rampal Singh* v. *Balbhadar Singh*, (1902) 25 All. 1=29 I.A. 203 (P.C.).

[44] (1890) 14 Mad. 26 (28).

[45] (1892) 16 Mad. 311=3 M.L.J. 144; Relied on *Abdul Rahim* v. *Kripa Ram*, 16 Bom. 1186 (1189) and *Jinatboo* v. *Shanagar*, 11 Bom. 78.

[46] *Singarappa* v. *Talari Sanjivappa*, (1904) 28 Mad. 349.

[47] *Ibid*.

[48] *Rajeswara* v. *Arunachellam*, (1913) 19 I.C. 596=38 Mad. 321=24 M.L.J. 592=13 M.L.T. 469=1913 M.W.N. 453.

**Lahore.**

**1541.** It was held in *Ghulam Rasul* v. *Ajab Gul*[2] (Plowden and Roe, JJ.) that

> "when a person sues for possession of immoveable property, and is met by a defendant in possession founded upon a title, which, as between him and the defendant, is null and void, the plaintiff may be at liberty to ignore the transaction and to get the benefit of twelve years' limitation; but if he is not at liberty to treat the title, or the transaction in which it originated, as a nullity, then one of the shorter periods of limitation is applicable, such as under Arts. 44, 91, 92, etc., according to the circumstances of the particular case".

This was followed by Rivaz and Chatterji, JJ., in *Hafiz Karim Baksh* v. *Mt. Begam Jan,*[3] where the principle was laid down

> "that in all suits in which there is a document executed either by the plaintiff himself or by those under whom he claims, which may be pleaded in complete bar of the claim, the plaintiff must fail unless he is in time for claiming cancellation of such deed".

However,

> "a document that is a nullity can acquire no validity by mere lapse of time":

and, the same principle was applied in *Amir* v. *Mt. Attar-ul-nissa,*[4] where it was held that the plaintiff's claim for possession of her share of her deceased father's property was untenable as she was not in time to sue for the cancellation of the deed of gift in favour of defendant, applying Art. 91, Limitation Act, to the case. A **Full Bench** of the **Punjab Chief Court,** held in *Dheru* v. *Sidhu,*[5] in a suit by reversioner for possession of property alienated by a male sonless proprietor, that the period for a declaratory suit was prescribed by Art. 120 of the Limitation Act, but that such a suit was not necessary, and in the case of an improper alienation of ancestral property by a sonless proprietor, a suit for possession, by the heirs, was maintainable at any time within twelve years after the death of the alienor. It was observed that Art. 91, Limitation Act, contemplates a case in which consequential relief is prayed for and not a mere declaration, and applies only to suits as between parties to the disputed instruments. Reliance was placed on *Ghulam Rasul* v. *Ajab Gul*,[5-a] for the proposition that where transaction, act or deed is a nullity, or presumably invalid, there is no necessity for a suit to set it aside. In *Murad Baksh* v. *Hussain Baksh*,[6] Anderson and Rattigan, JJ., laid down the rule

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[49] *Raja Rajeswara* v. *Kuppusami,* 68 I.C. 352 (357)=41 M.L.J. 474 =1921 Mad. 394.

[50] *Ibid.*

[1] *Govindasamy Pillai* v. *Ramaswamy Pillai,* (1908) 32 Mad. 72=5 M.L.T. 99=1 I.C. 719.

[2] 57 P.R. 1891; Relied on 12 Cal. 169; 13 Cal. 308 (P.C.) and 15 Cal. 58 (P.C.).

[3] 52 P.R. 1895 (Art. 127 or Art. 144, held applicable to suit by heir of a deceased Muhammadan, for his proportionate share of property, against defendant resisting claim on basis of a gift or a death-bed disposition).

[4] 75 P.R. 1896.

[5] 56 P.R. 1903 (F.B.) (Clark, C.J., Chatterji and Anderson, JJ.).

> "that where the transaction is not null and void, so as to permit the plaintiff to treat it as a nullity, but is done or made by a person with authority, and the transaction has immediate operation given to it, so as to effect immoveable property, proceedings must be taken under Art. 91, to set aside or cancel the instrument under which the transaction was effected".

It was observed

> "that the mere fact that a plaint expressly asks for cancellation is not of so much importance for the purpose of considering whether Art. 91 is applicable as the fact that the suit is one in which it is essential to set aside a document before other relief can be granted."[7]

In *Karm Kulli* v. *Karm Dad*,[8] Art. 91 was not applied to a suit by a reversioner against the defendant in possession under an alleged gift or will from a deceased sonless proprietor, on the ground that Art. 91 applies to suits of which the main object is to cancel or set aside an instrument made between the plaintiff and the defendant, or parties of which the plaintiff is one, but does not apply to a suit for possession of property conveyed by an instrument to which plaintiff was not a party, the cancellation of the instrument being merely incidental to the relief sought. According to the **Punjab Chief Court,** Art. 91 of the Limitation Act is restricted to a suit between the parties to the instrument or their successors in interest and a plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor-in-title.[9] This article is applicable only to voidable documents, not fictitious transactions.[10]

**Rangoon.**

**1542.** It has been held by the Rangoon High Court, in *Makin* v. *Ma Bwin*,[11] that a suit by a co-heir to recover his share from the other heir who is an administrator, is an administration suit, and a sale by the

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[5-a] 57 P.R. 1891, *Amir* v. *Mt. Attar-ul-nissa*, 75 P.R. 1896 and *Rangan* v. *Mahbub Chand*, 55 P.R. 1897.

[6] 74 P.R. 1904.

[7] *Ibid.*

[8] 79 P.R. 1905.

[9] *Sajjadali* v. *Zulfikar Khan*, 83 P.R. 1916 (Shadilal and Leslie Jones, JJ.).

[10] 34 P.W.R. 1916.

[11] 5 Rang. 266=103 I.C. 264=1927 Rang. 186.

administrator being voidable under S. 90 of the (old) Probate and Administration Act at the instance of a person interested in the property, Art. 91 of the Limitation Act applied to the suit, being of a kind mentioned in S. 39 of the Specific Relief Act to set aside a voidable conveyance. Art. 91, Limitation Act, can only be applied when the plaintiff has been himself, or through his predecessor-in-interest, a party to the instrument assailed.[12]

**1543. ARTICLE WHEN NOT APPLIED.**—It has been noticed in the preceding paragraphs that there is a considerable conflict of judicial opinion on the question of the exact scope of Art. 91 of the Limitation Act. The view taken in some early Allahabad and Bombay decisions that the article applies only to cases where the *only* relief asked for is the setting aside or cancellation of an instrument, *e.g.*, suits of the kind falling under S. 39 of the Specific Relief Act, is a very restricted view, which does not find any favour now-a-days.[13] But, Courts have very often confined Art. 91 to cases where the prayer for cancellation of a document is an *essential* part of the plaintiff's case. This article has, therefore, not been applied in cases in which the said prayer is only ancillary, or incidental to some other main relief asked for in the plaint.[14] A view had been taken that Arts. 91, 92 and 93, are restricted to suits brought *expressly* to cancel or set aside or to avoid an instrument as forged, and they do not apply to a suit where a substantial relief, by way of possession, etc., is prayed, and where the cancellation or setting aside is subservient or merely ancillary and not necessary to the granting of the main relief.

**Cancellation non-essential.**

**Ancillary or incidental relief.**

*Illustrations.*

(1) In *Hazarilal* v. *Jadaun,*[15] a suit for possession of immoveable property, by cancellation of a deed of transfer or gift of such property, was held governed by Art. 144, and not by Art. 91 of the Limitation Act.

(2) Similarly, a suit for possession, and for setting aside a mortgage of such property made on plaintiff's behalf during his minority, was held governed by Art. 142, and not by Art. 91.[16]

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[12] *Misan Ma Khaing* v. *Shwe Ba,* (1923) 74 I.C. 164=1923 L.B. 82.

[13] *Uma Shanker* v. *Kalka Prasad,* (1883) 6 All. 75 (76); *Din Dayal* v. *Harnarain,* (1893) 16 All. 73; *Hazarilal* v. *Jadaun,* (1882) 5 All. 76; also see Beaman, J., in *Narasa Gowda* v. *Chawa Gowda,* 42 Bom. 638 (642) (F.B.); and *Jinnat Boo* v. *Shanagar,* 11 Bom. 78; cf. *Murad Baksh* v. *Husain Baksh,* 74 P.R. 1904.

[14] *Abdul Rahim* v. *Kirpa Ram,* 16 Bom. 186; *Ikram Singh* v. *Intizam Ali,* (1884) 6 All. 260.

[15] (1882) 5 All. 76; Followed in *Ikram Singh* v. *Intizam Ali,* (1884) 6 All. 260; and *Uma Shanker* v. *Kalka,* (1884) 6 All. 75.

[16] *Ramausar* v. *Raghubar Jati,* (1884) 5 All. 490=3 A. W. N. (1883) 64.

(3) In *Din Dayal* v. *Harnarain*,[17] in a suit for maintenance of plaintiff's possession in certain joint-family property by cancelment, so far as his interest was concerned, of a certain deed of sale by which another co-parcener in the same property had purported to convey the whole to a stranger, it was held that the limitation applicable to such a suit was that prescribed by Art. 120, and not that prescribed by Art. 91.

(4) Likewise, in *Muhd. Baqar* v. *Mangolal*,[18] where the main prayer of the plaint was for a decree declaring and establishing the plaintiff's title, the prayer for cancellation of the lease was treated as merely subsidiary to the main relief asked, and Art. 120, and not Art. 91 or Art. 95 was applied to the suit.

(5) In *Unni* v. *Unahi Amma*,[19] the Madras High Court had confined Art. 91 to apply to suits to recover property against an instrument executed by himself or one under whom he claimed: and the article was held inapplicable to cases of alienation made by a person who was not the full owner of the property, but had only conditional authority to dispose of it. In such cases, Art. 91 was not applied, on the ground that it was not only not necessary, but it was not possible to have the instrument of alienation cancelled and delivered up. The same principle was laid down in *Jhawman Kunwar* v. *Tilohi*,[20] and *Ramdei Kunwar* v. *Abu Jafer*.[21]

(6) In suits for land, where there was no express prayer for cancellation of an instrument affecting the land executed by the plaintiff, Art. 91 did not bar the suit falling otherwise under Art. 144 of the Limitation Act.[22]

**Doctrine of subservience.**

**1544.** A view was taken by the **Allahabad High Court** in *Mt. Bageshra* v. *Sheonath*,[23] that Art. 144 applies to a claim for possession, although the plaintiff had expressly prayed for the cancellation of a document executed by the grantor in favour of the defendant subsequent to his own. Art. 91 was not held applicable where the *defendant was not in possession under the instrument*, and had only used it to defend his position. The **Bombay High Court,** held in *Abdul Rahim* v. *Kirpa Ram*[24] and *Jinat Boo* v. *Shanagar*,[25] that Art. 91 is not applicable to suits in which the substantial relief claimed is recovery of land; and a reference in such a suit to an instrument obtained by fraud, etc., was necessary only by way of confession and avoidance, and not as a part of the relief claimed. Where the necessity to set aside a document arose, because the defendant in possession was using it as a shield, in defending his position, and in resisting the plaintiff's suit, the prayer for setting aside or cancellation of a document was for a subservient purpose of obtaining the main relief. And, the **Bombay High Court** would not apply Art. 91 to such cases. This doctrine of subservience, as laid down in the Bombay case of *Bhagwant* v. *Kondi,*[26] was expressly overruled by their Lordships of the Privy Council, in *Malkarjun* v. *Narhari.*[27] The view is now held that any suit in which the decree prayed for, involves the decision of the question of the validity of an instrument of transfer set up by the defendant in defence is a suit to set aside such instrument within the meaning of Art. 91.[28] The present position is that to apply Art. 91, Limitation Act, the instrument must be a voidable instrument, and not void *ab initio,* or a nullity which need not be set aside or cancelled; and that the instrument must have been executed by the plaintiff or his predecessor in title, which stands in the way of, or obstructs, the plaintiff in getting the relief prayed for in a suit.[29]

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[17] (1893) 16 All. 73=14 A.W.N. (1894) 1.

[18] (1899) 22 All. 90 (93).

[19] (1890) 14 Mad. 26.

[20] (1903) 25 All. 435.

[21] (1905) 27 All. 494.

[22] (1892) 16 Mad. 311=3 M.L.J. 144.

[23] (1916) 32 I.C. 930=14 A.L.J. 464.

[24] 16 Bom. 186 (189).

[25] 11 Bom. 78.

**Documents null and void.**

1545. As noticed in last paragraph, since the overruling of the doctrine of subservience by their Lordships of the Privy Council, the trend of decisions has been to draw a marked distinction between documents which are null and void, and which need not be set aside, and those in which the instruments or transactions are voidable merely, which if allowed to stand unchallenged once they become known, might become important evidence against the persons whose rights they purported to affect. Field, J., has observed in *Raghuber* v. *Bhikya,*[30] that Art. 91 applies even to suits for possession, when the immoveable property cannot be recovered until the instrument of transfer is set aside: and, this view was approved by their Lordships of the Privy Council in *Janki* v. *Ajit.*[31] Similarly, Art. 91 has been applied to suits for possession, in respect of transactions *voidable* in character, which it was necessary for the plaintiff to cancel or set aside before successfully obtaining the relief as to immoveable property prayed for.[32] But, the point is now fully established by authorities that Art. 91 has no application as regards void documents. The **Allahabad** High Court has held in *Mohamed Najir* v. *Mt. Zulaikha,*[33] that "where a deed is null and void, there is no necessity for the party to come to Court promptly, and have the deed actually cancelled or set aside. Their Lordships of the **Privy Council** laid it down in the case of *Pethepermal Chetty* v. *Muniandy,*[34] that an inoperative instrument "does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims". Similarly, the decision in *Malkarjun* v. *Narhari,*[35] makes it clear that a transaction which is void and inoperative is a **nullity, and does** not require to be set aside within the shorter period of 3 years under Art. 91 of the Limitation Act. The **Calcutta High Court** has held in several cases that a document which is a nullity does not require to be set aside or cancelled under Art. 91, Limitation Act.[36] The **Patna High Court,** has likewise held that Art. 91 of the Limitation Act has no application in regard to a document which is altogether invalid and void.[37] A person who is entitled to possession of property is not bound to set aside a document which may have been executed by some body else in order to defeat his title.[38] **The Madras High Court** has held in *Narayanan* v. *Lakshmanan,*[39] that sales which are void *ab initio,* cannot become valid if not set aside within three years by suit. **The Punjab Chief Court,** has followed the principle laid down in Privy Council rulings that a document that is a nullity need not be set aside under Art. 91, Limitation Act, as they cannot acquire validity by lapse of time.[40] **The Rangoon High Court** takes the view that Art. 91 of Sch. I of the Limitation Act is not applicable to *benami* or sham transactions as they are inoperative from the beginning. A transfer without consideration is void and not merely voidable.[41] **The Oudh Chief Court** holds that Art. 91 is not applicable to a suit for possession on the ground that a deed of mortgage in respect of the suit properties was a fictitious or *sham* transacton. The instrument being inoperative, it is not necessary for the plaintiff to have it set aside as a preliminary to his obtaining the relief for possession, and the relief for cancellation of the deed is merely anciliary.[42]

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[26] (1889) 14 Bom. 279.

[27] (1900) 25 Bom. 337 (350) (P.C.).

[28] *Mohesh Narain* v. *Taruck Nath,* (1892) 20 Cal. 487=20 I.A. 25 (P.C.); also see *Qasin Beg* v. *Muhd. Ziabeg,* (1915) 29 I.C. 968 (All.); and *Mirkwood* v. *Maung Sen,* (1925) 52 I.A. 265=89 I.C. 773=30 C.W.N. 529 (P.C.).

[29] *Rajeswara* v. *Arunachellam,* (1913) 19 I.C. 596=38 Mad. 321=24 M.L.J. 592; *Sanni Bibi* v. *Siddik Hossein,* (1919) 49 I.C. 76=23 C.W.N. 93 (Art. 91 not applicable, if document void *ab initio*); *Narsagauda* v. *Chawagouda,* (1918) 47 I.C. 581=42 Bom. 638=20 Bom.L.R. 802 (F.B.); *Misan Ma Khaing* v. *Shive Ba,* (1923) 74 I.C. 164=1923 L.B. 82; *Mt. Bibi Kaniz Zainab* v. *Mobarak Hossain,* (1923) 72 I.C. 748=1924 Pat. 284 (Art. 91 not applied to documents which are not voidable, but void *ab initio*); also see *Mohammad Nazer* v. *Mt. Zulaikha,* 1928 All. 510; and *Makin* v. *Ma Bwin,* 5 Rang. 266=103 I.C. 264=1927 Rang. 186.

[30] 12 Cal. 69.

[31] 15 Cal. 58 (P.C.).

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[32] *Anatan* v. *Sankaran,* 14 Mad. 101; *Mahabir* v. *Harihur,* 19 Cal. 629 (634); *Sitaram* v. *Nilu,* 1 C.P.L.R. 75; *Unni* v. *Kunchi,* 14 Mad. 26.

[33] 1928 All. 267=109 I.C. 54=50 All. 510.

[34] 10 Bom.L.R. 590 (599)=35 I.A. 98=12 C.W.N. 562=35 Cal. 551 (P.C.).

[35] (1900) 25 Bom. 337=27 I.A. 216 (P.C.).

[36] *Rameshwar* v. *Lachhmi,* 31 Cal. 111 (129)=70 I.C. 525; *Sarat* v. *Kanai,* 26 C.W.N. 479; *Shankar Gir* v. *Ram Shewak,* 24 Cal. 77; *Banku* v. *Krishto,* 30 Cal. 433 (437); *Chooramoni* v. *Baidyanath,* 32 Cal. 473 (477); *Nibaran* v. *Narappa,* 26 C.W.N. 517 (527); *Sami Bibi* v. *Siddique,* 23 C.W.N.93.

[37] *Abdul Rahman* v. *Wali Muhammad,* (1922) 65 I.C. 224 (Pat.).

[38] *Jay Narain Pandey* v. *Kishen Dutt,* (1924) 78 I.C. 705=3 Pat. 575=1924 Pat. 551=5 P.L.T. 581.

[39] 39 Mad. 456=29 I.C. 1 (Mad.).

[40] *Ghulam Rasul* v. *Ajabgul,* 57 P.R. 1891; *Hafiz Karim Bux* v. *Mt. Begum Jan,* 52 P.R. 1895; *Dhern* v. *Sidhu,* 56 P.R. 1903 (F.B.); and *Murad* v. *Hussain,* 74 P.R. 1904. *See* **S. 1541,** *ante.*

*Illustrations.*

**Sham transactions.**

(1) In *Vithal* v. *Hari,*[43] where a plaintiff sought for cancellation of a mortgage-bond, and for possession of the mortgaged property, alleging that the transfer was a sham transaction, Art. 91, was not applied. A suit to recover possession of property alienated by a Hindu widow is not governed by this article, when the alienation is found to be *sham.*[44] Where the claim was not to set aside the sale-deed, but for a declaration that from its very inception, it was a sham transaction, Art. 91 did not apply.[45] Similarly, a suit to recover possession of immoveable property on the allegation that a deed of transfer executed in favour of the defendant was inoperative, and a mere paper transaction is governed by Art. 144, and not by Art. 91, Limitation Act.[46] This article has no application to a case where the document in question is merely fictitious and was not intended to be acted upon.[47]

***Non est factum.***

(2) Where the plaintiff raises the plea known to English lawyers as *non est factum,* if he should succeed in establishing that plea, then the instrument in question would be altogether void. It would not require setting aside, and the prayer to set it aside would be merely superfluous, so that Art. 91, would be inapplicable.[48]

**Declaration that instrument is null and void.**

(3) Article 91, Limitation Act, applies to a suit to cancel or set aside an instrument not otherwise provided for. It has no application to a suit for possession and a declaration that an instrument under which the defendant claims is void.[49] A suit by a Hindu coparcener for a declaration that an alienation of family property by

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[41] *Ma Mo* v. *Ma Set,* (1925) 93 I.C. 197=1926 Rang. 71.

[42] *Mahomed Yasin Ali* v. *Sarju Tewari,* 140 I.C. 709=9 O.W.N. 958.

[43] (1900) 25 Bom. 78.

[44] *Manoharam* v. *Pannabhai,* 40 Bom. 51.

[45] *Jagardeo* v. *Phuljare,* 30 All. 375; and *Md. Nazir* v. *Zulaikha,* 50 All. 510=1928 All. 267=109 I.C. 54; also see *Authikesavaloo* v. *Shah Abdulla,* (1915) 29 I.C. 62=2 L.W. 479; *Venkateswara* v. *Somasundaram,* (1917) 44 I.C. 551=7 L.W. 280; and *Narasimham* v. *Narayana Rao,* (1925) 92 I.C. 405=1926 Mad. 66 (Suit for declaration: Art. 120).

[46] *Sangawa* v. *Huchangowda,* (1924) 82 I.C. 533=25 Bom.L.R. 1207=48 Bom. 166=1924 Bom. 174.

[47] *Ram Brich Singh* v. *Mt. Sonjhari Koer,* (1920) 58 I.C. 380 (Pat.).

[48] *Saratchandra Gupta* v. *Kanailal,* (1921) 70 I.C. 525=1921 Cal. 786=26 C.W.N. 479.

[49] *Mt. Bibi Kaniz Zainab* v. *Syed Mobarak Hussain,* (1923) 72 I.C. 748=1924 Pat. 284.

another co-parcener is void *ab initio* is governed not by Art. 91, but by Art. 120, Limitation Act.[50] Art. 91 has never been applied to a transfer by persons with conditional authority, like the alienations by managers of an endowment, the manager of an infant heir, a Hindu widow, or any of the persons having a qualified or limited estate, open to contest by other persons interested in the property.[1] If the transfer is by a person who has no authority in law, or custom to execute it, the plaintiff need not sue to set it aside, but may treat it as null and void.[2] In the cases of a *Hindu widow,* the *karta* or manager of a joint-family, and the *karnavan* of a Malabar tarwad, it is not only not necessary, but it is not possible to have the instrument of alienation cancelled, and delivered up, because as between the parties to it, it may be perfectly valid.[3] Art. 91, does not apply to a suit by a reversionary heir for a declaration that a deed of gift executed by a Hindu widow, without the authority of her husband, is void and invalid, and not binding on the plaintiff.[4] A suit by the reversionary heirs to a *stanam* in Malabar, for a declaration that a *kanom* executed by him is null and void, is governed by Art. 120, Limitation Act.[5] Where a member of an Alyasanthana family sought to set aside an alienation made by the *ejman,* Art. 91 did not apply, and the suit was governed by Art. 144, Limitation Act.[6]

(4) Article 91 does not apply to sale by an unauthorised person on behalf of a minor.[7] Where property of a minor was alienated without necessity by his guardian *de facto,* the transfer being void *ab initio,* a suit for recovery of possession would be governed by Art. 142, and not by Art. 91 or 44, Limitation Act.[8]

(5) Where a son sued to set aside his mother's alienation made during minority, on the ground that she had no authority, Art. 91 was held inapplicable, as the plaintiff did not claim under his mother.[9]

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[50] *Dwarka Prasad* v. *Mt. Ram Dei,* (1923) 77 I.C. 329=1924 Oudh 120=10 O.L.J. 360; also see *Muktabai* v. *Karam,* 7 A.L.J. 783=6 I.C. 841.

[1] *Hanuman Pershad* v. *Mt. Munraj Koonwaree,* (1856) 6 M.I.A. 393.

[2] *Sheo Shanker* v. *Ram Shewak,* (1896) 24 Cal. 77 (82); *Mathura Das* v. *Gopalnath,* 1929 Lah. 816=11 L.L.J. 493.

[3] *Muktabal* v. *Haran,* (1910) 6 I.C. 841=7 A.L.J. 783; *Mancharam* v. *Panubai,* (1915) 40 Bom. 51; *Naro Gopal* v. *Paragowda,* (1916) 41 Bom. 347; and *Ganapathi* v. *Sivamalai,* (1912) 36 Mad. 575=23 M.L.J. 306; *Muthirulandi* v. *Sethurama,* 42 Mad. 425.

[4] *Chooramoney* v. *Baidyanath,* (1904) 32 Cal. 473.

[5] *Puraken* v. *Parvathi,* (1892) 16 Mad. 138.

[6] *Kunhanna* v. *Timmaju,* (1914) 24 I.C. 246=27 M.L.J. 60; also see *Kanna Panikar* v. *Nanchan,* (1923) 46 M.L.J. 340 (Alienation by a Karnavathi—Art. 144 applied).

[7] *Mt. Bageshra* v. *Sheo Nath,* (1916) 32 I.C. 930= 14 A.L.J. 644; *Vithu* v. *Devidas,* (1918) 51 I.C. 943=15 N.L.R. 55; *Mahadeo* v. *Somaji,* (1926) 99 I.C. 1050=1927 Nag. 145; *Husain* v. *Raja Ram,* 26 I.C. 813= 10 N.L.R. 133.

[8] *Sajjadali* v. *Zulfikar,* 83 P.R. 1916; Followed 73 P.R. 1890; 28 P.R. 1909 and 15 P.R. 1913; also see *Anandappa* v. *Totappa,* 33 I.C. 441=17 Bom.L.R. 1137 (N.).

[9] *Bachan Singh* v. *Kamta Pershad,* (1910) 32 All. 392; *Abdul Rahman* v. *Sukhdayal,* (1905) 28 All. 30.

(6) When a third party sues for a declaration that an instrument is inoperative against him, or that an alienation by the manager of co-parcenary property is null and void, Art. 120, and not Art. 91, applies to the suit.[10]

**Alienation by guardians.**

(7) This article is not applicable to a suit to set aside an alienation by a guardian *de facto.*[11] Article 44 of the Limitation Act is a special article for setting aside alienations by guardians, appointed by Court, or by legal guardians, etc., and in such cases no question of *cancellation* arises as under Art. 91, Limitation Act.[12]

**Void transfers.**

(8) In the Full Bench case of *Narsagauda* v. *Chawgauda,*[13] the Bombay High Court has held that Art. 91, Limitation Act does not apply to a suit for possession, where the plaintiff alleged and proved that a sale-deed is void, because it was executed by him while a minor. Where a deed of gift is executed by a person governed by Mahomedan Law, and possession of the property comprised in the deed is not delivered to the donees, the gift is void *ab initio,* and in such a case no question of limitation for a suit to impeach the gift can arise.[14]

(9) Where a mortgagee puts up the mortgaged property for sale under a power given to him by the mortgage-deed, he cannot sell it to himself, either alone, or with others, nor to a trustee for himself. *Sale* of this kind being *an entire nullity,* need not be set aside, and Art. 91, has consequently no application to such a case.[15]

**Document executed by person without legal authority.**

(10) A suit to recover possession of a temple from the managers, in whose hands the management was vested under an agreement, is in time if brought within 12 years, though no suit to set aside the agreement was brought under Art. 91, Limitation Act, within 3 years from the date of the agreement.[16] The alienation of temple property by a trustee is null and void, and need not be set aside: consequently, a suit by the succeeding trustee to recover the property is not governed by Art. 91, Limitation Act.[17]

(11) When it is established that the plaintiff was induced by the defendants' misrepresentation to execute a deed of sale believing the same to have been a deed of a different kind, the transaction is void, and not

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[10] *Mi San Ma Khaing* v. *Shwe Ba,* (1922) 74 I.C. 164=1923 Rang. 82; *Bunwari Lall* v. *Daya Sanker,* (1909) 13 C.W.N. 815.

[11] *Mahadeo* v. *Sanaji,* (1929) 99 I.C. 1050=1927 Nag. 145; also see *Husain* v. *Raja Ram,* 26 I.C. 813=10 N.L.R. 133.

[12] *See* Art. 44, Limitation Act, *ante—Arumugam* v. *Panayadian,* (1920) 40 M.L.J. 475; *Fakirappa* v. *Lumanna,* (1919) 44 Bom. 742; *Thyammal* v. *Kupanna,* (1914) 38 Mad. 1125; and *Muthukumara* v. *Anthony,* (1914) 38 Mad. 867=29 M.L.J. 617.

[13] (1918) 47 I.C. 581=42 Bom. 638=20 Bom.L.R. 802 (F.B.).

[14] *Mt Mulani* v. *Maula Bux,* (1924) 78 I.C. 222=1924 All. 370=46 All. 260=22 A.L.J. 149.

[15] *Vallabhdas Mulji* v. *Pranshankar,* (1928) 113 I.C. 313=1929 Bom. 24=30 Bom.L.R. 1519.

[16] *Narayanan* v. *Lakshmanan,* (1915) 29 I.C. 1 (Mad.)=39 Mad. 456=28 M.L.J. 571.

[17] *Sheo Shankar* v. *Ram Sewak,* 24 Cal. 77.

voidable only, and Art. 91 of the Limitation Act has no application to a suit by the plaintiff to recover the property.[18]

(12) A lease by an agent of the principal's property treating it as his own need not be set aside by the latter.[19] Where a Zemindar granted a village to a person for life for his maintenance, but the grantee gave a permanent lease of the village, *held*, that after the death of the grantee the lease became spent and void, and not merely voidable, and a suit by the Zemindar to recover possession from the lessee was not governed by Art. 91.[20]

(13) An alienation of an unrecognised portion of *Bhagdari Tenure*, which is void under S. 3 of the Bombay Bhagdari Act (V of 1862) need not be set aside under Art. 91 of the Limitation Act: the plaintiff may be entitled to a declaration as to its invalidity under Art. 120, Limitation Act.[21]

**Benami transaction.**

(14) In a suit by plaintiff against the defendant to have it declared that the deed in question was merely a *benami transaction*, and to recover possession of the property, Art. 144, Limitation Act and not Art. 91, applied.[22] Art. 91 is not applicable to a benami conveyance, or a deed of gift nominally executed, and not intended to be operative from the very beginning.[23]

**Transfer without consideration.**

(15) When the plaintiff, a person of weak mind, was got to execute a sale or mortgage without consideration by fraud of the defendant, Art. 144 governed the suit for possession, there being no necessity to set aside the sale under Art. 91, Limitation Act.[24]

(16) In a suit for possession by minor of property alleged to have been alienated by the appointed manager and by the mother and grand-mother of the minors, during his minority, it was held that if the deed was executed by the ladies only, then Art. 144, and not Art. 91, Limitation Act would apply; and even if the minors did actually execute it, nevertheless Art. 91 would not apply.[25]

**Oral transfers, acts, wills, etc.**

**1546.** This article is inapplicable when there is no *instrument* to be cancelled or set aside. For example a failure to set aside an *oral* transaction could not preclude the plaintiff from seeking his main possessory relief on basis of his

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18. *Bindaban Misra* v. *Dhrubacharan*, (1930) 121 I.C. 404=1929 Cal. 606=49 C.L.J. 540; Relied on *Sanni Bibi* v. *Siddik Hossein*, 49 I.C. 76=23 C.W.N. 93=29 C.L.J. 55.

19. *Lakshmi Narayana* v. *Madappayya*, 1931 M.W.N. 856.

20. *Beni Pershad* v. *Dudhnath*, 27 Cal. 156 (165) (P.C.).

21. *Shankarbhai* v. *Bai Shiv*, 54 Bom.L.R. 1013=127 I.C. 897=1930 Bom. 545 (553).

22. *Pethepermal* v. *Muniandy*, 35 I.C. 551=35 I.A. 98=10 Bom. L.R. 590 (599) (P.C.).

23. *Shamlal* v. *Amarendro*, (1895) 23 Cal. 460; and *Ma Mo* v. *Ma Set*, (1925) 93 I.C. 197=1926 Rang. 71; *Nagathal* v. *Ponnusami*, (1889) 13 Mad. 44.

24. *Sundaram* v. *Sithammal*, 16 Mad. 311; also see *Abdul Rahim* v. *Kirpa Ram*, 16 Bom. 186; *Boo Jinnatboo* v. *Shah Nagar*, 11 Bom. 78.

25. *Nabab Mir Sayad Alam Khan* v. *Yasin Khan*, (1892) 17 Bom. 755.

26. *Ma Nyi Ma* v. *Aung Myat*, (1919) 50 I.C. 324 (F.B.) (An oral sale is not an instrument to be set aside).

substantive rights under the ordinary period of limitation.[27] A suit to contest a mere *allegation* of the defendants that they had a certain tenure is not maintainable, under Art. 91.[28] A will is not an *instrument* which has immediate operation given to it within the meaning of the Calcutta ruling in *Raghubar Dayal* v. *Bhikayalal.*[29] A will, is not liable to be cancelled or set aside by a suit against the testator in his lifetime,[30] and, there is no occasion therefore to apply Art. 91, Limitation Act to the case of a will.[31] Article 120 applies to a suit for the cancellation of a will, if at all.[32] Where a reversioner brings a suit for declaration that a deed of transfer executed by the widow is void as against his rights, and a will alleged to have been executed by the deceased husband of the widow conferring an absolute estate upon her is set up in defence, the reversioner is not barred from disputing it, merely because he failed to sue for its cancellation within the period of limitation.[33] There is no obligation on a party, who challenges as a forgery a document purporting to confer rights, to set it aside by a suit. He is entitled to treat it as waste paper and it cannot be regarded as binding on any one even before it is set aside. Therefore, it has been held that there being no obligation on plaintiff to set aside a will, the relief claimed in respect of a will was unnecessary and irrelevant.[34]

**Parties, and their representatives. Punjab view.**

**1547.** Article 91, Limitation Act, contemplates a case in which consequential relief is prayed for, and not a mere declaration, and **applies only to suits as between parties to the disputed instruments.**[35] It was held by Reid, J., in *Karm Kulli* v. *Karmdad,*[36] that Art. 91 applies to suits of which the main object is to cancel or set aside an **instrument made between the plaintiff and defendant, or parties of whom the plaintiff is one,** but does not apply to a suit for possession of property conveyed by an instrument to which plaintiff was not a party, the cancellation of the instrument being merely incidental to the relief sought. Article 91 refers to instruments which are *prima facie* valid and cannot have been intended to compel persons to sue for cancellation of instruments which, so far as they are concerned, are presumptively invalid.[37] The necessity of cancellation of instruments arises in all suits in which there is a document executed either by the plaintiff himself or by those under whom he claims, which may be pleaded in complete bar of the claim, and the plaintiff must fail unless he is in time for claiming cancellation of such deed.[38]

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[27] *Raja Rajeswara* v. *Arunachellam,* (1913) 38 Mad. 321=24 M.L.J. 592.

[28] *Rajah Nilmoney* v. *Kally Churn,* (1874) 2 I.A. 83=23 W.R. 150 (P.C.).

[29] (1885) 12 Cal. 69.

[30] *Rambhajan* v. *Gurcharan,* (1904) 27 All. 14; also see *Umrao* v. *Badri,* (1915) 37 All. 422.

[31] *Sajid Ali* v. *Ibad Ali,* (1895) 22 I.A. 171=23 Cal. 1 (P.C.).

[32] *Firoz* v. *Sultan,* 1926 Lah. 634=96 I.C. 835.

[33] *Chhajumal* v. *Kandanlal,* (1923) 70 I.C. 838=1923 Lah. 53.

[34] *Gokula Venkama* v. *Gokula Narasimham,* (1917) 37 I.C. 642=4 L.W. 441 (Mad.).

[35] *Dheru* v. *Sidhu,* 56 P.R. 1903 (F.B.)—Per Chatterji, J.

[36] 79 P.R. 1905—Per Reid, J.

> "If *A* is owner of a piece of land, and *B* writes a deed in respect of it in favour of *C*, it is difficult to see how *A* can be precluded by his failure to get the deed cancelled or set aside within limitation from getting possession on his title. Surely he can ignore the deed."[39]

The cases in Arts. 41, 91, etc., are therefore, of deeds proceeding from the plaintiff himself or his agent, or his guardian which stand on a wholly different footing. If they are not set aside within the time fixed, they have perforce to be taken as valid, because plaintiff has lost his remedy against the deed.[40] Article 91 of the Limitation Act is thus restricted to a suit between the parties to the instrument or their successors in interest, and a **plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor in title.**[41]

**Allahabad.**

**1548.** The **Allahabad High Court,** has taken the view that Art. 91 of the Limitation Act applies to suits of the nature of those referred in S. 39 of the Specific Relief Act: and a suit to set aside a mortgage of plaintiff's property executed by defendant is a suit of a declaratory nature falling not under Art. 91, but under Art. 120 of the Limitation Act.[42] A suit for cancellation of an instrument executed by a person other than the plaintiff, which might interfere with or obstruct the plaintiff in respect of the property in question, would be an ordinary declaratory suit, governed by Art. 120, and not by that prescribed by Art. 91, or Art. 95.[43] Where a plaintiff sued

**Inapplicable to declaratory suits regarding instruments, to which plaintiff is not a party.**

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[37] *Mt. Atarkaur* v. *Sohan Singh,* 84 P.R. 1902—Per Rattigan, J.

[38] *Hafizkarim Baksh* v. *Mt. Begam Jan,* 52 P.R. 1895 (Rivaz and Chatterji, JJ).

[39] *Rangan* v. *Mahbub Chand,* 55 P.R. 1897 (Chatterji and Clark, JJ.).

[40] *Ibid.*

[41] *Sajjad Ali* v. *Muhd. Zulfikhar Ali,* 83 P.R. 1916=33 I.C. 943 (Shadilal and Leslie Jones, JJ.).

[42] *Sobha Pandey* v. *Sahodra Bibi,* (1883) 5 All. 322; also see *Din Dayal* v. *Harnarain,* 16 All. 73 (Sale, by another co-parcener of whole of property to a stranger).

[43] *Muhd. Baqar* v. *Mango Lal,* (1899) 22 All. 90.

for possession of property basing his title under a grant in his favour, a prayer for cancellation of a document executed by his grantor in favour of the defendant subsequent to his own, was held not to be one for cancellation falling within Art. 91 of the Limitation Act.[44] From the discussion in S. 1545, *ante,* it is clear that Art. 91 has no application to a document which is ineffective, inoperative, or null and void, so far as plaintiff himself is concerned; and, it is not necessary to have a document cancelled or set aside to which he is not a party or privy.[45] Thus, in *Gholam* v. *Topeshri Prasad,*[46] it was observed "If a third party having no interest in the property chooses to amuse himself by executing a mortgage-deed of that property it is no concern to the real owners until he does some act which puts their title in danger by allowing a decree to be passed and sale proclamation to be issued. The real owners may then sue for a declaration that the property is not liable to sale in execution of that decree. *They are not obliged to sue for the cancellation of the mortgage-bond."* Art. 91, therefore, applies to suits as between parties to an instrument sought to be set aside or persons claiming under such paries.[47] The rule is laid down, in *Aziz-un-nissa* v. *Siraj Hussain,*[48] that when a person sues to obtain possession of property which has been transferred by the person through whom he claims the suit must be brought within the period allowed by Art. 91, so long as the transfer is voidable and not void *ab initio.* In the former case, the plaintiff cannot evade the limitation prescribed by Art. 91, by merely framing his suit as though it were a suit for possession, and nothing else.

**Bombay.**

**1549.** Jenkins, C.J., oserved in *Suranna Devappa* v. *Secretary of State,*[49] that

> "if *A* attempted to dispose of plaintiff's land to *B,* it would be mere *brutum fulmen. A's* disposition would be so much waste paper and it would be unnecessary to set it aside."

In *Narsagauda* v. *Chawagauda,*[50] Beaman, J., in his referring order doubted whether Art. 91 will apply to any but a man's own deed. A Hindu son is under no obligation to set aside a deed of sale of joint family property executed by his father alone, and Art. 91 does not therefore apply to a suit by him to recover his share.[1]

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[44] *Mt. Bageshra* v. *Sheonath,* (1916) 32 I.C. 930.

[45] *See* **S. 1545—"Documents null and void".**

[46] 26 All. 606.

[47] *Bachansingh* v. *Komala Prasad,* 32 All. 392; *Abdul* v. *Sukhodayal,* 28 All. 30.

[48] 1934 All. 507=152 I.C. 146=1934 A.L.J. 817=3 A.W.R. 302.

[49] 24 Bom. 435.

[50] (1918) 47 I.C. 581=42 Bom. 638=20 Bom.L.R. 802 (F.B.).

[1] *Balwant Rao* v. *Ramkrishna,* (1901) 3 Bom. L. R. 682.

**1550.** Art. 91 applies to suits as between parties to the instrument or parties claiming under them.[2] It has been noticed in S. 1539, *ante,* that according to the authorities

**Calcutta.**

> "there can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under which he claims, he must first obtain the cancellation of the instrument, and that the three years' rule enacted by Art. 91 applies to any suit brought by such person".[3]

However,

> "where the instrument is not that of the plaintiff or of any person through whom he claims as in the case of a reversioner seeking recovery of property alienated without necessity or consent by a Hindu widow, the case appears to stand on a different footing".[4]

A deed of gift void *ab initio* against a reversionary heir, may be declared invalid under Art. 120, Limitation Act, or the suit for possession may be governed by Art. 141, Limitation Act, but Art. 91, does not apply, it being not necessary to have it cancelled or set aside in order to obtain other reliefs.[5] Art. 91 does not preclude a plaintiff from availing himself of the longer period allowed for the recovery of immoveable property, provided the instrument in question may be declared *null and void.* So far as his interests are concerned though it may be operative as between the parties.[6] The rule is laid down in a recent Calcutta case[6-a] that

> "Art. 91 can have no application where the deed which the plaintiff challenges is one which was not executed by him or by one under whom he claims, and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But it does apply to a case in which it is not possible to the plaintiff to get any relief until the instrument is set aside. In other words, if the instrument is binding upon the plaintiff, then even though the plaint may have been made to look as much like a suit for recovery of lands as possible, the plaintiff in order to get any such relief must have the instrument cancelled or at any rate to have a declaration of its invalidity as against him".

**1551.** Art. 91 only applies to suits to set aside or cancel an instrument, to which plaintiff, or his predecessor-in-title, is a party.[7] A suit is not barred under this article, by the three years' rule, if a prayer for

**Madras.**

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[2] *Mahabir Prasad* v. *Hurrihar Pershad,* (1892) 19 Cal. 629 and *Chunder Nath* v. *Ram Nidhi,* (1902) 6 C.W.N. 863.

[3] *Harihar Ojha* v. *Dasarathi Misra,* 33 Cal. 257=9 C.W.N. 636=1 C.L.J. 408; also see *Bejoy* v. *Krishna,* 34 Cal. 329 (P.C.).

[4] *Ibid.*

[5] Also see *Choora Mani* v. *Baidya Nath,* 32 Cal. 473.

[6] *Raghubar* v. *Bhikya,* (1885) 12 Cal. 69 and *Banku Behari* v. *Krishto Gobindo,* (1902) 30 Cal. 433 (438).

[6-a] *Radhika Mohan* v. *Haribashi,* 57 C.L.J. 399=1933 Cal. 812=146 I.C. 1010.

[7] *Raja Rajeswara* v. *Arunachellam,* (1913) 38 Mad. 321=19 I.C. 596=24 M.L.J. 592; also see *Govindasamy* v. *Ramasamy,* (1908) 32 Mad. 72 and *Sethupathi* v. *Kuppusami,* (1922) 68 I.C. 352=41 M.L.J. 474 (A

the cancellation of the instrument in favour of the defendant is not an essential part of the plainiff's relief.[8] **A declaration** that the deed in favour of the defendant is inoperative against plaintiff would still leave the deed to operate as between the parties, and therefore, would not amount to cancelling or setting aside that deed under Art. 91 of the Limitation Act.[9] Art. 120 of the Limitation Act would apply to a suit for declaration by the reversionary heirs that a document executed in favour of the defendant, by another defendant, was not binding on the plaintiff.[10] A plaintiff-legatee is not bound to set aside a sale by an executor, the validity of which depends upon the powers of the executor; and, the document not being executed by plaintiff, nor by any one through whom he claims, Art. 91 has no application.[11] A suit by an *aliyasanthana* family to recover possession of the family properties alienated by its *ejman,* not being a suit "to set aside an instrument" within the meaning of Art. 91 of the Limitation Act, is governed by Art. 144 of the Act.[12]

1552. **Other Courts.** Art. 91 of the Limitation Act does not apply to a suit by one member of a joint Hindu family for a declaration that mortgage of the joint family effected by the other members of the family, without the consent of the plaintiff, is invalid, and does not bind the family property.[13] This article is restricted to a suit between the parties to the instrument, or their successors-in-interest, and a person is not bound to set aside an instrument not executed by himself or his predecessor-in-title.[14] Art. 91 can only be applied when the plaintiff has himself, or through his predecessor-in-interest, a party to the instrument assailed. Where a third party sues for a declaration that an instrument is inoperative as against him, Art. 120 is applicable.[15] Art. 91 has no application to a case where plaintiff is not a party to the instrument, and does not need to have it set aside.[16]

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suit to set aside a deed of gift for undue influence, *held,* governed by Art. 91).

[8] *Unni* v. *Kunchi,* (1890) 14 Mad. 26.

[9] *Panchamuthu* v. *Chinnappan,* (1887) 10 Mad. 213; also see *Anantan* v. *Sankaran,* 14 Mad. 101.

[10] *Purakan* v. *Parvathi,* (1892) 16 Mad. 138; also see *Chingacham Vitil Sankaran Nair* v. *Vitil Gopala Menon,* (1906) 30 Mad. 18 and *Muthirulandi* v. *Sethurama,* (1919) 42 Mad. 425 (428) (F.B.).

[11] *Ganapathi Aiyar* v. *Sivamalai,* (1912) 36 Mad. 575=23 M.L.J. 306=12 M.L.T. 207=1912 M.W.N. 1112=17 I.C. 4.

[12] *Kunhanna Shetty* v. *Timmaji,* (1914) 24 I.C. 246 (Mad.).

[13] *Binda Prasad* v. *Gaya Prasad,* (1912) 13 I.C. 547 (Oudh).

[14] *Kunji Lal* v. *Chandra Singh,* (1921) 64 I.C. 775 (Nag.); Relied on *Tanto* v. *Gajadhar,* 1 N.L.R. 129 and *Sajjad Ali* v. *Muhammad Zulfikar,* 83 P.R. 1916=33 I.C. 943.

[15] *Mi San Ma Khaing* v. *Shwe Ba,* (1923) 74 I.C. 164 (L.B.).

[16] *Ram Rup* v. *Court of Wards,* 9 Luck. 365=147 I.C. 910=11 O.W.N. 193=1934 Oudh 55.

**Voidable transaction, election to treat as a nullity.**

**1553.** Art. 91 of the Limitation Act is not applicable to suits where the transaction though a *voidable* one, the plaintiff is allowed to treat it as a nullity, and is not obliged to seek its cancellation or setting aside through the intervention of a Court.

*Illustrations.*

**Sale by certificated guardian.**

(1) Where immoveable property belonging to a minor is sold by his certificated guardian for consideration, but without any permission from the Court, and the same property is subsequently sold by the certificated guardian, but with the permission of the District Judge, the second vendee in suing for possession on the basis of the sale in his favour, is under no necessity to sue for an express declaration that the previous sale was not binding on him.[17] This principle rests upon the authority of decisions in *Abdul Rahman* v. *Subhadayal,*[18] *Dijendra Mohan Sharma* v. *Manorama Dasi*[19] and *Rajana Kanta Roy* v. *Manmatha Nath Nandi.*[20]

**Sale or lease by Hindu widow.**

(2) Woodroffe, J., has held in *Harihar* v. *Dasarathi,*[21] that sales, mortgages, or leases by a Hindu widow stand in the same category: being all *voidable* in a particular case. This view is supported by the observations of Lord Davey, in *Bijoy Gopal* v. *Krishna Mohishi,*[22] reversing the Calcutta decision in *Bijoy Gopal* v. *Nilratan*[23]. It was held that "a Hindu widow may alienate her husband's property subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of property".

(3) A sale or a mortgage by a Hindu widow which purports to pass or hypothecate the absolute title is valid against every one except the reversioners and unless the reversioners elect to treat it as a nullity, it subsists as against every one else.[24] In the case of a reversioner it is not essential for him to set aside any alienation by the widow, but he can sue to enforce his right as reversioner without setting aside the alienation within the period prescribed by the Limitation Act after the death of the widow.[25]

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[17] *Nagendra Nath Ghose* v. *Mohini Mohan,* 1931 Cal. 131=130 I.C. 273=58 Cal. 128=34 C.W.N. 948.

[18] 28 All. 30.

[19] 1922 Cal. 150=70 I.C. 990=49 Cal. 911.

[20] (1918) 46 I.C. 665.

[21] 33 Cal. 257.

[22] 34 Cal. 329 (P.C.).

[23] 30 Cal. 990.

[24] *Kesho Prasad Singh* v. *Chandrik Prasad,* (1922) 68 I.C. 394=2 Pat. 217=1923 Pat. 122=3 P.L.T. 797.

[25] *Hanamgowda* v. *Irgowda,* 1925 Bom. 9=26 Bom. L. R. 829=48 Bom. 654=84 I.C. 374.

**Alienation by karnavan of a Malabar tarwad.**

(4) The members of a Malabar tarwad need not sue to set aside an invalid alienation by the *karnavan* but can sue to recover possession on the strength of title, and it makes no difference that the *karnavan* purported to act not only as *karnavan* but also as guardian of the minor members of the family. Such a suit is not governed by Art. 44 or Art. 91, but by Art. 144, Limitation Act.[26]

**Inoperative instruments.**

(5) Art. 91 is not applicable to a claim which involves the cancellation of an unregistered document,[27] or an inoperative transfer,[28] or an instrument which has become a spent instrument, *e.g.*, the tenants *pottah* on the death of the tenant for life.[29]

**Defence: Article inapplicable.**

**1554.** There can be no bar of limitation to a plea of fraud set up by way of defence.[30] The provisions of the Limitation Act, prescribing a limit of time for enforcement of rights and remedies apply only to actions brought by the plaintiff, and not to rights set up in defence. A defendant will not be precluded from setting up a right by way of defence even if he could not have done so under the Limitation Act as plaintiff by way of substantive claim.[31] It has been often expressed that a defendant may in equity set up a defence that a certain instrument is, by reason of its invalidity or other defect, ineffectual against him, although if he sued to have it avoided or declared a nullity, his suit would be barred by limitation.[32] The fact that the remedy of a suit to set aside a transfer is barred, does not necessarily bar the defence of invalidity of the transfer.[33] In *Orr* v. *Sundara,*[34] their Lordships held that persons who have had no occasion to sue for possession of property cannot have their right to property extinguished by lapse of three years under Art. 91, Limitation Act.

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26. *Kanna Pannikar* v. *Nanchan,* (1924) 78 I.C. 564=1924 Mad. 607 =46 M.L.J. 340.

27. *Dwarka Das* v. *Sardar Lachman,* (1905) 103 P.L.R. 1905; *Sani Kammu* v. *Audra Narayya,* (1919) 43 Mad. 436=38 M.L.J. 327.

28. *Meda Bibi* v. *Imaman Bibi,* (1884) 6 All. 207 (F.B.) (Gift not followed by possession).

29. *Beni Prasad* v. *Dudhnath,* (1899) 26 I.A. 216 (224)=27 Cal. 156 (P.C.); also see *Narasa Gowda* v. *Chawa Gowda,* (1918) 42 Bom. 638 (657, 658).

30. *Sri Krishan Lal* v. *Mt. Kashmiro,* 1916 P.C. 172=20 C.W.N. 957=34 I.C. 37=31 M.L.J. 362 (P.C.).

31. *Deowhari Pandey* v. *Dayanand,* (1916) 35 I.C. 610 (Cal.).

32. *Athan Kutti* v. *Matavil,* (1917) 37 I.C. 756 (759) (Per Spencer, J.); Relied on *Lakshmi Doss* v. *Roop Lal,* 30 Mad. 169=2 M.L.T. 4= 17 M.L.J. 19 (F.B.); *Ramanasari* v. *Muthusami Naik,* 30 Mad. 248.

33. *Maroti Suryabhai* v. *Rajwant Rao,* 107 I.C. 897=1928 Nag. 262; Relied on 30 Mad. 169, *supra;* also see *Ramaswami* v. *Mallappa,* 59 I.C. 947=43 Mad. 760 (776); *Rangnath* v. *Govind,* 28 Bom. 639=6 Bom. L.R. 592 and *Mina Lal* v. *Kharset Ji,* 30 Bom. 395=8 Bom. L. R. 296.

34. (1893) 17 Mad. 255.

*Illustrations.*

(1) In a suit brought in 1889 to recover land, it appeared that the defendant had been in possession since 1885, having obtained in 1883 a conveyance of the land from one of the plaintiffs. It was found that the conveyance had been obtained by fraud, and was supported by no consideration. The plaint contained no prayer for the cancellation of the conveyance. *Held,* that the suit was not barred by limitation.[35]

(2) In 1872, the plaintiffs induced the first defendant by fraud and misrepresentation to execute in their favour a deed of sale of the property in dispute. The defendants remained in possession and mortgaged the property to third parties. In a suit by plaintiff in 1884, for possession of property, the defendant's right to raise the plea of fraud was held not barred by the law of limitation.[36]

(3) Where the plaintiff sued in 1900 to recover from the defendant the amount due for interest on a mortgage bond of 1893, and the defendant contended that he did not execute the bond with free consent: *held,* that the defendant was entitled to resist the claim made against him by pleading fraud, although he had not brought a suit to set aside the transaction.[37]

**1555. STARTING POINT OF LIMITATION.**—The words, in column 3 of this article, "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him," must be construed to mean, when having **knowledge** of such facts, a **cause of action,** has accrued to him, and he is in a **position to maintain a suit.**[38] Therefore, the decree-holder was held to have no *locus standi* to sue to set aside a fraudulent sale-deed executed by the judgment-debtor, until his suit dismissed in the lower Courts had been decreed by the High Court, and his cause of action arose only when there was a necessity in execution to proceed against the property fraudulently alienated, although more than three years after he became aware of such fraudulent sale.[39] If Art. 91 was not applicable, a declaration might have been obtainable, under Art. 120, Limitation Act.[40]

**Cause of action.**

**1556.** Under Mahomedan law, a gift becomes operative only after delivery of possession; therefore, the cause of action for a suit to set aside a gift arises not on the date of the deed of gift, but when possession is delivered.[41] A suit to cancel or set aside an instrument must, under Art. 91 of the Limitation Act, be brought within three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. The facts which would entitle a person to bring such a suit are stated in S. 39 of the Specific Relief Act.[42] Where the plaintiff, in 1895, executed a sham sale-deed in favour of the defendants, neither party intending that it should be acted upon; and, the defendant began in 1900, to set up a claim to ownership on the strength of the deed, it was held that the suit was within time if brought within three years from the date when the plaintiff apprehended that the defendants set up title under the instrument.[43] In *Vithal* v. *Hari,*[44] where a plaintiff sought for the cancellation of a mortgage-bond, and for possession of the mortgaged property, alleging that the mortgage was a sham transaction, and plaintiff had been dispossessed within three years of the suit, *held,* that the period of the limitation for the suit could not be computed from the date of the mortgage-bond under the circumstances. Where a *wakfnama,* executed in 1880, by the grantor who died in 1896, was contested by his son in 1897, it was held that assuming that Art. 91 applied to the case, the suit was within time, as the plaintiff's title as heir did not accrue until the death of his father, and before that date, the son, as one of his heirs, had no interest in the property settled by the *wakfnama,* nor any right to have it cancelled or set aside.[45] A suit for a declaration that a reference to arbitration and an award made therein are not binding upon the plaintiff and are void and should be set aside falls within the purview of S. 39, Specific Relief Act, and is governed by Art. 91 of the Limitation Act. It was held by their Lordships of the Privy Council, that limitation for such a suit begins to run from the date of the award, and not from the date on which the Court refused to file it.[46] In *Janki Kunwar* v. *Ajit Singh,*[47] where a suit was instituted in 1884, by a husband and wife, to having a deed granting land, which was executed by the husband in 1872, set aside on the ground that it had been obtained from the latter by fraud and undue influence, their Lordships observed that the co-plaintiff had known the facts relied upon from the date of the deed, and the suit, falling within Art. 91, Limitation Act, was not maintainable by either of the plaintiffs. In a suit to set aside an *ikrarnamah* under which defendant was in possession, under an alienation by the widow, the cause of action in favour of the plaintiff-reversioner accrued on the death of the widow.[48] A suit to set aside a deed of partition, on the ground of fraud, was held governed by Art. 91 or 95, Limitation Act, and must be brought within three years after the minor plaintiff has attained majority acording to S. 7 of the Act.[49]

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[35] *Sundaram* v. *Sithammal,* (1892) 16 Mad. 311=3 M.L.J. 144.

[36] *Hargovan Das* v. *Raji Bhai,* (1889) 14 Bom. 222.

[37] *Rangnath Sakharam* v. *Gobind Narasiv,* (1904) 28 Bom. 639.

[38] *Tawangar Ali* v. *Kura Mal,* (1881) 3 All. 394=1 A.W.N. (1881) 2.

[39] *Ibid.*

[40] Cf. *Pachamuthu* v. *Chinnappan,* (1887) 10 Mad. 213; *Sobha Pandey* v. *Subodra,* (1883) 5 All. 322 and *Ikram* v. *Intizam,* (1884) 6 All. 260.

[41] *Meda Bibi* v. *Imaman Bibi,* (1884) 6 All. 207=4 A.W.N. (1884) 34 (F.B.); Followed in *Mt. Mulani* v. *Maula Bux,* 1924 All. 370=46 All. 260.

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[42] *Singarappa* v. *Talari Sanjivappa,* (1904) 28 Mad. 349=15 M.L.J. 228; Relied on 3 All. 394.

[43] *Ibid.*

[44] (1900) 25 Bom. 78; cf. *Qasim* v. *Muhammad,* 37 All. 640 (per contra).

[45] *Fazlur Rahim* v. *Mahomed Obedul Azim,* (1903) 30 Cal. 666=7 C.W.N. 916 (922).

[46] *Kirkwood* v. *Maung Sin,* (1925) 89 I.C. 773=5 Rang. 186=52 I.A. 265 (P.C.).

[47] 15 Cal. 58=14 I.A. 148 (P.C.); also see *Udit Narain Singh* v. *Randhir Singh,* (1922) 69 I.C. 971=45 All. 169 (176) (Estoppel by conduct from denial of adoption, known from date of registration).

**Knowledge of facts—Onus.**

**1557.** The **burden of proof** is on the defendant, pleading a bar by limitation, to show that the plaintiff had clear and definite knowledge of facts for more than the period of limitation prescribed. This burden is not discharged by proof of the fact that some hints and clues had reached the plaintiff which might have led to such knowledge.[50] In *Tanto* v. *Gajadhar,*[1] the Nagpur Court took the view that when a plaintiff sues to cancel or set aside an instrument setting out the facts which entitle him to have the instrument cancelled or set aside, and alleging that those facts became known to him at a certain time, it is incumbent on a defendant who pleads that the suit is barred by time to allege and prove a knowledge prior to the period from which time begins to run, and this view was followed by the same Court, in *Gunabai* v. *Motilal,*[2] where Kinkhede, A.J.C., held that any knowledge obtained by an agent prior to his employment as such agent, does not amount to information of the fact obtained by the agent in the course of the business transacted by him as an agent, so as to operate as a notice to the principal.[3] The **Calcutta High Court** has held to same effect in *Nibaran Chandra Mookerjee* v. *Nirupama Debi,*[4] relying upon the Privy Council decision in *Rahimbhoy* v. *Turner,*[5] that in a suit to set aside an instrument, a Pardanashin lady, the onus lay heavily upon the defendants, who obtained the deed by misrepresentation to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow her to maintain the suit.

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[48] *Mahabir Pershad* v. *Hurrihar,* (1892) 19 Cal. 629.

[49] *Chanvirappa* v. *Danava,* 19 Bom. 593.

[50] *Rahimbhoy Habibbhoy* v. *C. A. Turner,* (1892) 17 Bom. 341=20 I.A. 1 (P.C.).

[1] 2 N.L.R. 98; Followed in *Gunabai* v. *Motilal,* (1925) 89 I.C. 625 =1925 Nag. 398.

[2] *Ibid.*

[3] *Gunabai* v. *Motilal,* (1925) 89 I.C. 625=1925 Nag. 398; also see and cf. *Rampal* v. *Balbhadar,* 25 All. 1=29 I.A. 203 (P.C.); and *Kirkwood* v. *Maung Sin,* (1925) 52 I.A. 265=5 Rang. 186=89 I.C. 773 (P. C.) (Knowledge of agent when imputed to principal).

[4] (1922) 69 I.C. 476=1921 Cal. 131=26 C.W.N. 517=34 C.L.J. 563.

[5] 17 Bom. 341=20 I.A. 1 (P.C.).

The cause of action for a suit to set aside a document executed under undue influence does not arise until the cessation of that influence, that is, the date on which the facts must be considered to have come to plaintiff's knowledge within the meaning of Art. 91 of the Limitation Act.[6] But, it would appear that the cessation of the influence which was the avoiding circumstance, has no relevancy on the question of limitation unless S. 18 of the Limitation Act could be made to apply.[7] Their Lordships of the Privy Council have held in a recent case that the period of three years permitted by Art. 91 begins to run from the discovery by the plaintiff of the true nature of the deed which he had signed, and not from the date when he escaped from the influence by which according to the plaintiff, he was admitted.[8]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 92. | To declare the forgery of an instrument issued or registered. | Three years. | When the issue or registration becomes known to the plaintiff. |

### SYNOPSIS.

1558. Corresponding provisions.
1559. Scope of the article.
1560. Suit for possession.
1561. "Issued", explained.
1562. Starting point of limitation.

### NOTES.

**1558. CORRESPONDING PROVISIONS.**—This article is the same as Art. 92 of the preceding Act XV of 1877.

Art. 93 of Act IX of 1871 had the words "or, attempted to be enforced" in first column: and " the date of the issue, registration, or attempt," in column 3. Thus, the date of knowledge was immaterial under that Act, unless it could be shown that circumstances contemplated by S. 18 existed.

Under Act XIV of 1859, the general provision in S. 1, cl. 16 of that Act, would cover suits of this nature.

**1559. SCOPE OF THE ARTICLE.**—Art. 92 is allied with the next Art. 93, which formed one Art. 93, in Act IX of 1871. Both articles have as their scope, a suit for a declaration that the document is forged. If it is "issued" or "registered", the starting point is the date "when the issue or registration becomes known to the plaintiff"—meaning the plaintiff, or his predecessor-in-title (*vide* definition in S. 2, *ante*). If it is attempted to be enforced against the plaintiff (or his predecessor-in-title), the starting point is the "date of the attempt".

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[6] *Raja Rajeswara* v. *Rajagopala Iyer,* (1918) 43 I.C. 164 (Mad.) ; Relied on *Raja Rajeswara* v. *Arunachellam,* 19 I.C. 596=38 Mad. 321=24 M.L.J. 592.

[7] *Raja Rajeswara* v. *Kuppuswami,* 68 I.C. 352=41 M.L.J. 474; also see and cf. *Tribhwan Dutt* v. *Someshwar Dut,* 130 I.C. 119=1930 Oudh 34; s.c. 1931 Oudh 34.

[8] *Someshwar* v. *Tribhwan,* 1934 P.C. 130=61 I.A. 224=9 Luck. 178 =149 I.C. 480=67 M.L.J. 7 (P.C.).

**1560. SUIT FOR POSSESSION.**—Suits falling under Art. 92 are generally suits for a *declaration*, but this article has been applied even if in form the suit is not for declaration, where the claim really involves a declaration that the instrument "issued" or "registered" is a forged instrument. In the case of *F. M. Ahsan* v. *The Official Trustee of Bengal,*[9] under Act IX of 1871, Art. 93 was applied to the setting up of a deed by a respondent and insisting upon it for the purpose, as constituting an "attempt to enforce", a registered document by which plaintiff was alleged to have conveyed to him a share of the property decreed, and the defendant had objected that the deed was a forgery. The decree against which the defendant was appealing, entitled the plaintiff to the possession of the land with *wasilat* from the date named. In *Ratnamasari* v. *Akilandammal,*[10] the dissenting judgment of Bhashyam Ayyangar, J., in supporting his conclusion from the general scheme of the schedule to the Limitation Act, referred to Arts. 92 and 93, thus:—

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> "After providing a period of limitation in Art. 91 for a suit to set aside an instrument not otherwise provided for—an article which has given rise to numerous conflicting decisions as to the class of suits for the recovery of immoveable property to which it is applicable.[11] Articles 92 and 93 prescribe a period of limitation of three years for a suit to obtain a *declaration* that a certain instrument issued, registered, or attempted to be enforced against the plaintiff is a forgery........can it be contended that a suit brought for redemption or recovery of immoveable property or for the recovery of a debt within the period of limitation prescribed for such suits would be governed by Arts. 92 and 93 and barred thereunder, if the defendant resists the suit by relying upon a forged instrument of conveyance or a receipt and proves that the plaintiff had knowledge of its issue or registration more than three years before the date of the suit."

He would obviously answer this question in the negative. A forged instrument cannot acquire the force of a genuine document because no declaration has been sought for, or obtained under Arts. 92 and 93, before suing for redemption, or recovery of property.

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[9] 8 Cal. 178=8 I.A. 197=10 C.L.R. 176 (P.C.).

[10] (1902) 26 Mad. 291 (313)=13 M.L.J. 27 (This judgment has been inferentially approved in *Kalyandappa* v. *Chanbasappa,* 1924 P.C. 137=48 Bom. 411 (422)=79 I.C. 971 (P.C.).

[11] *Janki Kunwar* v. *Ajit Singh,* 15 Cal. 58 (65).

**Calcutta.**

**Bombay.**

**Madras.**

**Allahabad.**

The **Calcutta High Court,** has taken the view, that even if the plaintiff *incidentally* asks the Court to set aside a forged instrument, the three years' limitation will not apply.[12] According to the **Bombay High Court,** Arts. 91, 92 and 93 apply only to suits brought *expressly* to cancel, set aside, or declare the forgery of an instrument; but they do not apply to suits where substantial relief is prayed, and where the cancellation or declaration is merely ancillary, and not necessary to the granting of such relief.[13] The **Madras High Court** held in *Sundaram* v. *Sithammal,*[14] that in a suit for land governed by Art. 144, where the plaint contained no prayer for the cancellation of a conveyance obtained by fraud, and supported by no consideration, Art. 91 did not bar the suit, although the defendant was in possession, and relied upon the conveyance from one of the plaintiffs: and, this view was followed in a later Madras case of *Narayana* v. *Kannammal.*[15] The **Allahabad High Court** has applied Art. 92, to a suit so far as the relief concerning the document in question prayed for a declaration that the registered document was forged; and the suit having been brought after the lapse of three years, that relief was held barred by limitation. But, the next question, whether the relief asking for a declaration that the document was forged was to such an extent the principal relief that any other relief was merely so subsidiary that the whole suit must be regarded as barred, was decided with reference to interpretation of the plaint. Assuming that the relief asking for a declaration that the document was forged was wholly unnecessary, the case was one for jurisdiction of Revenue Courts only.[16] It may be noticed, that as held in a Madras case, there is no obligation on a party, who challenges as a forgery a document purporting to confer rights to set it aside by a suit. He is entitled to treat it as waste paper and it cannot be regarded as binding on any one even before it is set aside.[17]

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[12] *Trilochun* v. *Nobokishore,* (1878) 2 C.L.R. 10; *Nistariny* v. *Anundmoye,* (1878) 2 C.L.R. 561.

[13] *Abdul Rahim* v. *Kirparam,* (1891) 16 Bom. 186; also see *Nabab Mir Sayad Alam Khan* v. *Yasinkhan,* 17 Bom. 755 (758) (Art. 91 not applied to suit to recover lands, where defendant did not get into possession under the document).

[14] (1892) 16 Mad. 311=3 M.L.J. 144.

[15] (1904) 28 Mad. 338 (343) (Art. 93 not applied where suit is substantially for posession of property though the plaintiff avers that the instrument relied upon by the defendant is a forgery).

[16] *Mt. Muradan* v. *Raghunandan,* 102 I.C. 287=1927 All. 826.

[17] *Gokula Venkamma* v. *Gokula Narasimham,* (1917) 37 I.C. 642=(1916) 2 M.W.N. 325=4 L.W. 441.

**1561. "ISSUED".**—Their Lordships of the **Privy Council** have held in *Hurri Bhusan Mukerji* v. *Upendralal,*[18] that the term *"issued"* in Art. 92, is intended to refer to the kinds of documents to which people commonly apply that term in business, and has no application to an instrument, like the *anumati patro,* or such as a power to adopt.

This article will not be applicable to cases of a will, which is by its nature a revocable instrument, and may never take effect at all, and which can take no effect until testator's death. A suit will not lie, for a declaratory decree setting aside a will during the lifetime of the testator, but, if maintainable at all, Art. 120 of the Limitation Act, would govern such suits.[19] The **Punjab Chief Court,** has held in *Mt. Gauhar Bibi* v. *Ghulam Muhd.,*[20] that a suit, to declare an unregistered will as forged, and beyond the power of the testator to make it, is governed by Art. 120, Limitation Act, and Art. 92 does not apply to the case of a will which is neither "issued" nor "registered".

**1562. STARTING POINT OF LIMITATION.**—Under the corresponding Art. 93 of Act IX of 1871, the starting point of limitation, for a "suit to declare the forgery of an instrument issued or registered, or attempted to be enforced" was the date of the issue, or registration, or attempt." In a Calcutta case,[21] it was held that Art. 93, gave 3 years from the "date of issue, or registration, or attempt", *whichever* may first happen. And, this view was confirmed by their Lordships of the Privy Council, in 8 I.A. 197 (P.C.) s.c. **8 Cal. 178 (P.C.).**

Article 93 of Act IX of 1871, has been split up into two allied articles, but while the starting point of limitation under Art. 93, remains the date of the attempt, in Art. 92, dealing with the issue or registration of forged instruments, the commencing period of limitation dates from the time "when the issue or registration becomes known to the plaintiff.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 93. | To declare the forgery of an instrument attempted to be enforced against the plaintiff. | Three years. | The date of the attempt. |

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18. (1895) 24 Cal. 1 (P.C.).

19. *Nurkhan* v. *Mt. Bakhtawar,* (1915) 27 I.C. 574=36 P.L.R. 1915=200 P.W.R. 1915; also see *Firoze* v. *Sultan,* 1926 Lah. 635=96 I.C. 835 (Art. 91 had no application to case of will).

20. 82 P.L.R. 1909=4 I.C. 923 (Kensington and Rattigan, JJ.).

21. (1878) 4 Cal. 209.

## SYNOPSIS.

1563. Article explained.
1564. Starting point of limitation.
1565. Scope, and application.

## NOTES.

**1563. ARTICLE EXPLAINED.**—The words "attempt to enforce", in this article are applicable to the attempt to recover under the instrument, and not to the unsuccessful attempt to have it recorded.[22] For instance, where a landlord applied to the *mamlatdar* of his district for recording a lease under the Record of Rights, and the lessee challenged the document as a forgery, and upon this the mamlatdar returned it to the applicant without recording it, and subsequently the document was recorded, and the landlord sued and recovered from the lessee a part of the rent due under the lease, it was held that a suit to recover back the rent paid, on the footing of the alleged lease being a forgery, was within time if brought within 3 years of the document being enforced by recovery of rent under the lease.[23]

**"Attempt to enforce."**

**Madras.**

It was observed by the **Madras High Court,** that

> "it may not be very easy to give the definition of the word **"attempt"** which would apply to all cases. What does or does not constitute an attempt within the meaning of Art. 93 of the Limitation Act **must depend upon the facts alleged** in each case".[24]

The same High Court, has held in another case, that

> "a person can be said to attempt to enforce a forged instrument against the plaintiff within the meaning of Art. 93 of Sch. I of the Limitation Act only when he **institutes proceedings in which the genuineness** of the document **is directly put in issue** and to which the person against whom it is sought to be enforced is a direct and necessary party."[25]

It is not necessary for the application of this article that the attempt to enforce the instrument should have been made, by the person relying upon it, as plaintiff in a suit, but there can be no doubt as to the correctness of the general proposition laid down above.[26] This view of the article also finds considerable support from the **Privy Council** ruling in the case of *Hurri Bhushan Mukerji* v. *Upendralal.*[27]

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[22] *Achuyt Rayappa* v. *Gopal Subbayya,* (1915) 30 I.C. 399=17 Bom. L.R. 635=40 Bom. 22.

[23] *Ibid.*

[24] *Achama Pantulu* v. *Seethamma,* (1921) 62 I.C. 531=1921 Mad. 545=40 M.L.J. 348.

[25] *Kamalanabhan* v. *Sattirazu,* 32 I.C. 99 (Mad.).

[26] 62 I.C. 531=1921 Mad. 545=40 M.L.J. 348, *supra.*

[27] 24 Cal. 1=23 I.A. 97 (P.C.) (An adoption by a widow by an *Anumati Patra,* cannot be said to be an enforcement of the deed, against the reversionary heirs).

**1564. STARTING POINT OF LIMITATION.**—The **Calcutta High Court** has held in *Nistariny* v. *Anundmoye,*[28] that where no fraud is alleged, the three years' limitation in Art. 93, will run from **any attempt** to enforce the instrument, **although** that attempt might **not** have been **known** to the person who brings the suit to declare it a forgery. And, in *Fakharooddeen* v. *Pogose,*[29] it was observed, that if a document has once been **used or attempted to be used,** a party having notice of such use or attempted use cannot, after the expiration of three years from such use or attempted use, bring a suit to have it declared a forgery by reason of any further attempt to make use of it. On appeal, their Lordships held that the setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it. **The rule** deducible is that the starting point of limitation would be **the first attempt** made to enforce the instrument, and, apart from fraud, the plaintiff's ignorance or knowledge would be **immaterial.**

**Date of attempt—Knowledge immaterial.**

**1565. SCOPE AND APPLICATION.**—It has been held in a recent Madras case, that a suit by a widow to recover possession of her husband's properties falls under S. 144, Limitation Act; and Art. 93 is not applicable to such a suit merely from the fact that a will alleged to have been executed by her husband, which she now attacks as a forgery, has been put forward against her in a prior succession certificate proceeding, and that she had not within three years from the date of such proceeding, taken any steps to declare the will invalid.[30] Reliance was placed for this view on the Madras decision in *Venkamma* v. *Narasimham,*[31] where it was held that "there is no obligation on a party, who challenges as a forgery a document purporting to confer rights, to set it aside by a suit. He is entitled to treat it as waste paper and it cannot be regarded as binding on anyone even before it is set aside. The joinder of an unnecessary prayer in a claim which is barred with other substantial reliefs not barred cannot entail the dismissal of the suit. The former may be struck out, and the claim adjudicated with regard to the substantial relief. In *Narayanan Chetty* v. *Kannammal Achi,*[32] it was held, following *Sundaram* v. *Sithammal,*[33] that Art. 93 does not apply where the suit is substantially for possession of property though the plaintiff avers that the instrument relied upon by the defendant is a forgery. In *Ratnamasari* v. *Akilandammal,*[34] the dissenting judgment was delivered by Bhashyam Ayyangar, J., which has since been inferentially approved by the Privy Council.[35] The same principle was applied by their Lordships of the Privy Council, in *Bijoy Gopal Mukerji* v. *Krishna Mahishi,*[36] in a suit by a reversioner to recover possession from the lessee after the widow's death, where Art. 91 was not applied to bar the claim involving defendant's reliance on the document which plaintiff was not bound to cancel or set aside, as a relief essential to the cause of action sued for. The article to apply in any proceeding is the article that relates to the form of remedy that the plaintiff seeks. Where plaintiff's form of remedy is a suit for recovery of possession, and the mere allegation of a forged will by the defendant does not defeat it, Art. 93 cannot apply to *bar* the claim: but if the document is *proved* by the defendant, the suit may fail on the merits.[37]

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[28] (1878) 2 C.L.R. 561.

[29] (1878) 4 Cal. 209=2 C.L.R. 573 s.c. on appeal (1882) 8 Cal. 178 (P.C.).

[30] *Peram Chennamma* v. *Peram Mangamma,* 1935 Mad. 709.

[31] 1918 Mad. 1198=37 I.C. 642.

[32] (1905) 28 Mad. 338.

[33] (1893) 16 Mad. 311=3 M.L.J. 144.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 94. | For property which the plaintiff has conveyed while insane. | Three years. | When the plaintiff is restored to sanity, and has knowledge of the conveyance. |

## SYNOPSIS.

1566. Corresponding provisions.
1567. Article explained.

## NOTES.

**1566. CORRESPONDING PROVISIONS.**—This article is same as Art. 94 of Sch. II of Acts XV of 1877, and Act IX of 1871.

**1567. ARTICLE EXPLAINED.**—Unlike Arts. 92 and 93, this article does not contemplate a suit for declaration, but for possession of property, after the plaintiff has recovered his reason, and has come to know about a conveyance by himself while insane. Such a knowledge about the execution of the conveyance, and its contents, must have been acquired after being restored to sanity.

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[34] (1906) 26 Mad. 291 (297, 313)=13 M.L.J. 27; see *Kalyandappa* v. *Chanbasappa,* 1924 P.C. 137=79 I.C. 971=51 I.A. 220=48 Bom. 411 (P.C.) at pp. 422, 423.

[35] *Chennamma* v. *Mangamma,* 1935 Mad. 709; Referring to *Velaga Mangamma* v. *Bandlamudi Veerayya,* (1907) 30 Mad. 308=17 M.L.J. 182, as approved by the Privy Council thus disapproving of the majority judgment in 26 Mad. 291=13 M.L.J. 27.

[36] (1904) 34 Cal. 329=34 I.A. 87 (P.C.); cf. *Janaki* v. *Ajit Singh,* 15 Cal. 58=14 I.A. 148 (P.C.).

[37] *Chennamma* v. *Mangamma,* 1935 Mad. 709.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 95. | To set aside a decree obtained by fraud, or for other relief on the ground of fraud. | Three years. | When the frand becomes known to party wronged. |

### SYNOPSIS.

1568. Corresponding provision.
1569. The English Law.
1570-74. *Scope and application of the article.*
1570. To set aside a decree.
1571. Suits for possession and declaration.
1571-A. *Illustrations.*
1572. Plaintiff, a party to the decree.
1573. Article applied: "*other relief*".
1574. Illustrative cases.
1575. Starting point of limitation.

### NOTES.

**1568. CORRESPONDING PROVISIONS.**—This article is same as Art. 95 of Act XV of 1877: and the first part of this article corresponds to Art. 96, and the second part to Art. 95 of Act IX of 1871.

Under Act XIV of 1859, the general provision in S. 1, cl. 16, read with S. 10, applied to such a suit, in which the cause of action was founded on a fraud, and limitation ran from the time at which such fraud had been first known by the party wronged. In *Gopal Chunder Dey* v. *Purnoo Beebe*, Kemp, J., held that where the holder of a decree under Regulation VII of 1799 sold his rights in the decree, and after substituting the purchaser's name for his own as decree-holder, fraudulently received from the judgment-debtor moneys under that decree, limitation would run against the purchaser from the time he discovered the fraud.

**1569. The English law** makes provision as regards claims to land, and rent charges, postponing the operation of the statute of limitation by enacting that the right to bring a suit shall be deemed to have first accrued at the time at which such fraud shall or with reasonable diligence might have been first known or discovered.[37-a] In respect of claims in equity, the general principle is that time is no bar in cases of fraud so long as the fraud is unknown to the plaintiff and he is in no way to blame for want of his knowledge.[37-b]

**1570. SCOPE OF THE ARTICLE.**—This article has no application where there is no fraud alleged as a ground of setting aside a decree. For example, where a compromise decree against a minor is sought to be avoided on the ground that the same was obtained without the sanction of the Court, and not on the ground of

**To set aside a decree—obtained by fraud.**

**Compromise decree.**

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[37-a] *See* S. 26 of 3 & 4 Will. IV, c. 27 (The Real Property Limitation Act, 1833).

[37-b] *See* Lightwood, p. 297.

fraud.[38] A decree based on a compromise by guardian of minor, without leave of Court is voidable, but the suit to avoid that decree on ground other than that of fraud would fall under Art. 120, Limitation Act.[39] Where title of a person is jeopardised for the first time by a decree in a suit, such a person is entitled to institute a suit for declaration that he is not bound by that decree, and the article applicable to such a suit is Art. 120, Limitation Act.[40] Where a suit is compromised on behalf of a minor by his guardian *ad litem* with the sanction of the Court, a suit by minor to set aside the decree on ground of fraud, falls under Art. 95.[41] The setting aside of a compromise decree, being the essence and substance of the action, Art. 95 of the Limitation Act will apply to the case, and the suit should be brought within three years from the date of the knowledge of the fraudulent decree.[42] Art. 95 has no application where the decree is sought to be avoided on the ground that the minor defendants' guardian was grossly negligent in defending the minor's interests in the suit.[43] But, where the decree is a consent decree, or even a decree based on an award, if it is sought to be set aside on the ground of fraud, this article will apply.[44]

**1571. SUITS FOR POSSESSION OR DECLARATION.**—Art. 95 was not intended to apply to suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act.[45] Art. 95 does not apply to every case in which fraud enters as an element in the conduct of the defendant, but it is limited in its application to cases where **relief is**

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[38] *Phulwanti* v. *Janeshar,* 46 All. 575=83 I.C. 782=1924 All. 625 =22 A.L.J. 521.

[39] *Jita Singh* v. *Man Singh,* 2 Lah. 164.

[40] *Abdul Ahad* v. *Chhabi Ram,* 1930 All. 420=123 I.C. 830.

[41] *Thi Raj* v. *Khwansi,* (1923) 77 I.C. 588=22 P.W.R. 1923=1924 Lah. 427; also see *Mohamad Jain* v. *The Commissioner of Patna,* (1917) 37 I.C. 797 (Pat.).

[42] *Mohamad Jain* v. *The Commissioner of Patna,* (1917) 37 I.C. 797 (Pat.).

[43] *Basavayya* v. *Bapanna,* 1930 Mad. 173=120 I.C. 880=58 M.L.J. 349=30 L.W. 911; cf. *Gurbachan Singh* v. *Hazara Singh,* 1935 Lah. 961 (Art. 95 applied to suit for possession of property on ground that decree passed during plaintiff's minority was not binding on him, the guardianship having collusively failed to produce material evidence).

[44] *Muhammad Baksh* v. *Mahomed Ali,* (1883) 5 All. 294; *Mohendra* v. *Gour,* (1918) 22 C.W.N. 860; *Mahomed Jain* v. *Commissioner of Patna,* (1916) 37 I.C. 797 (Pat.) and *Nidhan Singh* v. *Sassoon & Co.,* (1927) 100 I.C. 596 (Lah.).

[45] *Chunder Nath* v. *Tirthanand,* (1878) 3 Cal. 504=2 C.L.R. 147.

**claimed on the sole ground of fraud.**[46] The **Calcutta High Court** has observed in *Kali Prasanna* v. *Haripada*,[47] that

> "it seems clear that when a person is *prima facie* bound by a fraudulent decree he cannot by suing ostensibly ignore that decree, and thereby evade the operation of Art. 95; and where there is such a decree standing in the way of the plaintiff obtaining relief which is inconsistent with that decree he must first of all bring his suit within the period prescribed by Art. 95, in order to get the decree out of the way. In other words, the plaintiff cannot simply ignore the decree which denies his title and sue for possession on the basis of the title so long as that decree is subsisting. Where a decree has been made with jurisdiction and in the presence of the plaintiff that decree would be voidable on the ground of fraud, but it must be avoided."

This view is supported by *Mehr Afzal* v. *Rahman Ali Meah*,[48] where Art. 95 was applied to a suit for possession of *raiyati* holding after setting aside an *ex parte* decree as fraudulent. The **Madras High Court** has taken the same view in *Kumarasawmy* v. *Kamakshi Ammal.*[49] It was observed that where there has been adjudication by Court between parties disentitling a plaintiff to a certain relief, the same relief cannot be asked for unless the previous decree be got rid of. The decree is binding on both parties so long as it stands, and it is not open to either of the parties to ignore it. For purposes of limitation Art. 95 must be regarded as conclusive.[50] Similarly, it has been held by the **Patna High Court**, that money paid under a judgment or decree cannot be recovered back in a fresh suit so long as the decree or judgment under which it is paid remains in force. The decree or judgment must be taken as subsisting until it is reversed or superseded by some ulterior proceeding.[1] A transaction tainted with fraud is *voidable*, not void. A decree obtained by fraud, collusion or any other unlawful means, is a pronouncement of a Court of justice, and cannot be treated as waste paper.[2] Therefore, a bar of limitation under Art. 95, cannot be avoided by describing the decree as fraudulent or null and void.[3] However, if the decree can be ignored altogether, there would be no application of Art. 95. The plaintiff's right to bring a suit to get the relief ought not to be curtailed or cut down to the period of three years by reason of Art. 95 merely because the action of the defendant was tainted with fraud.[4]

**Voidable decret.**

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[46] *Gour Mohun Gouli* v. *Dinonath*, (1897) 25 Cal. 49 (51); *Jamsetji* v. *Hirjibhai*, (1912) 37 Bom. 158.

[47] (1931) 129 I.C. 871=1931 Cal. 69 (71)=34 C.W.N. 801 (805, 806).

[48] (1913) 19 I.C. 908 (Cal.).

[49] 16 I.C. 843 (Mad.).

[50] *Ibid.*

[1] *Upendra Chandra* v. *Chioditti*, (1918) 46 I.C. 562 (Pat.).

[2] *Fazuluddin Muhammad* v. *Khetra Ghorai*, (1925) 90 I.C. 866=30 C.W.N. 59=1926 Cal. 167.

[3] *Sarada Prosad* v. *Rai Mohan*, (1925) 85 I.C. 629=1925 Cal. 819; also see *Kali Prasanna* v. *Haripada*, supra.

[4] 1931 Cal. 69 (71)=129 I.C. 871.

A judgment or decree obtained by fraud upon a Court, binds no such Court, nor any other; and, its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding.[5]

## 1571-A. ILLUSTRATIONS.—

(1) In *Uma Shanker* v. *Kalka Prasad*,[6] it was held that Art. 95 did not apply where the **main and substantial relief** sought for was the assertion of the right of the plaintiff. Similarly, in *Burjorji* v. *Dhunbai*,[7] the plaintiff having already obtained possession, it was held that the suit did not fall under Art. 95, as the "relief" asked for was the declaration of plaintiff's absolute title, and the **"ground" of the relief being the acquisition of his title** by virtue of the certificate of sale coupled with a denial of it by the defendant.

(2) A suit for the recovery of possession of immoveable property on the **ground that the decree** on the basis of which the defendant dispossessed the plaintiff **was obtained by fraud** is governed by Art. 95.[8]

(3) A **sale in execution of a fraudulent decree is** not void, but **voidable,** so long as such decree is not successfully impeached as fraudulent, the sale thereunder must stand operative.[9]

(4) Where *shebaits* of a debutter came to terms with the executors of a will, and the compromise dealing with the *shebaiti* rights was binding, the executors could not sue for recovery of possession of the debutter property, and for declaration avoiding transfer of *shebait* rights, when they could not set aside the **compromise decree** under Art. 95 of the Limitation Act, owing to expiry of prescribed period before the institution of the suit.[10]

(5) A **minor is not entitled to have a decree passed against him ignored** merely owing to gross negligence of his guardian in failing to attend at the hearing of the suit in which the decree was passed.[11] **But, a decree passed against a** person who is really a **minor, as if he was of age, should be** treated as **a nullity** against such person, and as one which it is not necessary to set aside under Art. 95 of the Limitation Act.[12]

(6) Where the decree sought to be set aside by the plaintiff remains intact and cannot be set aside on account of the suit being barred by limitation, the money paid by the plaintiff to the defendant in excess of the sum due in pursuance of the decree cannot be recovered.[13]

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[5] *Hare Krishna Sen* v. *Umesh Chandra,* (1921) 62 I.C. 962=6 P.L.J. 373 (F.B.).

[6] (1883) 6 All. 75.

[7] (1891) 16 Bom. 1 (10).

[8] *Jugdeo Singh* v. *Ajodhya Singh,* (1919) 49 I.C. 953 (Pat.).

[9] *Raj Kumar Sarkel* v. *Raj Kumar Mali,* (1915) 33 I.C. 767=20 C.W.N. 659.

[10] *Mohendra Nath Bagchi* v. *Gour Chandra,* (1918) 46 I.C. 867=22 C.W.N. 860.

[11] *Raghuraj Gir* v. *Rudra Partap Singh,* (1916) 36 I.C. 811=19 O.C. 119.

[12] *Puran Chandra Kumar* v. *Mahatap Bahadur,* (1913) 18 I.C. 859 (Cal.).

[13] *Upendra Chandra* v. *Chioditti,* (1918) 46 I.C. 562 (Pat.).

**Declaratory relief.**

(7) A suit brought by *A* to obtain a declaration that a decree originally obtained by *B* against *C* and another, which had been purchased in the name of *D*, had really been purchased by the plaintiff for his own benefit, the cause of action alleged being the wrongful execution of the decree by *D*, is not a suit for relief on the ground of fraud, within Art. 95; but is governed by Art. 120, Limitation Act.[14] Art. 95 has no application to a suit by a reversioner for a declaration that a *kot kobala* executed by the last owner and a compromise decree made in a suit to enforce the *kot kobala* are not binding on the inheritance. Art. 120 applies to such a suit.[15] However, a suit claiming a declaratory relief would come under Art. 95 if the relief claimed involves setting aside a decree, or other relief on the ground of fraud.

**Plaintiff a party to the decree.**

**1572.** "Fraud", within the meaning of Art. 95, Limitation Act is fraud practised upon a party to the decree or transaction in which the fraud was committed.[15] Thus, Art. 95 does not apply to **suits by a reversioner impeaching** on the ground of fraud against himself **transactions of a preceding qualified owner** to which he was no party. The period of limitation applicable to such cases is that prescribed by Art. 120. However, the plaintiff is not bound to bring such a suit, and it is open to him to bring a possessory suit when the succession falls in.[17] Where **plaintiffs suing as shebaits,** and not merely as executors or the legal representatives of a deceased testator, were no parties to the sale transactions, Art. 95, Limitation Act, could have no application to a suit for declaration as against the defendants, that they were entitled to possession of the property in question.[18] But, a suit to set aside a compromise decree alleged to have been obtained by fraud against a party, is governed by Art. 95, Limitation Act.[19] However, if the plaintiff's title is not shown in any way to be affected by a fraudulent sale, to which he is not a party, Art. 95 does not bar the suit which is not a suit to set aside a decree on ground of fraud.[20] Where the plaintiffs were the heirs and legal representatives of their mother, and they claimed under her, they were held bound by the mortgage-decree and the sale which took place thereunder, and they could not sue for possession unless they had cleared the way for such a suit by securing the annulment of the mortgage-decree, and the sale, within a period prescribed by Art. 95, Limitation Act.[21] This article has no application to a suit by a reversioner for a declaration that a certain document shall not bind the reversion, and that a compromise decree made in a suit to enforce the document are not binding on the inheritance.[22] A suit by the grantees of certain lands to set aside a compromise and a decree based on such compromise between their co-grantees and the superintendent of such properties is governed, as regards limitation by Art. 95, Limitation Act.[23] This article will not bar a *defendant* from impeaching the decree for fraud, in defence to a claim against him on the basis of the decree.[24]

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[14] *Gour Mohun Gouli* v. *Dinonath,* (1897) 25 Cal. 49.

[15] *Hara Narain* v. *Sridhar,* (1918) 47 I.C. 2 (Cal.); also see *Sarat Chandra* v. *Kanailal,* (1921) 70 I.C. 525=26 C.W.N. 479; *Abdul Ahad* v. *Chhabi Ram,* (1930) 123 I.C. 830=1930 All. 420 and *Velammal* v. *Velammal,* (1910) 6 I.C. 198=7 M.L.T. 155 (Suit for a declaration that a mortgage decree passed against a co-sharer will not bind the plaintiff).

[16] *Sundarappa* v. *Sreeramulu,* (1907) 30 Mad. 402.

[17] *Ibid.,* 30 Mad. 402; Followed, 3 Cal. 504.

[18] *Kaliprasanna* v. *Haripada,* 1931 Cal. 69=34 C.W.N. 801 (805).

[19] *Mohammad Jan* v. *The Commissioner of Patna,* 37 I.C. 797 (Pat.); also see and cf. *Thi Raj* v. *Kheause,* 77 I.C. 588=22 P.W.R. 1923 (Compromise by guardian *ad litem* with the sanction of Court).

[20] *Annada Pershad* v. *Prasannamoyi,* (1907) 34 Cal. 711=34 I.A. 138 (P.C.).

**Effect of bar of limitation.**

### 1573. ARTICLE APPLIED—"OTHER RELIEFS".—

**Other relief not *ejusdem generis*.**

The **Madras High Court** has held in *Bank of Madras* v. *Multan Chand Kanyalal,*[25] that the "other relief", referred to in Art. 95, Limitation Act need not be of the same kind as setting aside a decree obtained by fraud, and the article is not limited in its operation to specific relief on the ground of fraud. This has been followed in another **Madras** case of *Prennayil* v. *Raman Nair*[26]; and by the **Patna** High Court, in *Jugdeo Singh* v. *Ajodhya Singh.*[27] The **Calcutta** High Court also observed in *Prayag Ray* v. *Sidhu Prasad,*[28] that Art. 95 does not refer to fraud of the same nature as that in a decree obtained by fraud. It was held in *Chunder Nath Chowdhry* v. *Tirthanand Thakoor,*[29] that Art. 95, Limitation Act

> "has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences".

But, as pointed out by the **Allahabad High Court**, in *Benares Bank, Ltd.* v. *Ram Prasad,*[30] this is not inconsistent with the view that

> "mention of a decree in the first part of the language of Art. 95, does not, in any way detract from the generality of the latter part thereof".

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[21] *Hitendra Singh* v. *Rameswar Singh,* (1925) 87 I.C. 849=1925 Pat. 625 s.c. 88 I.C. 141=4 Pat. 510.

[22] *Har Narain Bera* v. *Sridhar Pande,* (1918) 47 I.C. 2 (Cal.).

[23] *Muhammad Baksh* v. *Muhammad Ali,* (1883) 5 All. 294=3 A.W.N. (1883) 40.

[24] *Rajab Panda* v. *Lakhan,* (1899) 27 Cal. 11 (23); *Prayag Kumari* v. *Siva Prasad,* (1923) 93 I.C. 385 (424)=1926 Cal. 1; also see *Kali Kumar* v. *Kashi Chandra,* (1911) 11 I.C. 882 (Cal.); *Rang Nath* v. *Gobind,* (1904) 28 Bom. 639.

[25] (1903) 27 Mad. 343 (345).

[26] (1907) 31 Mad. 230=18 M.L.J. 19.

[27] (1919) 49 I.C. 953 (Pat.).

[28] (1908) 35 Cal. 877 (888).

[29] (1878) 3 Cal. 504.

[30] 1930 All. 573=124 I.C. 180=1930 A.L.J. 1153.

### 1574. ILLUSTRATIVE CASES.—

**Compensation for damages.**

(1) The expression "other relief" is comprehensive enough to include a relief claimed as compensation for damages caused to the plaintiff by the fraud practised by the defendant.[31] A purchaser of immoveable property at a Court auction is entitled to sue to recover the whole or a portion of his purchase-money on proof that the existence of an incumbrance had been concealed from him by the decree-holder. Such an action must be for damages on the ground of fraud, under Art. 95.[32] This article is comprehensive enough to include a suit based entirely on fraud caused by the defendant in obtaining the decree whereby the plaintiff was dispossessed.[33]

**Suit to set aside award.**

(2) A person cannot impeach a decree incorporating an award unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91. If Art. 95 applies, the *terminus a quo* will be the date on which the fraud becomes known to the plaintiff.[34]

**Suit for compensation money.**

(3) Where compensation under the Land Acquisition Act had been paid to the defendant through fraud on her part, or mistake on the part of the Collector, a suit for compensation money payable to the plaintiff was held to be governed by Arts. 95 or 96.[35]

**Suit to set aside an execution sale.**

(4) A suit to set aside an execution sale on the ground that the decree was obtained by fraud is maintainable, and is governed by Art. 95.[36]

**Suit to set aside fraudulent sale.**

(5) A suit for declaration that a sale has been fraudulently confirmed and for recovery of possession of the land sold, not being one under the Chota Nagpur Tenancy Act, is governed by Art. 95 of the Limitation Act and not by S. 231 of the Chota Nagpur Tenancy Act.[37] Such a suit is not governed by Art. 12, but by the more specific Art. 95, Limitation Act.[38] Where relief is sought on the ground of fraud, the limitation applicable is that provided in Art. 95 only, and not any other law of limitation.[39]

(6) A sale held in execution of a fraudulent decree is not a void, but a voidable sale till vacated by an appropriate proceeding, the rights created thereby are effective. Consequently, where the right to have the decree set aside as fraudulent has become barred by limitation, no decree can be passed setting aside the sale only as made in execution of a fraudulent decree. A

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31. *Bank of Madras* v. *Multanchand Kanyalal,* (1903) 27 Mad. 343 (345).

32. *Balasubramania* v. *Maruthamalai,* (1912) 16 I.C. 215 (Mad.).

33. *Jugdeo Singh* v. *Ajudhia Singh,* (1919) 49 I.C. 953 (Pat.).

34. *Nidhan Singh* v. *E. P. Sassoon & Co.,* (1927) 100 I.C. 596=1927 Lah. 172=28 P.L.R. 106.

35. *Venkata Viraragavayyangar* v. *Krishnasami,* (1883) 6 Mad. 344.

36. *Motilal* v. *Russick Chandra,* (1896) 26 Cal. 326.

37. *Rameshwar Narain Singh* v. *Mahabir Prasad,* 96 I.C. 529=1926 Pat. 401=5 Pat. 759.

38. *Ibid.*

39. *Nathsingh* v. *Jodhasingh,* (1884) 6 All. 406=4 A.W.N. (1884) 140.

suit for a declaration that a decree and an auction-sale thereunder are not binding on the plaintiffs, is not a mere declaratory suit but in substance a suit to set aside the decree on the ground of fraud, and is governed by Art. 95, Sch. I, Limitation Act.[40]

(7) In a suit by reversioner to establish his title to property sold in execution of decree obtained against a widow representative of her deceased husband's estate, where the plaintiff alleged that the decree had been fraudulently and collusively obtained on a forged instrument, it was held that Art. 12 did not apply, but Art. 95, for although the plaintiff sued to set aside a sale held in execution of a decree, he did so not as one who would have been bound by the sale if the suit had not been brought, but in order to obtain a declaration that he was not bound by it, the decree under which the sale was held having been fraudulent and collusive; so that the cause of action could only have arisen when he become aware of the fraud.[41]

(8) Where *A,* instituted a suit to set aside a sale held under the Public Demands Recovery Act, on the allegation that the defendants, who were his co-sharers, fraudulently suppressed the notice under S. 10 of the Act, and purchased the property fraudulently in the name of their agent, **held** that the suit to set aside such a sale is governed not by Art. 12 (*b*), but either by Art. 95, or Art. 120, Limitation Act.[42] A purchaser who was a party to a fraud in the sale, cannot take advantage of the shorter period prescribed by Art. 12.[43] However, it has been held in *Kaliprasanna* v. *Haripada,*[44] that merely because the action of the defendants was tainted with fraud the plaintiff's right to bring a suit to get the relief prayed ought not to be curtailed or cut down to the period prescribed by Art. 95 and Art. 95 cannot apply where no decree is passed under the proceedings under the Public Demands Recovery Act.

**Suit to recover money.**

(9) Where a suit was brought to recover a specified sum of money which the plaintiff had to pay in consequence of the fraudulent act of the defendant, it was held by the Calcutta High Court, that the suit was not one to obtain relief on the ground of fraud, but fell within Art. 61, Limitation Act.[45] But, the Punjab Chief Court, has applied Art. 95, to a suit for value of property fraudulently received by the defendant.[46] For example, where *H* and *M,* representing themselves to be *S's* agents, received from *B,* a certain number of cattle in payment of a debt which *B* owed *S,* and instead of giving the cattle to *S,* they appropriated them to their own use, in consequence of which *B,* was compelled by suit to pay the defendant a second time; it was held that *B's* suit against *H* and *M* to recover the value of the cattle wrongfully and fraudulently received and appropriated by them, was governed by Art. 95, Limitation Act.[47]

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[40] *Fazuluddin Mahammad* v. *Khetra Ghorai,* (1925) 90 I.C. 866=1926 Cal. 167=30 C.W.N. 59.

[41] *Parekh Ranchor* v. *Bar Vakhat,* (1886) 11 Bom. 119.

[42] *Syamlal Mandal* v. *Nilmony Das,* (1907) 34 Cal. 241=5 C.L.J. 385; Relied on *Venkata Pattu* v. *Subramanya,* (1886) 9 Mad. 457; cf. *Bajaji Krishna* v. *Pirchand,* 13 Bom. 221; also see *Jagapattu Raju* v. *Bapiraju,* 34 Mad. 143=7 I.C. 60=8 M.L.T. 154=1910 M.W.N. 286 (Sale of immoveable property in Court auction vitiated by fraud,—Art. 95, applied).

[43] *Venkatapathi* v. *Subramanya,* (1886) 9 Mad. 457.

[44] 1931 Cal. 169=129 I.C. 871=34 C.W.N. 801 (805, 806).

[45] *Tarab Ali* v. *Nilruttan,* 13 Cal. 155.

[46] *Budhasingh* v. *Hira and Megha,* 19 P.R. 1878.

[47] *Ibid.*

**Suit to set aside decree obtained by perjury**

(10) It is doubtful if plaintiff can maintain a suit to set aside a decree on the ground of fraud, simply because the decree had been obtained on perjured testimony.[48]

**Partition made during minority of plaintiff.**

(11) A suit to set aside a deed of partition on the ground of *fraud* is governed by Art. 95, or Art. 91 of the Limitation Act, and must be brought within 3 years after the minor plaintiff has attained majority according to S. 7 of the Act.[49] However, if relief is sought against a partition to the detriment of a minor member of a Hindu family, not on the ground of fraud, or mistake, the suit would not be subject to the limitation prescribed by Arts. 95 or 96, Limitation Act, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor.[50]

**Benami transactions for defrauding creditors.**

(12) It is laid down generally that a man cannot set up an illegal or fraudulent act of his own, in order to avoid his own deed.[1] If *A*, in order to defraud *C*, allows *B* to acquire the legal ownership of his property, *A* will not generally be aided by equity in undoing his own act or avoiding his own submission.[2] Where, in order to defeat an execution by a judgment-creditor, a judgment-debtor invited his landlord to distrain and sell for rent not really due, the tenant, it was held, could not be assisted by the Court in recovering the money realized by the sale.[3] Acting upon these principles it has been held in *Chenvirappa* v. *Puttappa*,[4] by West, J., that as to parties themselves to a collusive decree neither of them can escape its consequences. In general principles, where a defendant has suffered a judgment to pass against him, the matter is then placed beyond his control.[5] A decree obtained by fraud stands as between colluding parties, and it may be impeached in any collateral proceeding only when some other interest is concerned, of a person not a party to the fraudulent decree.[6]

**Madras Rent Recovery Act.**

(13) A suit simply to set aside a sale for arrears of revenue held under the Madras Rent Recovery Act, (II of 1864), on the ground of fraud, and collusion between the purchaser and the village officer, is governed not by Art. 95, but by the special period of six months' provided by S. 59 of that Act.[7] But, where the suit is to set aside the sale on the ground of fraud, as well as to recover possession from the purchaser Art. 95 would apply, because the Madras Rent Recovery Act is con-

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[48] *Kumarasamy Chetty* v. *Kamakshi Ammal*, (1912) 16 I.C. 843; also see *Kadirvelu Nainar* v. *Kuppuswami Naicker*, (1918) 45 I.C. 774=41 Mad. 743=34 M.L.J. 590 (F.B.).

[49] *Chanviraja* v. *Danava*, 19 Bom. 593.

[50] *Lal Bahadur* v. *Sispal*, 14 All. 498.

[1] *May*, on fraudulent conveyances, p. 432.

[2] In re *Mapleback, Ex parte Caldecott*, L.R. Ch. D. 150.

[3] *Sims* v. *Tuffs*, 6 Carr and P. 207.

[4] (1887) 11 Bom. 708; Relied on *Venkatayamma* v. *Kiramma*, 10 Mad. 17; and *Ahmedhboy* v. *Vullebhoy*, 6 Bom. 703.

[5] *Ibid.*, 11 Bom. 708 (720).

[6] Not followed, *Paramsingh* v. *Laljimal*, 1 All. 403.

[7] *Venkata* v. *Chingadu*, 12 Mad. 168 (F.B.); also see *Iswara* v. *Karuppan*, 3 M.L.J. 255.

fined to a suit merely for setting aside a sale, and not for any other relief claimed.[8]

**1575. STARTING POINT OF LIMITATION.**—The prescribed period of 3 years' limitation under this article runs from the date of the knowledge of fraud. **The principle,** to be given effect to, as recognised by the Limitation Law is that

Knowledge of fraud.

> "so long as a person, upon whom fraud has been practised, remains in ignorance of such fraud, no time will run against him; but, when he has acquired knowledge of such fraud, he must, within three years from the date of obtaining such knowledge, come into Court for relief".[9]

The knowledge, predicated by the terms of Art. 95 of the Limitation Act, **not mere suspicion;** it is such definite knowledge as will enable the person defrauded to seek his remedy in Court.[10] Mere suspicion is not knowledge within the meaning of this article.[11] The knowledge contemplated must be of such a character as will enable the person defrauded to seek his remedy in Court.[12]

**The principle** as stated by Westbury, L.C., in *Rolfe* v. *Gregory,*[13] has been accepted by Mookerjee, J., in *Biman Chandra* v. *Promotha Nath,*[14] that

> "when the remedy is given on the ground of fraud, it is governed by this important principle, that the right of party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed".

In a suit instituted under Art. 95 to set aside a decree obtained by fraud or for other relief on the ground of fraud, the plaintiff must show, to begin with, that by fraud of defendant he was kept ignorant of the decree.[15] Once fraud is established, the burden is thrown on the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation: such knowledge must be clear

Onus probandi.

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[8] *Venkatapathi* v. *Subramania,* 9 Mad. 457; also see *Kuppusami* v. *Subramania,* 7 M.L.J. 73.

[9] *Muhammad Baksh* v. *Muhd. Ali,* (1883) 5 All. 294=3 A.W.N. (1883), 40.

[10] *Nath Singh* v. *Jodha Singh,* 6 All. 406=4 A.W.N. (1884) 140; also see *Debradun Mussoorie Electric Tramway Company* v. *Hansraj and Company,* 1935 All. 995 (The party alleging fraud is bound to establish it by cogent evidence, and suspicion cannot be accepted as proof).

[11] *Indra Nath Banerji* v. *Rooke,* (1909) 3 I.C. 316=14 C.W.N. 101.

[12] *Rahimbhoy Hubibbhoy* v. *The Official Assignee,* (1889) 14 Bom. 408 (Affirmed in *Rahimbbhoy* v. *Turner,* 17 Bom. 341).

[13] (1865) 4 De. G. J. and S. 576.

[14] (1922) 68 I.C. 94=36 C.L.J. 295=1922 Cal. 157=49 Cal. 886.

[15] *Ibid.,* 49 Cal. 886; also see *Abbas Ali Bhuiya* v. *Ram Kanai Majumdar,* 1935 Cal. 95.

and definite knowledge of the facts constituting the particular fraud.[16] As Lord Hobhouse points out in *Rahimbhoy Hubibbhoy* v. *Turner,*[17] it is not sufficient for the defendant to show that the plaintiff had some clues and hints which, perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud. When it is uncertain when the fraud was discovered, the *onus* is on the defendant to show that the suit is out of time.[18]

**Question of fact.** The question when knowledge was obtained is one of fact.[19]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 96. | For relief on the ground of mistake. | Three years. | When the mistake becomes known to the plaintiff. |

### SYNOPSIS.

1576. Corresponding provisions.
1577. Relief on ground of mistake.
1578. Money paid by mistake.
1579. Rectification of documents.
1580. Suits to set aside decree.
1581. Mistake of fact or law.
1582. Suits for possession, or declaration of title.
1583. Starting point of limitation.

### NOTES.

**1576. CORRESPONDING PROVISIONS.**—This article is same as Art. 96 of Sch. II of the Limitation Act XV of 1877: and corresponds to Art. 97 of Sch. II of Act IX of 1871, which was confined to mistakes "in fact". The present article, relates to "mistake", whether of fact or of law.

The general article to S. 1, cl. (16) of Act XIV of 1859, applied to such cases.

Under English law, relief is allowed on the ground of mistake, and

> "cause of action accrues, and the statute runs, in the case of mistake, as soon as the mistake is or with reasonable diligence could have been discovered".[19-a]

**1577. RELIEF ON THE GROUND OF MISTAKE.**—Section 20 of the Indian Contract Act provides that

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[16] *Biman Chandra* v. *Promotha Nath,* 49 Cal. 886; also see *Abbas Ali Bunia* v. *Ram Kania Majumdar,* 1935 Cal. 95.

[17] 17 Bom. 341 (P.C.).

[18] *Punnayil Kutti* v. *Raman Nair,* (1907) 31 Mad. 230.

[19] *Krishnan* v. *Sridevi,* 12 Mad. 512 (P.C.).

[19-a] *See* Lightwood, p. 239; Leake, pp. 66-69.

"where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void".

It is explained that

"an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact".

A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact. (S. 21, Indian Contract Act.) A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. (S. 22, Indian Contract Act.)

**Money paid by mistake.**

**1578.** A suit lies under this article for money paid by mistake of the party suing, or paid to defendant by mistake of some other person, who should have paid it to paintiff. For example, money awarded to defendant, either by fraud of the party, or by mistake of the Collector, is recoverable under Art. 95 or 96 of the Limitation Act, within three years from the date of plaintiff's knowledge of the fraud or mistake.[20] Art. 96 has been applied to a suit to recover a sum of money by the plaintiff to the defendants in excess of the sum demanded by the latter from the former on account of cesses under the **Bengal Rent Act** (VIII of 1869).[21] Art. 96 is an article of general import, and covers all cases in which relief is sought on the ground of mistake.[22] This article is more special, however, than the general provision of Art. 62, and must override the latter.[23] In *Martand* v. *Moreswar,*[24] where the plaintiff sued the defendant for money on a mortgage-bond which was allotted to the plaintiff's share but which ultimately turned out to have been satisfied, it was held that Art. 96 would apply, and time would run from the decree of the Court dismissing the plaintiff's suit on the ground that the bond had been satisfied. Similarly, a suit for setting aside a partition decree, and to obtain a fresh adjustment of the ancestral property, was held governed by Art. 96, and not Art. 127 or 144, where the cause of action arose out of the mistake that was committed, and which alone gave plaintiff a right to sue.[25] See also *Madras Factories* v. *W. C.*

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[20] *Viraragava* v. *Krishnasami,* (1883) 6 Mad. 344 (350).

[21] *Mathura Nath* v. *Steel & Co.,* (1886) 12 Cal. 533.

[22] *Tofal Das* v. *Moinuddin Mirza,* (1926) 93 I.C. 129=4 Pat. 448=1925 Pat. 765=7 P.L.T. 431.

[23] *Ramiah* v. *Sadasiva Mudaliar,* (1925) 91 I.C. 151=48 Mad. 925.

[24] 45 Bom. 582=1921 Bom. 184.

[25] *Ramakotayya* v. *Sundararamayya,* 1931 Mad. 707=61 M.L.J. 430=54 Mad. 883=135 I.C. 9.

*Shaw,*[26] where the suit by the creditor was for setting aside a decree of dismissal on the ground that the plaintiff had given the discharge by mistake.

**Rectification of documents.**

**1579.** Art. 96 is equally applicable to a suit for a rectification of a document on the ground of mutual mistake and other reliefs relating to moveable as well as immoveable property.[27] This article was intended to apply to the well-known class of actions for rectification of deeds and rescission of contracts.[28] A suit for the amendment or rectification of a lease, on the footing of a common mistake of the lessor and the lessee under which some land was wrongly included in the lease is governed by Art. 96, and must be brought within three years from the date when the plaintiff became aware of the mistake.[29]

**Suit to set aside decree.**

**1580.** It would be noticed, that while Art. 95 refers to a suit to set aside a *decree* on the ground of **fraud,** there is nothing in Art. 96, to extend the scope of the article to suits to set aside *decrees* on the ground of **mistake.**

The **Oudh Judicial Commissioner's Court** has held in *Ramzan Khan* v. *Muhammad Yakub Khan,*[30] that Art. 96 of the Limitation Act is only intended to apply to those cases in which the Courts are asked to relieve parties from the consequences of **mistakes committed** by them **in the course of contractual relations.** The article does not refer to a suit to set aside a decree on the ground of a mistake but only to a suit for relief on the ground of mistake other than that made in the decree. The facts of *Jogeswar Atha* v. *Ganga Bishnu Ghattack,*[31] were different. A suit had been brought for foreclosure of a mortgage of certain properties and one of the defendants had set up a claim to one of those properties as against the plaintiff, which had been misdescribed. The result of the mistake was, that in the decree the property which was released to the defendant was misdescribed. It was held that a suit was maintainable to have the decree put right. This ruling was considered in *Chand Mea* v. *Srimat Asima Banu,*[32] by another Bench of the Calcutta High Court, where it was held that it could not be broadly laid down that any error in a decree made by a Court may be challenged by a separate suit, in view of the procedure by way of appeal or review under Civil Procedure Code. As pointed out by Mitra, J., in *Jogeshwar* v. *Ganga Bishun*,[33] Art. 96 does not refer to a suit to set aside a decree on the ground of mistake. It obviously refers to a suit for relief on the ground of some mistake other than that made in the decree. It is limited in its application to cases of mistake committed in transactions arising in the course of relations which are more or less contractual in character, and could not in any event be applied to a case where there was no mistake on the part of the plaintiff.[34] Where the money due under a mortgage was sent by the mortgagor through post, and was received by only one of the mortgagees-co-sharers, and therefore the plaintiff mortgagor had to pay the other mortgagee-co-sharers once again, Art. 96 was held applicable to a suit to recover the amount from the mortgagee who had received the amount.[35]

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[26] 14 M.L.J. 443.

[27] *Tofal Das* v. *Moinuddin Mirza,* (1926) 93 I.C. 129=4 Pat. 448=1925 Pat. 765=7 P.L.T. 431.

[28] *Dwarkanath* v. *Shashti Kumar,* (1913) 18 I.C. 869 (874).

[29] *Bijoy Chand* v. *Secretary of State,* (1918) 48 I.C. 972 (Cal.).

[30] (1911) 11 I.C. 537 (Oudh); Followed in *Sher* v. *Piara Ram,* 69 I.C. 501=1924 Lah. 324.

[31] 8 C.W.N. 473.

[32] 10 C.W.N. 1024 (1025, 1026).

**Mistake of fact or of law.**

1581. In Art. 97 of the Act of 1871, the provision related expressly to a mistake of *fact*. Under the corresponding Art. 96 of the Acts of 1877 and 1908, the mistake may be a mistake of fact or of law. For example, where certain amounts were paid voluntarily, but under a *bona fide* mistake as to the amount which the defendants were entitled to recover from them, it was held that Art. 96 applied to a suit to recover a sum of money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demanded by the latter from the former on account of the cesses under Bengal Rent Act.[36] Act XV of 1877, Art. 96, applied to both mistakes in fact, and in law[37]: and as Lord Chelmsford said in *Earl Beauchamp* v. *Winn*,[38]

> "there are many cases found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake".

There are cases in the Courts of common law in which it has been held that money paid under a mistake of law cannot be recovered. But this rule has of late been limited to cases of mistake as to any *general* rule of law.[39] Under the Indian Contract Act, 1872,

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[33] 8 C.W.N. 473 (475).

[34] *Pannalal Ghose* v. *The Adjai Coal Co.*, 101 I.C. 62=1927 Cal. 117 (123).

[35] *Ganesh* v. *Jot Singh*, (1924) 87 I.C. 1017 (Nag.).

[36] *Mathura Nath Kandu* v. *Steel*, (1886) 12 Cal. 533.

[37] *Pochkhanawalla* v. *Dossabhoy*, (1895) 20 Bom. 511 (516).

[38] 6 H.L. 223 (234).

[39] *The British Workmen's Assurance Co.* v. *Cunliffe*, (1902) 6 C.W.N. ccxxix=18 T.L.R. 502 (C.A.).

S. 21, error of law does not vitiate a contract, much less will it annul a conveyance after the lapse of many years, unless there has been some fraud or misrepresentation and an absence of negligence.[40] A payment made voluntarily, under a mistake of law, without there being any duress or coercion exercised cannot be recovered.[41] As regards payment under a mistake of fact, it has been held by the Bombay High Court, that where a person accepts the position of a drawee of a bill of exchange and honours the bill under a mistake of fact, he establishes for the time being a mutual relationship between himself and the person to whom the payment is made and this relationship casts upon him the duty to inform the latter within a reasonable time that he has accepted that position under a mistake of fact. Where such person gives no notice to the person to whom the payment has been made for a long time after the discovery of the mistake, he is not entitled to recover the amount of the payment on the ground that the payment was made under a mistake of fact.[42]

**Suits for possession or declaration of title.**

**1582.** Art. 96 of the Limitation Act has no application to a suit for mere declaration of title, or a suit for possession of immoveable property, which does not involve a relief on the ground of mistake.[43] Where mistake is not the basis of suits grounded on title, and mistake of fact or law is merely an incident in the explanation why the suit was delayed, Art. 96 does not apply.[44] A suit raising a pure question of title is governed by Art. 120.[45]

*Illustrations.*

(1) Where, on the death of a person, his heirs made an unequal division of property under a family arrangement, which was the result of a mistake, this mistake could be relieved against by a regular suit for possession, and the mere fact that the party seeking relief accepted a lesser share under a mistake would not reduce the period of twelve years for a possessory suit under Art. 141 to a period of three years under Art. 96, Limitation Act.[46]

(2) Where certain members of a joint Hindu family partitioned the family property among them in such a way as to give one member of the family, who at the time of the partition was a minor, less than the share to which he was entitled, the minor's suit, on attaining majority to recover the full share to which he was entitled, was not a suit for relief on the

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[40] *Vishnu Sakharam* v. *Kashinath,* (1886) 11 Bom. 174.

[41] *Raja Rajeswara* v. *Secretary of State,* 1929 Mad. 179=52 Mad. 12=55 M.L.J. 770.

[42] *Raghunath Rithkaran* v. *The Imperial Bank,* (1925) 91 I.C. 342 =50 Bom. 49=27 Bom. L. R. 1229=1926 Bom. 66.

[43]

[44] *Dwarkanath* v. *Shashti Kinkar,* (1913) 18 I.C. 869 (Cal.).

[45] *Sher* v. *Piara Ram,* (1922) 69 I.C. 501=1924 Lah. 324; cf. *Kazi Sultan Mahmud* v. *Alim Khan,* 3 P.L.R. 1906.

[46] *Wasudeo* v. *Vithal,* (1920) 55 I.C. 422 (Nag.).

ground of fraud or mistake, and the suit was not subject to the limitation of three years prescribed by Art. 95 or 96 of the Limitation Act.[47]

(3) Where a plaintiff sues for recovery of possession of certain property sold under a mortgage-decree to which he was a party, and he cannot take the Court sale as a nullity, a suit to recover from the purchaser what he has purchased at the Court-sale would come under Art. 12; and not under Art. 96 even though the plaintiff seeks relief on the ground of mistake.[48]

1583. **STARTING POINT OF LIMITATION.**—Where money has been paid, under protest, and plaintiff has a right to sue the Government to recover it as money paid by him under a mistake, Art. 96 would govern the suit, and the starting point would be the date when fact was discovered entitling the plaintiff to recover the amount. The plaintiff's suspicions may have been roused earlier, but this is not sufficient under the article which requires a *knowledge* of the facts.[49] In *Gopilal Bhawaniram* v. *Pandurang,*[50] the case came under Art. 62, Limitation Act, but assuming that Art. 96 applied, the suit could not be maintained where the plaintiff was presumed to have had actual or constructive notice of the illegality from the first, and there could be no question of holding the plaintiff as against the defendants or any of them was innocent in the matter. But, on general principles, where no duty is enforced by law to make enquiry the mere fact that the plaintiff did not avail himself of the means of knowledge open to him does not bar him of the relief.[1] Time runs forthwith from discovery of mistake, and is not postponed till the decision of an appeal by the plaintiff.[2] In *Martand* v. *Dhondo,*[3] the suit was held to be time-barred taking time to commence running from the decision of the trial Court and not the appellate Court.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 97. | For money paid upon an existing consideration which afterwards fails. | Three years. | The date of the failure. |

## SYNOPSIS.

1584. Corresponding provisions.
1585. **Scope and applicability.**
1586. Privy Council decisions.

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[47] *Lal Bahadur Singh* v. *Sispal Singh,* (1892) 14 All. 498=12 A.W.N. (1892) 61.

[48] *Nagabhatta* v. *Nagappa,* 46 Bom. 914=24 Bom. L. R. 423.

[49] *Balwant Singh* v. *Secretary of State,* (1903) 25 All. 527=30 I.A. 172 (P.C.).

[50] 92 I.C. 640=1926 Nag. 241.

[1] Wood, Limitation, 4th Edn., p. 1416.

[2] *Hukamchand* v. *Pirthichand,* 21 Bom. L. R. 632 (P.C.).

[3] 23 Bom. L. R. 69; Followed 21 Bom. L. R. 632 (P.C.); cf. *Basu Kuar* v. *Dhum Singh,* 11 All. 47 (Where the High Court reversed the decree, and then the cause of action accrued).

1587. Allahabad cases.
1588. Bombay cases.
1589. Calcutta cases.
1590. Madras cases.
1591. Lahore cases.
1592. Other High Courts.
1593. **Conclusion.**
    (1) Applicability of Art. 97.
1594. (2) Applicability of Art. 116.
1595. (3) When consideration fails.
    (*i*) contract void *ab initio*.
    (*ii*) Possession taken under void contract.
    (*iii*) Void executory sales.
    (*iv*) Voidable contract, not followed by possession.
    (*v*) Possession taken under voidable contract.
    (*vi*) Possession decreed in first Court.
    (*vii*) Possession failed in first Court.
    (*viii*) Sales in execution.
    (*ix*) Suit against mortgagor on failure of consideration.

## NOTES.

**1584. CORRESPONDING PROVISIONS.**—This article is the same as Art. 97 of Sch. II of the Limitation Act XV of 1877: and Art. 98 of the Limitation Act IX of 1871. Under Act XIV of 1859, suits of this nature were governed by the general provision in S. 1, cl. 16 of that Act.

We have seen in notes under Art. 62, *ante,* that the English Common Law form of actions for money had and received, also included claims for refund of money paid for consideration which failed subsequently. This equitable form is no longer in use in England. Under statutory law, time begins to run, in cases of failure of consideration as soon as the failure has with certainty occurred.[3-a] But, it does not begin to run until such event, as until that time no right of action accrues to recover back the money paid.[3-b]

**1585. SCOPE AND APPLICABILITY.**—This article contemplates cases of contracts and transfers, where there was an existing consideration at the time of the contract or transfer which has subsequently failed, when the contract is invalidated, or the transfer is rescinded.

**Art. 62 and 97 compared.**

It has been pointed out in notes under Art. 62, that Art. 97 does not apply to transactions which are *void ab initio.*[4] Art. 62 applies where a sale is void *ab initio,*[5] either because there is no consideration

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[3-a] Lightwood, p. 239.

[3-b] Wood, p. 787.

[4] *Venkata Narasimhulu* v. *Peramma,* 18 Mad. 173=5 M.L.J. 32; *Dharm Chand* v. *Gorelal,* (1918) 47 I.C. 886 (890) (Nag.).

[5] *Mt. Munni* v. *Madan Gopal,* (1915) 27 I.C. 733=13 A.L.J. 185 (Sale in favour of a minor); *Butaram* v. *Gurdas,* 44 P.R. 1918=46 I.C. 26 (Property sold did not belong to the vendor).

at all for the contract,[6] or there is unlawful consideration,[7] or the transaction is a nullity.[8] Article 62, would apply to a suit to recover an amount paid under a void agreement,[9] or to recover the purchase-money where sale is void *ab initio,* and possession is not given to the purchaser.[10] But, where the sale deed is *voidable,* at the instance of a third party, the article applicable would be Art. 97, Limitation Act.[11] Where a sale valid at its date, fails subsequently by reason of dispossession, a suit by purchaser to recover the whole or a portion of the purchase-money falls under this article.[12] Similarly, a suit for the recovery of an advance paid under a contract for sale of land on the Court's refusal to decree specific performance is governed by Art. 97, and not by Art. 62.[13] Where the plaintiff had immediately on attaining majority repudiated a mortgage executed in his favour during his minority, and subsequently brought a suit for refund of the mortgage amount paid out of his estate, the suit was held to be governed by three years' period of limitation under Art. 62, or Art. 97, according as to whether the contract was *void* or *voidable.*[14]

1586. **PRIVY COUNCIL CASES.**—The scope and application of Art. 97 has been considered by their Lordships of the Judicial Committee in several leading cases, which may be briefly noticed.

(1) In *Basso Kuar* v. *Lala Dhum Singh,*[15] where in contemplation of a sale of land by the debtor to the creditor, it was agreed that the book debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed on the ground that no effectual agreement had been made, it was held that this decree brought about a new

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[6] *Jagannath* v. *Girdhari,* 29 I.C. 429 (433)=19 C.W.N. 102.

[7] *Bai Diwali* v. *Umed Bhai,* (1916) 36 I.C. 564=40 Bom. 614=18 Bom. L. R. 773.

[8] *Juscurn Boid* v. *Pirthi Chand,* 46 Cal. 670=50 I.C. 444=23 C.W.N. 721 (P.C.).

[9] *Hansraj* v. *Dehradun M. E. T. Co.,* 1933 P.C. 63 (65).

[10] *Hanuman* v. *Hanuman,* (1891) 19 Cal. 123=18 I.A. 158 (P.C.); *Ratan Bai* v. *Ghasi Ram,* (1932) 134 I.C. 1157=55 Bom. 565=1932 Bom. 36; Relied on *Ardeshir* v. *Vijesing,* (1901) 25 Bom. 593=8 Bom. L. R. 1910; also see *Abdul Rahim* v. *Kada,* 1930 Sind 12=118 I.C. 203.

[11] *Jagannath* v. *Girdhari,* 29 I.C. 429 (433)=19 C.W.N. 102.

[12] *Venkatanarasimhulu* v. *Peramma,* 18 Mad. 173; *Hanuman* v. *Hanuman,* (1891) 19 Cal. 123 (P.C.) and *Premsukh Das* v. *Namdeo,* (1920) 55 I.C. 93 (Nag.); also see *Munni* v. *Kunwar,* 45 All. 378 (379) =1923 All. 321=21 A.L.J. 265; *Tulsi Ram* v. *Murlidhar,* 26 Bom. 750; *Narsingh* v. *Pachu,* 37 Bom. 538=20 I.C. 254.

[13] *Bommanaboyina* v. *Ramaraju,* (1917) 40 I.C. 893 (Mad.).

[14] *Milkha Singh* v. *Fazl Din,* 145 I.C. 186=1933 Lah. 581=34 P.L.R. 96.

[15] (1888) 11 All. 47=15 I.A. 211 (P.C.).

state of things, and imposed a new obligation on the debtor to pay that which he had retained in payment of his land, the **date of the decree giving the date of the failure of an existing consideration** within the meaning of Art. 97 of the Limitation Act. Their Lordships observed that

> "a debt retained in part-payment of the purchase-money is in effect, and as between vendor and purchaser, a payment of that part; . . . . *D.S.* retained the money, and *B.M.* lost the use of it, in consideration of the villages which formed the subject of the sale-deed. That consideration failed when the decree of 1884 was made, and it failed nontheless because the failure was owing to *B.M.'s* own reluctance to take it under the conditions insisted on by *D.S.*"[16]

**19 Cal. 123 (P.C.)**

(2) The leading authority on the scope of Art. 97 is the Privy Council decision in the case of *Hanuman Kamat* v. *Hanuman,*[17] where a purchaser sued to recover the purchase-money and interest thereon as his suit for possession of the property sold failed on the ground that the vendor being a member of the joint-Hindu family the sale could not effectively give title to the plaintiff, the transaction being repudiated by the other members of the family as not being binding upon them and made without their consent, Sir R. Couch, in delivering their Lordship's judgment observed:—

> "There are two articles in that schedule, which it has been said may be applicable to the present case. The 62nd article provides that, in a suit for money had and received the period of limitation runs from the time of the money being received. The 97th article applies to a suit to recover money upon an existing consideration which afterwards fails, and it is said that the period of limitation is to date from the time when the consideration failed. Their Lordships are of opinion that the case must fall either within Art. 62 or Art. 97. **If there never was any consideration** then the price paid by the appellant was money had and received to his account. . . . . . But their Lordshps are inclined to think that **the sale was not necessarily void, but was only voidable** if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only **from the time when the appellant** endeavoured to obtain possession of the property, and being opposed, **found himself unable to obtain possession.**"

**45 All. 179 (P.C.)**

(3) In *Harnath* v. *Indar,*[18] the agreement was manifestly void from its inception, because its subject-matter was incapable of being found in the manner stipulated. The claim for refund of purchase-money arose out of a sale of a mere expectancy which was opposed to the provisions of the Oudh Estates Act, and the Subordinate Judge applied Art. 62 following 15 Cal. 51, where it was held

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[16] *Bassu Kuar* v. *Dhum Singh,* (1888) 11 All. 47 (57)=15 I.A. 211 (P.C.).

[17] (1891) 18 I.A. 158=19 Cal. 123 (P.C.).

[18] (1922) 50 I.A. 69=45 All. 179=27 C.W.N. 949=37 C.L.J. 346 (P.C.).

"that purchase-money paid for a consideration which has wholly failed is money received for the use of the buyer, and a suit to recover back the money is governed by Art. 62 of Limitation Act, time having commenced to run from the date of the payment of purchase-money".

The Privy Council reversed the decree of the lower Courts without mentioning any particular article applicable to the case, and held that the time would run from the time when the demand for possession by the vendee was resisted, and the vendor's rights were discovered to be void. It would seem that Art. 62, must have been in contemplation.

**46 Cal. 670 (P.C.)**

(4) In *Juscurn Boid* v. *Pirthi Chand Lal,*[19] their Lordships were dealing with the case of a plaintiff, a purchaser at *patni* rent sale, which was set aside by the Court at the instance of a *darpatnidar.* He had sued to recover the purchase-money and also the rent which he paid to the Zemindar; and, their Lordships, while pointing out Art. 62 to be the more appropriate article which would apply to the suit as it related to an involuntary transfer, were of opinion that the suit fell under Art. 97, and that the starting point of limitation would be not the failure to get or retain possession, but the **date of the challenge to the sale, and the negation of the purchaser's title.** It was further held in that case, putting an end to the conflict previously existing on this point, that the **decree of the first Court,** by which the sale was set aside would be the starting point, and not the date of the decree of the appellate Court where it confirms the decree of the first Court.[20]

**50 Cal. 929 (P.C.).**

(5) The earlier decision in *Harnath* v. *Indar,*[21] was explained by the Judicial Committee, in the case of *Annada Mohan Roy* v. *Gour Mohan,*[22] to have proceeded upon the special circumstances of the particular case, *viz.,* that the discovery of the agreement being unenforceable was later than the date of the contract itself; and, their Lordships laid down the general rule that, in the absence of any proof of the special facts, the discovery of the agreement becoming unenforceable or of the contract becoming void must normally be taken to be the date of the agreement or contract itself, and that the **cause of action to recover back the consideration, under S. 65 of the Indian Contract Act, would accrue on the date of the agreement.**

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[19] (1918) 46 I.A. 52=46 Cal. 670=36 M.L.J. 557 (P.C.).

[20] *Ibid.,* (1918) 46 I.A. 52=46 Cal. 670=36 M.L.J. 557 (P.C.); see and cf. *Rajagopalan* v. *Tirupananthal,* (1907) 30 Mad. 316=17 M.L.J. 149 and *Sarvothama Row* v. *Chinnasami Pillai,* (1918) 42 Mad. 507 =36 M.L.J. 157.

[21] 45 All. 179 (P.C.).

[22] (1923) 50 Cal. 929=50 I.A. 239=45 M.L.J. 617 (P.C.).

**5 Rang. 283 (P.C.).**

(6) The recent decision of the Privy Council in *Ma Hnit* v. *Fatima Bibi,*[23] is an instance of the application of Art. 97, to relief on the ground of a subsequent failure of an existing consideration. Where the plaintiff obtained a mortgage of certain properties of a minor, on the representation that they belonged to the defendant who also acted for the minor at the same time, and a decree followed on the basis of this mortgage, in execution of which the equity of redemption was purchased by a stranger who subsequently sold the same to the plaintiff, but the minor obtained the possession from the plaintiff, and the latter sued to recover principal and interest borrowed by the defendant. It was held that the suit was within three years of the **date of the decree obtained by the minor, which was the date of the failure of the consideration.** In this case there was no failure of consideration at the time of the loan upon which the loan of the money and the promise to repay it were made. It was only a case where there was a subsequent failure of consideration which on the facts did not occur until the date of the decree.

1587. **ALLAHABAD CASES.**—Following the decision of their Lordships of the Privy Council in *Basukuar* v. *Whumsingh,*[24] the Allahabad High Court has applied Art. 97, in the case of *Udit Narain* v. *Muhd. Minnatulla,*[25] where the defendants against whom a decree for foreclosure was outstanding agreed to sell, certain immoveable property to the plaintiff, and the plaintiff paid into Court as part of the consideration the amount due by the defendant under the foreclosure decree; but, the defendants neither executed a conveyance of the property which they had agreed to sell nor did they return to the plaintiff the money which he had paid on their behalf: and the plaintiff thereupon sued the defendants, claiming in the alternative either a decree for a specific performance of the agreement to sell, or **a refund of the money paid by him as part of the consideration for the sale** agreed upon. This latter relief was granted by the High Court on appeal from the decree of the trial Court which had allowed specific performance; and the **date of the High Court's decree** declaring the agreement to sell to be unenforceable, was taken as starting point. In *Lachman Kachi* v. *Secretary of State,*[26] where the plaintiff paid part of the price for which he purchased insolvent's property from the Official Receiver, but the sale was not sanctioned, it was held that **the consideration failed when the plaintiff did not get the property** which had been promised to him, that is, when the property was sold, and the suit to recover the purchase-money paid to the Official Receiver was held

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23. 5 Rang. 283=31 C.W.N. 830=101 I.C. 414=1927 P.C. 99 (P.C.).

24. (1888) 11 All. 47 (P.C.).

25. (1903) 25 All. 618.

26. 1934 All. 547=1934 A.L.R. 438=148 I.C. 629=1934 A.L.J. 864 =4 A.W.R. 558.

governed by Art. 97, Limitation Act. A suit for specific performance, and a **suit for return of earnest money** are based on different causes of action. **Limitation** for return of earnest money **runs from the dismissal of suit for specific performance.**[27] Where a suit for setting aside of the decree purchased by the plaintiff on the ground of fraud is decreed in the first Court and the decree of the first Court is reversed on appeal, but on further appeal to the High Court the decree of the first Court is restored, in a **suit by plaintiff for refund of the price** on the ground of failure of consideration **time begins to run from the date of the High Court's decree** and not from the date of the first Court's decree as when that decree was set aside by the District Judge, it no longer remained in force.[28]

**Applicability of Art. 116.**

**1587-A.** The **Allahabad High Court** has observed in *Zia-ud-din Ahmad Khan* v. *Akbar Ali,*[29] that in determining the particular article of the Limitation Act applicable to a case much depends on the **nature of the plaintiff's claim.** Where the plaintiff seeks to enforce a **covenant in the nature of indemnity,** the suitable article to be applied is Art. 116, Limitation Act. This article inincludes an implied contract also. This was the view taken in *Hanwant Rai* v. *Chandi Prasad,*[30] relying on *Mul Kunwar* v. *Chittarsingh,*[31] where the claim was upon a covenant contained in the sale-deed, that the vendee would be entitled to a refund of consideration and to damages in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way, and it was held that this was a suit on that covenant and for the breach of it within Art. 116 of the Limitation Act. The contrary view taken in *Kundenlal* v. *Bisheshar Dayal,*[32] has not been followed. The recent judgment by a Division Bench in *Muhd. Sidiq* v. *Muhd. Nuh,*[33] supports the view taken in *Hanwantrai's* case.

**1588. BOMBAY CASES.**—Art. 97 prescribes limitation for a suit for money paid upon an **existing consideration which afterwards fails.** Where the defendant had passed a sale-deed in favour of the plaintiff, but the transaction was found to be a sham one, in which the full consideration of the sale-deed was falsely recited to have been paid in cash to the defendant, and the amount due to an undisclosed mortgagee did not form part of the consideration of the sale, it was held that the suit was not for money paid upon an existing consideration which afterwards failed: and that Art. 61, and not Art. 97, applied to the case.[34]

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[27] *Munni Baba* v. *Kunwar Kamta Singh,* 1923 All. 321=45 All. 378=72 I.C. 86.

[28] *Sabir Hussain Khan* v. *Jan Muhd.,* 1931 All. 651=133 I.C. 415; Relied on *Sarvothama* v. *Chinnasami,* (1919) 42 Mad. 507=49 I.C. 729.

[29] 1932 All. 358=136 I.C. 829=1932 A.L.J. 317.

[30] 1929 All. 293=51 All. 651=119 I.C. 243=1929 A.L.J. 433.

[31] (1908) 30 All. 402=5 A.L.J. 480=1908 A.W.N. 185; also see *Collector of Mirzapur* v. *Dawansingh,* (1908) 30 All. 400.

[32] 1927 All. 734=25 A.L.J. 841=103 I.C. 165=50 All. 95.

[33] 1930 All. 771=1930 A.L.J. 653=124 I.C. 185=52 All. 604; Relied on 1929 All. 293=51 All. 651=119 I.C. 243.

**Void contracts where no possession given.**

In *Javerbhai* v. *Gordhan,*[35] where the mortgage was void *ab initio,* as being opposed to the Bombay Bhagdari Act, it was held that the mortgagee could sue for the recovery of mortgage-money as for money had and received contemplated under Art. 62, Limitation Act, as consideration failed at the date of the transaction, there being no subsequent failure of consideration. Similarly, in *Bai Diwal* v. *Umedbhai,*[36] where also the mortgage was held to be void *ab initio,* the mortgagee was held entitled to the debt only as a claim for money had and received under Art. 62. It may, however, be questioned if there was a failure of consideration *ab initio* in these cases, as the defendant in one case was paying rent to the plaintiff as a tenant of the mortgaged property until the date after the expiry of lease when the defendants refused to surrender possession; and, in the other case the mortgagee was in possession under the usufructuary mortgage-deed. If these facts be borne in mind, the decision in both these cases would conflict with the pronouncement of their Lordships of the Privy Council in *Ma Hnit* v. *Fatima Bibi.*[37] However, on the assumption that contracts were void *ab initio,* the proposition laid down would seem to be in accordance with other authorities on the point.

**Void executory sales when possession is given.**

In *Ardeshir* v. *Vaje Singh,*[38] where the vendor was found not entitled even at the date of sale to a portion of the property sold, and the vendee sued for compensation, it was held that the consideration failed on the date of the sale itself, the sale being void *ab intio,* and therefore Art. 62 would apply, and not Art. 97, Limitation Act. A distinction is made between cases where from the inception the vendor had no title to convey, and the vendee had not been put in possession of the property, and other cases, where the sale is only voidable on the objection of third parties and possession is taken

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[34] *Raghunath Abaji* v. *Lahnu Vithoba,* 1931 Bom. 39=32 Bom. L. R. 1376=128 I.C. 907; cf. 11 All. 47=25 All. 618 (P.C.); and 28 All. 466, where agreements were for consideration, afterwards discovered to be void.

[35] (1914) 39 Bom. 358.

[36] (1916) 40 Bom. 614.

[37] 5 Rang. 283=54 I.A. 145 (P.C.).

[38] (1901) 25 Bom. 593.

**Voidable contract where possession is given.**

under the sale.[39] The legal position is different where possession has actually been given to the plaintiff, under a sale; there is then no question of the sale being void *ab initio* or voidable, or the contract being executed or executory, and under Art. 97, the consideration would be considered to have failed only when the vendee is deprived of his possession.[40] However, it was held in *Gulab Chand* v. *Narayan,*[41] that the plaintiff's knowledge of the sale to a third person by which the plaintiff's title was negatived, was the starting point for the recovery of the purchase-money paid by him to the defendant: and not the date of the possession being lost.

**Applicability of Art. 116.**

Where plaintiffs bought land under a registered deed and were put in possession, and the land was leased to a tenant who subsequently set up his own title to the land, and his claim was also embodied in a final decree of the Court; and plaintiff then filed a suit against their vendor for the recovery of purchase-money, etc., it was held that Art. 116 and not Art. 97 applied, and time began to run only when the tenant obtained the decrees supporting his own title to the land.[42] But, in *Tulsiram* v. *Murlidhar,*[43] where the clause in the sale-deed was not a contract of indemnity, but at most a covenant for title and quiet enjoyment, it was held in a claim for damages to recover money upon an existing consideration that had failed, that the case fell under Art. 97, Limitation Act, and the failure of consideraion took place when the plaintiff endeavoured to obtain possession of the property, and being opposed found himself unable to obtain it. It was observed by Jenkins, C.J., that the sale-deed in *Hanuman* v. *Hanuman,*[44] was prior to the passing of the Transfer of Property Act, and that in *Ardeshir* v. *Vajesing,*[45] was passed at a time when that Act was not in force in Bombay Presidency.[46] Similar views were held in *Ganapa* v. *Hammad Saiba.*[47] In a suit against mortgagor on failure of consideration, before the passing of the Transfer of Property Act, where the mortgage security failed, it was held that the mortgagee's suit for recovery of the loan was governed by Art. 97, Limitation Act.[48] Where a sale is void *ab initio*, and possession is not given to the purchaser, a suit to recover the purchase-money would be governed by Art. 62. Where, however, the title is imperfect and possession is not handed over, and it is subsequently discovered that the contract of sale became void, Art. 97 would apply to a suit to recover purchase-money on an existing consideration which afterwards failed, from the time when the purchaser endeavoured to obtain possession of the property and being opposed, found himself unable to obtain possession, but where possession has been handed over by the vendor to the vendee, the cause of action would not arise till the vendee is dispossessed.[49]

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[39] *Multanmal Jaydram* v. *Budhumal Kevalchand,* 1921 Bom. 252=45 Bom. 955.

[40] *Narsing* v. *Pachu,* (1913) 37 Bom. 538.

[41] (1916) 41 Bom. 31.

[42] *Multanmal Jayaram* v. *Budhumal Kewalchand,* 1921 Bom. 252=45 Bom. 955.

[43] (1902) 26 Bom. 750; Relied on *Hanuman* v. *Hanuman,* (1891) 18 I.A. 158=19 Cal. 123 (P.C.).

[44] 19 Cal. 123 (P.C.).

[45] (1901) 25 Bom. 593.

[46] *Tulsiram* v. *Murlidhar,* 26 Bom. 750 (756) (Per Jenkins, C.J., "we allude to these facts because we desire to guard ourselves against being taken to decide that where the Transfer of Property Act applies, there may not be remedies to which a different period of limitation would be applicable").

[47] 49 Bom. 596 (Art. 116 applied).

**Void transactions.**

1589. **CALCUTTA CASES.**—A failure of consideration may be a failure from the very commencement, if the sale transaction is void *ab initio*, though it may not become apparent to a vendee until a suit for possession is brought and fails.[50] **Art. 62 will apply to a suit for refund of purchase-money,** and not Art. 97, which applies to suits for payment of money on an existing consideration which subsequently fails.[1] **A suit by a lessee for refund of a part of the premium paid** for a lease proportionate to the portion of the land of which possession could not be obtained by him, it having been previously leased out by the lessor to another, is governed by Art. 62, Limitation Act.[2] **If there never was any consideration,** Art. 62 would apply, and the cause of action would arise from the time of payment.[3] In *Janaki* v. *Bijoy*,[4] where the plaintiff purchased at a *patni* sale, under the Regulation, and the *patnidar* having instituted a suit for cancellation of the sale, the Zemindar preferred an appeal which was ultimately dismissed, and the purchaser who had paid rent to the Zemindar in the meantime to prevent further sale under the Regulation, instituted a suit for recovery of the money paid by him as rent, it was held that at the time when the payment was made there was a failure of consideration, and Art. 97 was not applicable to the suit. But, where goods paid for before delivery are short delivered, there is **failure of consideration on the date of delivery,** and limitation in

**Failure of consideration when.**

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48. *Khandapa* v. *Abaji*, 11 Bom. 475.

49. *Ratanbai* v. *Ghasi Ram*, 33 Bom. L. R. 1092=55 Bom. 565=134 I.C. 1157.

50. *Hanuman* v. *Hanuman*, (1887) 15 Cal. 51; Affirmed in (1891) 19 Cal. 123=18 I.A. 158 (P.C.).

1. *Hanuman* v. *Hanuman*, (1891) 19 Cal. 123 (P.C.).

2. *Mahamed Ayub Chowdhury* v. *Elahi Baksh Mandal*, (1919) 49 I.C. 258 (Cal.); Relied on 19 Cal. 123 (P.C.); and 25 B. 593.

3. *Janaki* v. *Bijoy*, (1921) 33 C.L.J. 366=1921 Cal. 596.

4. *Ibid.*

respect of a suit to recover back the sum overpaid will be reckoned from that date.[5] Where purchase-money was paid and the stamp papers for conveyance were passed, but the defendant informed the plaintiff that the conveyance could not be executed, and the plaintiff failed to get possession, it was held that Art. 97 applied to a suit for refund of the purchase-money.[6] In *Galstaun* v. *Shahebzadi,*[7] where there was no specific date for the performance of the contract for sale of property, the cause of action for a suit for the return of deposit amount was held to date from the time **when the contract became impossible of performance**; that is, when the property which had been mortgaged by the vendor was sold in satisfaction of mortgage. In the case of void executory sales, a distinction was drawn between a voluntary and involuntary transfers. Where after an auction sale the **judgment-debtor is declared to have no saleable interest** in the property sold by a decree of Court, limitation for a suit to recover purchase-money begins from the **date of** such **a decree** and not from the date when purchaser was deprived of the possession of property purchased.[8] In *Amrita* v. *Jogendra,*[9] Art. 120 was applied to a sale held by Court under the provisions of the Civil Procedure Code; and Art. 62 or 97 would be applied to cases where the suit is between the original contracting parties. But, in *Ram Kumar* v. *Ram Gour,*[10] their Lordships of the Privy Council made no such distinction between a voluntary and an involuntary transfer, and applied Art. 62, Limitation Act.

**Applicability of Art. 116.**

In a **suit against a mortgagor on failure of consideration,** Art. 97, can have no application, because since the Transfer of Property Act has come into operation, the mortgagor is personally liable under **S. 68 of the Transfer of Property Act** for the mortgage-money, irrespective of the question whether there is a personal covenant in the deed or not.[11] However, a suit for personal decree against the mortgagor, in case the mortgagee is deprived of the mortgage security, or the mortgagor fails to secure the mortgagee in possession is governed by Art. 120, Limitation Act. If, however, the mortgagor's liability be taken to arise under a covenant implied in law, Art. 116 would apply if the document is a registered one.

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[5] *Atul Kristo Bose* v. *Lyon & Co.,* (1887) 14 Cal. 457.

[6] *Sudha Mukh Debi* v. *Chairman,* 58 C.L.J. 235.

[7] 56 Cal. 455=117 I.C. 700=1929 Cal. 216.

[8] *Bijraj Boyed* v. *Bijoy Sinha,* (1926) 91 I.C. 768=1926 Cal. 297=30 C.W.N. 79; Compare *Amritalal Bagchi* v. *Jogendralal,* (1913) 40 Cal. 187 (Where limitation was computed from the date the sale was declared invalid, although Art. 120 was held applicable).

[9] (1912) 40 Cal. 187; also see *Makar Ali* v. *Sarfuddin,* 50 Cal. 115 (Art. 181).

[10] 37 Cal. 67 (P.C.).

[11] *Maharaja Ram Narain* v. *Adhindra,* 20 C.W.N. 989; s.c. 21 C.W.N. 383 (P.C.).

**1590. MADRAS CASES.**—Art. 97, Limitation Act applied where the plaintiff obtained from the defendant a sale deed of certain land and paid part of the purchase-money, but subsequently, a judgment-creditor of the defendant's husband obtained a decree in the High Court under which the plaintiff was ejected.[12] The cause of action accrued on the date of the failure of consideration, *i.e.*, the date of the High Court's decree. Where a sale is only voidable at the instance of a third person and possession is taken by the purchaser under such a sale, the cause of action for a suit to recover the consideration money arises **when the possession of the purchaser is disturbed** and not till then.[13] Where from the inception the vendor had no title to convey, and the vendee has not been put in possession of the property, the starting point of limitation will be the date of the sale.[14] Where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties, the cause of action will arise only on the disturbance of possession.[15] Until that possession is interfered with, the purchaser is not bound to ask for the return of his purchase-money on the possible ground that at some future time his sale may be impeached.[16] In *Rajagopalan* v. *Thirupananthal Thambiran*[17] and in *Sriramulu* v. *Chinna Venkatasami*,[18] possession had passed to the vendee, and there was subsequent deprivation of possession. A suit by a transferee under a *voidable* transfer who has been in actual possession of the property transferred but has been dispossessed under a decree avoiding the transfer, for recovery of the consideration paid by him for the transfer is governed by Art. 97 of the Limitation Act, and the limitation begins to run from the **date of actual dispossession** of the plaintiff and not from the date of the decree avoiding the transfer.[19] In *Meenakshi* v. *Krishna Royar*,[20] it was held that no

**Failure of consideration when.**

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[12] *Venkatanarasimhulu* v. *Peramma*, (1894) 18 Mad. 173=5 M.L.J. 32.

[13] *Subbaraya Reddiar* v. *Rajagopala Reddiar*, (1914) 23 I.C. 570=38 Mad. 887=15 M.L.T. 240=1914 M.W.N. 376.

[14] *Ramanatha Aiyar* v. *Oyhaloor Parthiriserri*, (1913) 21 I.C. 740=14 M.L.T. 524=1 L.W. 110=1913 M.W.N. 1029.

[15] *Subbaraya Reddiar* v. *Rajagopala Reddiar*, supra.

[16] *Ibid.*; Relied on 37 Bom. 538=20 I.C. 254=15 Bom.L.R. 559.

[17] 30 Mad. 316=17 M.L.J. 149.

[18] 25 Mad. 396.

[19] *Harihara Manglath Kizhoor* v. *Thaiparambil Kottul Ummar*, (1922) 70 I.C. 787=46 Mad. 40=32 M.L.T. 3=1922 M.W.N. 634=43 M.L.J. 921=16 M.L.W. 684=1923 Mad. 46.

[20] 32 I.C. 176=19 M.L.T. 163.

possession had been given under a contract of sale, the sale was not void *ab initio,* and plaintiff was entitled to recover his purchase-money under Art. 97, Limitation Act. The starting point for limitation was held to be **the date of dispossession, and not the** date of the sale-deed. Similarly, where a purchaser of a service *inam* land from a person claiming to be the office-holder is subsequently evicted by a decree of Court obtained by the lawful holder of the office, a suit by the purchaser for recovery of the purchase-money paid by him for failure of consideration is governed by Art. 97 of Sch. I to the Limitation Act, in a case where he was put into possession on the date of sale. The starting point of limitation for such a suit is the date of dispossession, **and not the date of sale.**[21] Where the vendee in his suit to obtain possession of the property sold, was not able to obtain possession, because the sale was voidable, time would begin to run only from the date when the plaintiff endeavoured to obtain possession of the property, and being opposed found himself unable to obtain possession.[22]

**Applicability of Art. 116.**

It has been held in several cases of the **Madras High Court** that under the Transfer of Property Act, S. 55, there is an **implied covenant of title and quiet enjoyment** in every contract of sale, and that in case of *registered* sale-deeds, a suit by the purchaser for refund of purchase-money on account of failure to get possession would be deemed to be a breach of contract in writing registered, within the meaning of Art. 116, Limitation Act, and time would start running from the date of dispossession or when the possession ought to have been delivered, and was obstructed.[23] Thus, a suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale deed executed after coming into force of the Transfer of Property Act is governed by Art. 116, Limitation Act.[24] In *Unichaman* v. *Ahmed Kutti,*[25] where the defendants demised certain land to the plaintiff under a registered *kanom* deed, the plaintiff was allowed six years, under Art. 116 of the Limitation Act, from the date of his eviction, to sue to recover the amount of the *kanom.* Similarly where by a registered document, defendant leased certain villages to plaintiff, and plaintiff applied to be put in possession, but never obtained possession his suit, for the alternative relief of damages which he had sustained by the failure on the part of defendant to put him into possession, was held governed by Art. 116, Limitation Act.[26] Where a lessor has received a certain sum in advance as part of the rent of the property leased, but fails to deliver possession of the property to the lessee, and where the lessee sues for the refund of the advance, time begins to run from the date of the lease.[27] A claim based on a registered indemnity bond, is governed as to limitation by Art. 116 of the Limitation Act, and a claim on the implied covenant for good title in a sale-deed is also governed by Art. 116, Limitation Act.[28] The case in *Basivi Reddi* v. *Nagamma,*[29] to the contrary, follows the Privy Council decision in *Hanuman* v. *Hanuman,*[29-a] without noticing that the Privy Council case would not apply where the Transfer of Property Act is now in force. In *Ramanatha Aiyar* v. *Raman,*[30] where by a registered deed of assignment, *A granted* to *B, jenmi* rights in certain land for valuable consideration, and *B,* was evicted under an appellate decree confirmed by the High Court, as the vendor was found entitled only to mortgage rights, it was held that a suit for damages and refund of purchase-money was governed by Art. 116, and was barred: though the Transfer of Property Act did not bar the suit to recover the money on failure of consideration.

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[21] *Vangali Venkatanna* v. *Polamanasetti China Appalaswami,* (1925) 86 I.C. 755=48 M.L.J. 217=1925 Mad. 749=22 L.W. 126.

[22] *Arunachala* v. *Ramasami,* (1914) 38 Mad. 1171.

[23] *Chidambaram* v. *Sivathasamy,* 15 M.L.J. 396; *Nageswara* v. *Sambasiva,* (1911) 1 M.W.N. 361=11 I.C. 337; *Krishnan* v. *Kannan,* 12 Mad. 8.

[24] *Sigamani Pandithan* v. *Manibadra Nainar,* 1926 Mad. 255=49 M.L.J. 668=22 L.W. 704=91 I.C. 514; also see *Gopalasamy* v. *Nummachi,* (1923) 74 I.C. 416=1923 Mad. 392=17 L.W. 54.

[25] (1897) 21 Mad. 242=8 M.L.J. 81.

**Art. 97 applied.**

A suit for the recovery of an advance paid under a contract for sale of land on the Court's refusal to decree specific performance is governed by Art. 97, and not by Art. 62 of the Limitation Act.[31] Where plaintiff purchased certain properties from a junior member of a joint Hindu family, and when he attempted to take possession, he was obstructed by a prior purchaser of the properties from the manager of the joint-family, and plaintiff then brought a suit for possession of the properties, and succeeded in the first Court, but his suit was dismissed on appeal, and the High Court confirmed the appellate decree on second appeal, and an application for review of the judgment of the High Court was also unsuccessful, it was held that the consideration for the plaintiff's purchase should be deemed to have failed only on the **date of the High Court's decision,** and this was taken to be the starting point of limitation for purposes of Art. 97 of the Limitation Act.[32] However, where owing to a defect in title of the vendor to convey, the vendee is dispossessed in execution of a decree obtained against him setting aside the conveyance, the starting point of limitation for a suit by the vendee for damages for breach of covenant is the date of the original decree in execution of which he is dispossessed. The fact that there is an appeal and second appeal in the suit would not postpone the *terminus a quo* to the date of the appellate decree,

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[26] *Zemindar of Viziamagram* v. *Behara Suryanarayana,* (1901) 25 Mad. 587 (597); cf. *Avuthala* v. *Dayumma,* 24 Mad. 233 (Art. 116 not applied).

[27] *Appasami Ayyangar* v. *Krishnaswami Padayachi,* 1932 Mad. 225 =35 L.W. 68=1932 M.W.N. 51=138 I.C. 119.

[28] *Venkatachallam Pillai* v. *Krishnaswami Pathan,* (1919) 50 I.C. 673 (Mad.); also see *Thillai Kannu* v. *Abdul Kadir,* (1933) 140 I.C. 805 =1933 Mad. 126.

[29] (1910) 35 Mad. 39; cf. *Arunachala* v. *Ramasami,* (1914) 38 Mad. 1171=27 M.L.J. 517 and *Sigamani* v. *Manibadra,* 49 M.L.J. 668=1926 Mad. 255=91 I.C. 514.

[29-a] 19 Cal. 123 (P.C.).

[30] (1913) 21 I.C. 740 (Mad.).

[31] *Bommanaboywa* v. *Ramaraju,* (1917) 40 I.C. 893 (Mad.)=6 L.W. 44; Relied on 11 All. 47 (P.C.) and 19 Cal. 123 (P.C.); also see *Venkatarama Ayyar* v. *Venkatasubrahmanian,* (1899) 24 Mad. 27 (Suit for recovery of money paid on a consideration that has failed, is based on a cause of action different from that in the suit for specific performance. The suit was based on a partial failure consideration).

**Effect of appeal.**

> "because an original decree is not suspended by the presentation of an appeal, nor is its operation interrupted where the decree on appeal is one of dismissal".[33]

Where an appeal to a superior Court only results in the decree appealed against being confirmed there is no interruption in the running of time calculated from the date of the orginal decree.[34] The starting point for limitation for a suit for damages brought on the confirmation by an appellate Court of a decree declaring that defendant had no saleable interest in the property sold, is the **date of the first Court's decree,** and not the date of the appellate decree, irrespective of whether the case falls within Art. 95 or Art. 120 of the Limitation Act.[35] Where a decree is confirmed on appeal, time under Art. 97 runs from the date of the adverse judgment of the first Court. The running of the time is not postponed by reason of the filing of the appeal.[36]

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[32] *Sarvothama Rau* v. *Chinnasami Pillai,* (1919) 49 I.C. 729=36 M.L.J. 157=9 L.W. 379=25 M.L.T. 291=42 Mad. 507; also see *Rajagopalan* v. *Tirupananthal,* 30 Mad. 316=17 M.L.J. 149; cf. *Hukum Chand Boid* v. *Pirthichand,* 50 I.C. 444=46 Cal. 670=46 I.A. 52 (P.C.).

[33] *Mahamed Ali Sheriff Saheb* v. *Budharaju Venkatapathi,* (1921) 60 I.C. 235=39 M.L.J. 449=11 L.W. 537=27 M.L.T. 304.

[34] *Gopalasamy Iyengar* v. *Nummachi,* (1923) 74 I.C. 416=1923 Mad. 392=17 L.W. 54, Followed *Hukum Chand Boid* v. *Pirthichand,* 50 I.C. 444=46 Cal. 670 (P.C.); Not followed *Sarvothama* v. *Chinnasami,* 49 I.C. 729=42 Mad. 507=36 M.L.J. 157.

[35] *Nadukandilakath* v. *Kuyattil Kandan,* (1922) 70 I.C. 45=16 L.W. 285=31 M.L.T. 169=1923 Mad. 23=1922 M.W.N. 561.

[36] *Muthirulappa Pillai* v. *Kamaraja Pandia,* 1934 Mad. 224=39 M.L.W. 147=148 I.C. 523; Followed *Juscurn Boid* v. *Pirthichandlal,* 1918 P.C. 151=50 I.C. 444=46 I.A. 52=46 Cal. 670 (P.C.).

**1591. LAHORE CASES.**—Article 97 has been applied in the Punjab, where plaintiff sued to recover money due to him from the defendant, alleging that the deed of **mortgage executed by the defendant** by which the plaintiff was to be put in possession of a certain property until the debt was paid, **being unregistered, the debtor took advantage of the non-registration** to turn the plaintiff out of possession of the property. It was held that in effect the suit was one for money paid on an existing consideration, *viz.*, the creation of a possessory mortgage, which consideration subsequently failed by the possession being taken away by the defendant standing on his legal right of denying that any mortgage had been created.[37] Where plaintiff alleged a payment of certain money to defendant's agent, on the understanding that the decree should be held satisfied to the amount paid but the execution was sued out in respect thereof, and the defendant's agent distinctly declined to give credit for the money, the **suit, to recover money paid out of Court to satisfy the decree and not credited for,** was held governed by Art. 115, Limitation Act; but it was observed that Art. 97 may also be applicable so far as the payment of cash item was concerned.[38] An **auction-purchaser** who has paid the full price can bring a **suit to recover** that money, on being **dispossessed** of the property **by a successful claimant** establishing his right to property.[39] Art. 97 has also been applied to case of a decree debt paid to insolvent creditor, of which second payment was made to receiver, and plaintiff sued the creditor for refund.[40] Similarly, where a plaintiff, who had advanced money on a mortgage repudiates it himself, and files a suit for the money paid, such a suit is not a suit for compensation for breach of contract, and is governed either by Art. 62, or by Art. 97, according as to whether the contract is void or voidable.[41]

**Art. 97 applied.**

But, this article is not applied to suit by vendee for refund of purchase-money on a **void sale, where the property sold did not belong to the vendor,** and the consideration failed at the very outset.[42] Similarly, Art. 97 is not applicable, **where a house** was mortgaged while under attachment, and the mortgagee sought to enforce the personal security against mortgagor.[43] Where two widows sold certain property to *S*, by sale-deed containing the covenant as regards quiet enjoyment and possession, but the reversioners succeeded in contesting the sales and obtained a declaratory decree from the Privy Council: and meanwhile *S* had sold a portion of the property to plaintiffs, who on being dispossessed brought a suit against the widows based on the covenant embodied in their sale-deeds, it was held that Art. 97 did not apply, and that limitation did not commence to run till the vendees were actually dispossessed.[44] But, where the transaction was not void *ab initio*, but only voidable, Art. 97 would apply. For example, where *A's* suit against *B* was withdrawn and dismissed, on *B's* executing a mortgage in favour of *C*, and the latter admitting liability to *A* for the sum originally claimed from *B*. But, there was trouble over the mutation of mortgage and *C's* suit against *B* was subsequently dismissed. *A's* suit against *B*, was held governed by Art. 97, and not by Art. 62, Limitation Act.[45] The words "date of failure of consideration" in Art. 97, meant that the date to be taken was the date on which plaintiff ceased to derive any benefit from the transfer.[46] In *Nur Din* v. *Allah Din*,[47] where a mortgage of ocupancy rights was held to be invalid, time began to run under Art. 97, when mortgagors were put in possession, and not from when they were actually dispossessed.

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[37] *Gurmukhsingh* v. *Chandushah,* 193 P.R. 1888.

[38] *Ganpat* v. *Kirpa Ram,* 79 P. R. 1892; also see and cf. *Karm Clahi* v. *Hari Ram,* 1933 Lah. 112.

[39] *Asadullah* v. *Karamchand,* 4 Lah. 354; also see *Habibuddin* v. *Hatima Mirza,* 6 Lah. 283 (There is no implied covenant of title, under S. 55 (2), Transfer of Property Act, in a Court sale made in execution of a decree).

[40] *Dhanpatrai* v. *Devisaran,* 62 I.C. 929=1922 Lah. 103=4 L.L.J. 164 (Art. 97 or 120 applicable).

[41] *Milkhasingh* v. *Fazaldin,* 1933 Lah. 581=145 I.C. 136=34 P.L.R. 96.

[42] *Butaram* v. *Gurdas,* 44 P.R. 1918; Relied on 25 Bom. 593; and Followed 19 Cal. 123 (P.C.).

**When consideration filed.**

**1592. OTHER HIGH COURTS.**—Article 97 applies to a suit for money paid upon an existing consideration which afterwards fails, and the period prescribed is three years. But this article does not apply to **transactions which are void *ab initio*.**[48]

**Art. 97 not applied.**

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[43] *Ghulam Murtaza Khan* v. *Fazal Ilahi Khan*, 1927 Lah. 101=27 P. L.R. 801.

[44] *Mt. Gopal Dai* v. *Dhanna Mal.* 9 Lah. 191=1927 Lah. 570=9 L.L.J. 468=106 I.C. 804.

[45] *Ladditta* v. *Dost Muhammad*, 1932 Lah. 382=13 Lah. 188=33 P.L. R. 440=137 I.C. 828; also see *Ramhatti* v. *Sundardas*, (1920) 55 I.C. 413 (Lah.) (Art. 62, not applied, where mortgage was a genuine contract at the time when it was effected: but the consideration failed subsequently. Art. 97, read with Art. 116, applied); and *Chanan Mal* v. *Maharaj*, 1931 Lah. 448 (Art. 97 or 116 applied).

[46] *Nur Din* v. *Allah Din*, 1933 Lah. 83=140 I.C. 760=34 P.L.R. 104 (Date on which the plaintiff ceased to be in possession as mortgagee under the instrument); also see and cf. *Tapasimal* v. *Jhandoo*, (1921) 62 I.C. 953 (Lah.) (Consideration failed when plaintiff was declared to have no title to the land under the instrument: and not merely when he was dispossessed).

[47] 1933 Lah. 83=140 I.C. 760.

[48] *Harpal* v. *Narain*, 3 C.P.L.R. 173.

Where the **property** in suit was a cultivating holding not liable for sale, and **inalienable** from the very inception, there never existed any consideration which could afterwards fail.[49] **An action for breach of duty** declared by S. 108 of the Transfer of Property Act is regulated by Art. 116 of the Limitation Act, if the lease is in writing registered, the obligation being deemed to be embodied in the contract, and not by Art. 62, or Art. 97.[50] A mortgage by the manager of a joint Hindu family, unless made for necessity or antecedent debt, is absolutely void, and a suit brought to enforce such a mortgage, after the death of the mortgagor, or, in the alternative, for a **personal decree against the assets of the deceased,** must be brought within the period of limitation prescribed by Art. 116, Limitation Act.[1] Where Arts. 115 and 116 apply, the very basis of the suit is that the contract has been broken, is no longer in existence and damages are sought.' Art. 97, on the other hand applies when the plaintiff says the contract is still good and subsisting and an event contemplated by the contracting parties has happened, that is to say, the possible future inability of the plaintiff to enjoy the property, and the plaintiff relies upon the express or implied contract on the part of the defendant that in the happening of such circumstances the defendant will pay back the money which he has already received. **Under Arts. 115 and 116 the events subsequent to contract are immaterial while under Art. 97 they are material.** The difference between Arts. 97 and 116 has nothing whatever to do with the form of contract. The existence of a registered instrument is the item of difference between Arts. 15 and 116.[2] Where a house was sold with its site without apprising the vendee of the fact that the consent of both the co-sharers in the village was essential, and the sale was held voidable at the instance of the Lambardar, Art. 116 applied to the suit to reimburse money spent by vendee.[3] Where a guardian agreed to convey property of the minors after obtaining sanction of the Court, but he was found unfit to be the guardian and was removed from guardianship, it was held that a suit for money paid under the agreement was not governed by Art. 97, as this was not a case of a voidable sale, but of no sale or in any case of a sale which was void *ab initio.*[4] Every

**Applicability of Art. 116.**

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[49] *Thammansingh* v. *Dalchand,* (1922) 67 I.C. 595=1922 Oudh 113.

[50] *Nabinchandra Ganguli* v. *Munshi Mander,* 1927 Pat. 248=6 Pat. 606.

[1] *Gajadhar Baksh* v. *Gauri Shankar,* (1921) 61 I.C. 205=1921 Oudh 47.

[2] *Lalji Singh* v. *Ramrup Singh,* 1934 Pat. 148=150 I.C. 975=13 Pat. 192.

[3] *Bhawani Singh* v. *Girdhari,* 1932 Nag. 3=137 I.C. 161.

[4] *Pribhaduiomal* v. *Mt. Chutti,* 1933 Sind 379.

**Application of Art. 97.**

**conveyance imports a covenant of title** under S. 55 (2), and this is so whether the buyer has or has not notice of the infirmity of the title of the seller.[5] **Where there is a covenant of title, express or implied** in a document duly registered, a **suit** for refund of purchase-money based upon covenant of title **is governed by Art. 116,** Limitation Act.[6] In other cases, where there is no covenant express or implied the case entitling the vendee to get back the purchase price has first to be made out on its merits and then the application of Art. 97, determined according as the case is a **void or voidable transaction.**[7] Where a person is entitled to ask for a decree for specific performance he is also entitled to ask for a return of his money if there has been any payment under the agreement.[8] A debt retained in part payment of the purchase-money is in effect, and as between vendor and purchaser, a payment of that part.[9] Where a person transfers in satisfaction of a debt due from him, a certain property to another but afterwards refuses to effect a registration of the same, the latter can bring a suit for the recovery of the amount of the debt under Art. 97 of Sch. I of the Limitation Act as a suit for money paid under a consideration which afterwards failed.[10] The words "is discovered to be void" in S. 65 of the Contract Act apply to a case where an agreement which is not *prima facie* void in its entirety, though it might be void in part, is declared by the Courts to be void.[11] Money paid under such an agreement as the above is "money paid under an existing consideration which afterwards fails" within Art. 97 of Limitation Act, and in such a case time runs only from the date of the failure of the consideration, which would be the date **when the agreement is declared to be void** by the Court.[12] Where plaintiff is deprived of possession of only part of the property given him by the defendant under a compromise, there is no failure of consideration within Art. 97.[13] The case was not one of failure of consideration but one of mere inadequacy of consideration.[14] In a suit for refund of purchase-

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5. *Mt. Chandrawatibai* v. *Valabdas,* 1931 Sind 141=25 S.L.R. 173=133 I.C. 76; Relied on *Mt. Lakhpat* v. *Durga Prasad,* 8 Pat. 432.

6. *Ibid.,* 1931 Sind 141=133 I.C. 76; Relied on 1930 Sind 12=118 I.C. 203=24 S.L.R. 172; 1932 Nag. 5=13 I.C. 225=28 N.L.R. 31 (F.B.).

7. *Ibid.,* 1931 Sind 141=133 I.C. 76=1930 Sind 12=118 I.C. 203.

8. *Maung Aung Ban* v. *Maung Aung Po,* (1922) 70 I.C. 121=1923 Rang. 87 (P.C.).

9. *Ibid.,* 70 I.C. 121=1923 Rang. 87; Followed 11 All. 47 (57) (P.C.).

10. *Ibid.,* 70 I.C. 121=1923 Rang. 87.

77. *Maung Kyi Oh* v. *Maung Kyaw Zan,* (1926) 93 I.C. 119=1926 Rang. 7.

12. *Ibid.,* 93 I.C. 119=1926 Rang. 97.

13. *Karim Bux* v. *Abdul Wahid Khan,* 1924 Oudh 377=80 I.C. 81=11 O.L.J. 323.

14. *Ibid.*

money limitation will ordinarily run from the date of the agreement. But there may be special circumstances in which it would not when there is a misapprehension as to the private rights of the vendor in the property which he purported to sell the limitation begins when the true nature of the rights is discovered.[15]

**Starting point of limitation.**

Where a mortgage of joint-family property was made, but the mortgagee took possession of the property, and was subsequently dispossessed therefrom, it was held that even if the mortgage was void, the mortgagee having got possession of the mortgaged property had an existing consideration for his mortgage and that it only failed when the mortgagee was finally dispossessed of the property. Article 97 was applied, and time began to run from the **date of the dispossession.**[16] Where plaintiffs paid money for redemption of a mortgage, and a suit for foreclosure by another having mortgagee interest was decreed. Article 97, was applied to a suit for refund of money paid held to be wrongly made, and limitation ran from **date of the foreclosure decree.**[17]

**Effect of appeal.**

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal, and, therefore, the time from which the period of limitation ought to be counted is the **date of the decree of the first Court.**[18]

**1593. CONCLUSION.**—As a result of the pronouncements made by their Lordships of the Privy Council in several decisions bearing on the scope and application of this article, (*vide* S. 1586, *ante*), and in view of the trend of authorities laying down certain principles in this connection, with some conflict no doubt, in the judgments of the different High Courts in India, (*vide* Ss. 1587-1593, *ante*), the following **conclusions** may be briefly noticed as follows:—

**(i) Applicability of Art. 62.**

Article 97 applies to a suit for money paid upon an existing consideration which afterwards fails, and the period prescribed is three years from the date of failure. This article is not applicable to cases where the transaction being void *ab initio,* the consideration was non-existing at the date of the transaction, or had failed immediately from the beginning. To such cases Art. 62, would apply, as noticed in S. 1585, *ante*.[19]

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[15] *Ramjirao* v. *Maruti Narayan,* 1933 Nag. 244=144 I.C. 724.

[16] *Ram Harakh* v. *Salik Ram,* (1925) 89 I.C. 332=1926 Oudh 19.

[17] *Shambhudutt* v. *Rambaksh,* 1935 Oudh 378=1935 O.W.N. 549=1935 O.L.R. 292=155 I.C. 299.

[18] *Muli* v. *Ganpat,* 1928 Nag. 134=109 I.C. 457; Followed 1918 P.C. 151=Dist. 42 Mad. 507.

**(ii) Applicability of Art. 116.**

1594. In cases where a **registered document** has been executed by way of transfer, though no possession was given, the purchaser may claim re-payment of the purchase-money and damages for **breach of covenant for title,** and Art. 116 would apply to such cases.[20] A claim based on a registered indemnity bond, or implied covenant for good title in a sale-deed is governed by Art. 116.[21] Article 116 includes cases of express or implied covenant for title.[22] In 38 Mad. 1171, it was pointed out that in all registered conveyances executed after the Transfer of Property Act came into force a covenant of title is implied by S. 55 (2) of that Act and that the registered conveyance should be read as if it expressly embodied that covenant and that the breach of that covenant is the breach of a contract in writing registered within the meaning of Art. 116. Similar views have been held in other High Courts.[23] But, in 21 I.C. 740, it was held that though Art. 116 might govern a suit for damages for breach of contract and for refund of purchase-money, it might also be treated as a suit for failure of consideration.

1595. **WHEN CONSIDERATION FAILS.**—But, if the transaction was not void *ab initio,* and it was valid and enforceable at the time of the contract, and was voidable only if objection were taken to it by the other party, or at the instance of a third person interested, or the transaction was defective in its nature, until something was done later to give it full operation, and the plaintiff was deprived of the use or benefit of his consideration in respect of the transaction by subsequent events, Art. 97 would apply, and give three years' time from the **date of the failure**

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[19] 27 I.C. 733=13 A.L.J. 185; 45 All. 179=50 I.A. 69 (P.C.); 25 Bom. 593; 40 Bom. 614; 55 Bom. 565; 1931 Bom. 39; 1921 Cal. 596=33 C.L.J. 366; 19 Cal. 123 (P.C.); 46 Cal. 670 (P.C.); 29 I.C. 429=19 C.W.N. 102; 49 I.C. 258 (Cal.); 44 P.R. 1918=46 I.C. 26; 18 Mad. 173; 35 Mad. 39; 1933 P.C. 63 (65); 47 I.C. 886 (Nag.); 1930 Sind 12 =118 I.C. 203; 3 C.P.L.R. 173; 70 I.C. 121=1923 Rang. 87; 93 I.C. 119=1926 Rang. 7.

[20] See S. 1587-A; Ss. 1588-1590 and S. 1592, *ante;* 47 I.C. 924 (Mad.); 45 Bom. 955; 46 Mad. 40; also see 1932 All. 358=136 I.C. 829; 6 Pat. 606=1927 Pat. 248; 61 I.C. 205=1921 Oudh 47.

[21] 50 I.C. 673 (Mad.); 13 Pat. 192; 1931 Sind 141; 1930 Sind 12.

[22] 30 All. 402; 51 All. 651; 52 All. 604; 45 Bom. 955; 49 Bom. 596; 20 C.W.N. 989 s.c. 21 C.W.N. 383 (P.C.); 21 Mad. 242; 25 Mad. 587; 15 M.L.J. 396; 1 M.W.N. 361=11 I.C. 337; 1926 Mad. 255=91 I.C. 514; 1930 Sind 12; 1931 Sind 141.

[23] 26 Bom. 750; 49 Bom. 596; 30 All. 402; 8 Pat. 432; cf. 35 Mad. 39 and 50 All. 95 following 19 Cal. 123 (P.C.) (Art. 97 applied); cf. 49 I.C. 258 (Art. 62 or 97 applied).

**of consideration.**[24] As observed in Mitra's Limitation Act,

> "one of the difficult questions arising under this article is as to when the consideration fails". "That in turn depends upon whether a transaction is voidable or void and whether the contract has been *executed* or whether the transaction remains executory."

It depends on a number of other considerations also. There is a considerable divergence of view apparent on the question, but the following rules deducible from the weight of authority may be safely accepted.

**(*i*) Contract void *ab initio*.**

(*i*) Where the contract is for no existing consideration, and the transaction is **void *ab initio*,** there is a failure of consideration from the very beginning, and limitation runs, under Art. 62, Limitation Act, from the date of the agreement.[25] Time would run in such cases from the payment itself, though the defect may not become apparent, in some cases, until an attempt to enforce the contract has failed.[26] In the Privy Council case of 47 I.C. 214 (221), however, time was held to run from the date when the vendor's rights were discovered to be void, *i.e.*, when the possession was resisted to the vendee.[27] This decision was explained in 50 Cal. 929 P.C. to have proceeded on its special circumstances. In ordinary cases the discovery of the agreement becoming unenforceable would be taken to give the right to recover back the consideration from the **date of the agreement itself.**

(*ii*) **Where possession is taken under a void contract** of sale, in a suit for refund of purchase-money, the cause of action would not arise until the plaintiff was deprived of, or disturbed in his possession.[28]

(*iii*) In the case of **void executory sales,** the right to recovery of money arises from the date of the payment itself,[29] or at the latest, when the plaintiff was found not entitled to recover the property sold.[30] In 46 Cal. 670 P.C., the sale was an **involuntary** sale, and not a private contract, and no actual possession was obtained by the vendee. However, in 91 I.C. 768 (Cal.), in the case of an involuntary Court sale, limitation for return of purchase-money was held to begin not from the date of the disturbance of possession, but from the date of the decree declaring title of a third person to the property. This ruling is of doubtful value. In 48 M.L.J. 217, the cause of action was held to arise only from the date of dispossession and not from the date of the decree. In 1925 Mad. 1049=86 I.C. 378, where the plaintiff mortgagor paid the amount not to the mortgagee on record, but to the defendants under a mortgage-decree, and in execution the mortgagee on record objected to satisfaction being entered, and this was upheld by the Court, the date of dismissal of the application was held to be the starting point.

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[24] 11 All. 47 (P.C.); 19 Cal. 123 (P.C.); 46 Cal. 670 (P.C.); 5 Rang. 283 (P.C.); 25 All. 618; 45 All. 378; 1934 All. 547; 45 Bom. 955; also 41 Bom. 31; 37 Bom. 538; 26 Bom. 750; and 55 Bom. 565; 14 Cal. 457; 56 Cal. 455; 24 Mad. 27; 40 I.C. 893=6 L.W. 44; 193 P.R. 1883; 79 P.R. 1892, etc.

[25] 40 Bom. 614; 1931 Bom. 39=32 Bom. L. R. 376; 15 Cal. 51; affirmed in 19 Cal. 123 (P.C.); also see 39 Bom. 358; 25 Bom. 593; 49 I.C. 258 (Cal.); cf. 5 Rang. 283; also see 1933 Nag. 244=144 I.C. 724.

[26] 19 Cal. 123 (P.C.); 25 Bom. 593; 46 Mad. 40; 24 Mad. 27; 45 Bom. 955; 46 I.C. 26; 33 C.L.J. 366=1921 Cal. 596.

[27] 93 I.C. 119=1926 Rang. 97.

[28] 52 All. 604; 37 Bom. 538; 45 Bom. 955; 44 I.C. 719 (Cal.); 46 Cal. 670 (P.C.); 38 Mad. 887; 46 Mad. 40; 32 I.C. 176 (Mad.); 1925 Mad. 749; also see 21 I.C. 740; 47 I.C. 886 (Nag.) and 55 I.C. 93 (Nag.); cf. 62 I.C. 955 (Lah.) (follows 41 Bom. 31); also see and cf. 18 Mad. 173; 50 I.C. 815 (Mad.).

[29] 25 Bom. 593; 49 I.C. 258 (Cal.); 64 I.C. 315 (Cal.); 33 C.L.J. 366=60 I.C. 698 (Art. 62); also see 50 I.C. 815.

(*iv*) Where the **contract is voidable, and no possession is obtained** by the purchaser, time would begin to run against the plaintiff, under Art. 97, only when he endeavoured to obtain possession of the property, and found himself unable to obtain possession.[31] Where the plaintiff's suit for specific performance failed, time would start running from the dismissal of the suit, as on a failure of consideration.[32]

(*v*) But, **where a vendee has obtained possession** in pursuance of a contract of sale, the consideration may be said to fail when possession is lost subsequently as the result of avoiding that sale.[33]

**Effect of appeal.**

(*vi*) (*a*) **If possession has been decreed in first Court,** but this decree is reversed on appeal, the plaintiff would have either a fresh cause of action or a revival of his original cause of action for refund of purchase-money on the reversal of the decree of the first Court on appeal, and the starting point of limitation would be the date of the appellate Court's judgment reversing the decree of the first Court.[34]

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[30] 24 Mad. 27; also see 49 I.C. 258 (Cal.) and 64 I.C. 315 (Cal.); cf. 50 I.C. 673 (Title found wanting by a decree of Court).

[31] 19 Cal. 123=18 I.A. 158 (P.C.); 26 Bom. 750; 55 Bom. 565=134 I.C. 1157; also see 38 Mad. 1171 and 1927 All. 734=108 I.C. 165.

[32] 40 I.C. 893 (Mad.); 31 All. 68 (P.C.); 24 Mad. 27.

[33] 52 All. 604; 37 Bom. 538; 45 Bom. 955; cf. 41 Bom. 31 (Date of knowledge of sale); 44 I.C. 719 (Cal.); 38 Mad. 887; 46 Mad. 40; 1925 Mad. 749=86 I.C. 755; 25 Mad. 396; also see 32 I.C. 176 (Mad.); 21 I.C. 740; 55 I.C. 93 (Nag.); 1927 Lah. 570=108 I.C. 804.

[34] 37 M.L.J. 101 (106) Journal; Mitra's Limitation Act, Vol. II, p. 1352; 11 All. 47 (P.C.); also see 1927 All. 756=108 I.C. 385 (Art. 97 applied—time running from date of failure of suit in appeal).

(*vi*) (*b*) **Where plaintiff's suit for possession has failed in the first Court,** time does not run from the date when the plaintiff's suit for possession was finally determined on appeal, confirming the decree of the trial Court; but, the starting point of limitation is the date of the first Court's decree dismissing plaintiff's suit.[35] Where the first Court set aside a decree and the same was reversed on appeal, but restored on second appeal, a suit by the plaintiff who had purchased the decree for refund of the price as on failure of consideration, brought within three years of the date of the decree of the second appellate Court has been held to be in time.[36]

(*vii*) Their Lordships of the Privy Council have laid down that the failure to get or retain possession is the starting point generally in cases of voidable transfers, for a suit for refund of consideration paid, but

> "under certain circumstances the challenge to the sale and the negation of the purchaser's title would be the starting point".[37]

(*viii*) In cases of **sales in execution,** an auction-purchaser has his remedy under Civil Procedure Code, to recover back the purchase-money, if it is found that the judgment-debtor had no saleable interest in the property sold. Art. 97, does not apply to such cases.[38]

(*ix*) In case of **suit against mortgagor on failure of consideration,** Art. 97 has been applied to a suit for recovery of the loan, if the mortgage security failed. This was before the passing of the Transfer of Property Act.[39] But since the Transfer of Property Act has come into operation, the mortgagor's personal liability arises under S. 68, irrespective of the question whether there is a personal covenant in the deed or not. Art. 97 does not apply to such cases, which are governed either by Art. 116, or Art. 120 of the Limitation Act.[40] A suit by mortgagee of house under attachment to enforce the personal security is not governed by Art. 97.[41] Where mortgage was not acted upon, a suit to recover debt could not fall under Art. 97, so as to compute the period of limitation from the date when the mortgage was declared ineffective.[42]

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[35] 46 I.A. 52=46 Cal. 670 (P.C.); 60 I.C. 235 (Mad.); also see 70 I.C. 45 (Mad.) and 74 I.C. 416 (Mad.); 1928 Nag. 134; cf. 42 Mad. 507=36 M.L.J. 157 and 30 Mad. 316=17 M.L.J. 149; also see and cf. 38 Mad. 887; 53 All. 914.

[36] 133 I.C. 415 (All.).

[37] 19 Cal. 123=18 I.A. 158 (P.C.).

[38] 16 Mad. 361; 23 M.L.J. 487; 40 Mad. 1009; 35 All. 419; 50 Cal. 115; cf. 26 All. 519; 22 Bom. 783 and 7 Mad. 595.

[39] *Khandappa* v. *Abbaji,* 11 Bom. 475.

[40] 18 All. 371; 30 All. 400; 7 A.L.J. 391; 20 C.W.N. 989 s.c. 21 C.W.N. 383 (P.C.); 25 Cal. 450; 21 Mad. 242; 29 Mad. 362; 1921 Oudh 47=61 I.C. 205; cf. 39 Bom. 358; 40 Bom. 614; 55 I.C. 413; 54 I.A. 145 (P.C.).

[41] 1927 Lah. 101=61 I.C. 205=1921 Oudh 47.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 98. | To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust. | Three years. | The date of the trustee's death or, if the loss has not then resulted, the date of the loss. |

## SYNOPSIS.

1596. Corresponding provisions.
1597. Article explained.
    - Application of S. 10.
    - Application of Art. 98.
1598. "Loss".
1599. "General estate".
1600. "Breach of trust".

## NOTES.

1596. **CORRESPONDING PROVISIONS.**—Under Act **XIV of 1859,** S. 2, provided for similar cases; with a proviso corresponding to Art. 100 of the present Act. In **Act IX of 1871,** the article corresponding to this provision was Art. 99, Sch. II, in which the third column was worded slightly different. Instead of the words "if the loss has not then resulted", we had "if the loss has not then been occasioned". The present article is the same as Art. 98, Sch. II, Act XV of 1877.

1597. **ARTICLE EXPLAINED.**—An apparently fraudulent trustee who has put trust money into his own pocket, cannot escape under this article by reason of three years' lapse of time, if the case falls under S. 10, Limitation Act, which prevents a suit brought against such a trustee from being barred by lapse of time.[43] Under **English law,** S. 25 (2) of the Judicature Act, lays down that

> "no claims of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitation".

**Application of S. 10.**

But, the law of limitation in India is placed on a special statutory footing, and unless the suit falls within the exemption of S. 10, it is liable to become barred by some one or other of the articles of the schedule of the Act.[44] To claim the benefit of S. 10, which deals with suits against a trustee, or his representatives, the trustee must be "a person in whom property has become vested in trust for a specific purpose", and the suit must be for the purpose of "following the trust property in his hands".[45] The present article refers to suits in respect of **loss occasioned to the general estate of a deceased trustee, by a breach of trust.** "The breach of trust is committed *before* his death, but the suit under this article is brought *after* his death."[46] **The combined effect of S. 10, and Art. 98,** Limitation Act is that while suits for recovery of trust property or proceeds thereof from the representatives of a deceased trustee are not affected by the bar of time, **suits for breach of trust, not claiming specific property** must be brought within three years.[47] A suit by the beneficiaries of a trust would be within the operation of S. 10, Limitation Act, but if the suit is brought between co-trustees in respect of loss occasioned by any breach of trust committed by the defendant, the residuary Art. 120, would apply, as this **Art. 98 refers to deceased trustee only.**[48] A claim not for any specific property still in the hands of a representative of a deceased trustee is not covered by S. 10 and Art. 98, Limitation Act.[49]

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[42] 1930 Lah. 993=129 I.C. 201.

[43] *Chintaman Raoji* v. *Khanderao,* (1928) 52 Bom. 184=1928 Bom. 58.

**Application of Art. 98.**

**1598.** "Art. 98 says that the general estate of the trustee is liable for three years from his death to make good any loss occasioned by a breach of trust." This article would not cover any loss occasioned by a trustee. When S. 10 and Art. 98 are read together, it is evident that the word *'loss'* in Art. 98 must be read as **referring to loss of the 'specific property'** mentioned in S. 10; and the **meaning of Art. 98** is that, in case the specific property is irrevocable, then the value can be recovered out of the *general estate* for the period of three years after the death of the trustee."[50]

**"Loss."**

**1599.** The words **"general estate"**, of the deceased trustee, do not cover the joint family property of the father and sons which passes by survivorship to the sons on the death of the father.[1]

**"General estate."**

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[44] *New Fleming Spinning and Weaving Co.* v. *Kessowji Naik,* (1885) 9 Bom. 373 (399).

[45] *Ibid.,* 9 Bom. 373 (399).

[46] Mitra's Limitation Act, Vol. II, p. 1363.

[47] *Chintaman Raoji* v. *Khanderao,* 52 Bom. 184=1928 Bom. 58; also see *Syed Hussain Miyan* v. *The Collector of Kaira,* 21 Bom. 257 (S. 10 does not save from bar of limitation, if the claim is not to follow up specific property).

[48] *Ranga Pai* v. *Baba,* 20 Mad. 398.

[49] *New Fleming Spinning and Weaving Co., Ltd.* v. *Kessowji Naik,* (1885) 9 Bom. 373 (399).

[50] *Ibid.,* 9 Bom. 373 (400).

[1] *Subramania Aiyar* v. *Gopala Aiyar,* 33 Mad. 308=7 I.C. 898=20 M.L.J. 633.

**Breach of trust.**

1600. A claim against a trustee for failure to detain possession of the *corpus* and income of trust property is governed by the ordinary law of limitation and does not fall within the scope of S. 10 of the Limitation Act.[2] In *Tholosingam Chetty* v. *Vedachellaiyah*,[3] the Madras High Court has pointed out the distinction between negligence and breach of trust.

> "*Negligence* depends upon the public duty which is incumbent upon every one to exercise due care in his daily life; but a *breach of trust* depends upon the neglect of some special duty undertaken, in regard to some specified person or body of persons. In the former case the liability dies with the person. In the latter it follows the trustee's estate after his death."

This is **the principle** underlying the liability of the deceased's estate in the hands of his legal representatives, although it has derived no benefit from the breach of trust.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 99. | For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers. | Three years. | The date of the payment in excess of the plaintiff's own share. |

### SYNOPSIS.

1601. Corresponding provisions.
1602. Change in the law.
1603. Scope of the article.
1604. Suits for contribution: Other articles.
1605. Right of contribution based on equity.
1606. Applicability of the article.
1607. Payment whether creating charge.
1608. Voluntary and involuntary payment.
1609. Starting point of limitation.

### NOTES.

1601. **CORRESPONDING PROVISIONS.**—Under **Act XIV of 1859,** suits for contribution came under the general provision of cl. 16 of S. 1.[4] The starting point of limitation was the date of payment of the money sought to be recovered.[5]

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[2] *Kolta Tholasingam* v. *Vedachala,* (1917) 42 I.C. 544=1917 M.W.N. 651=41 Mad. 319=6 L.W. 523=22 M.L.T. 388.

[3] 41 Mad. 319; Relied on 9 Bom. 373 (399).

This article corresponds to Art. 100 of Sch. II, to the Limitation Act, IX of 1871; and Art. 99 of Sch. II, Limitation Act, XV of 1877. But, the Art. 99 of the previous Act was worded thus:—

"For contribution by a party who has paid the *whole* amount due under a joint decree, or by a sharer in a joint estate who has paid the *whole* amount of revenue due from himself and his co-sharers." "Three years": "the date of plaintiff's advance in excess of his own share".

**Change in the law.**

**1602.** Article 99, in the present Act, introduces the words *"or more than his share"*, to meet a difficulty created by the interpretation of the terms of the corresponding Art. 99 of Sch. II to the Limitation Act XV of 1877.[6] In *Pattabhiramayya* v. *Ramayya*,[7] a doubt was expressed as to whether the article would apply to a case where not the *whole* but only a *part* of the money due under a joint decree or *part* of the amount of revenue was paid. A **Full Bench of the Madras High Court,** in 26 Mad. 686, per Bhashyam Ayyangar, J., pointed out that a strictly grammatical and literal interpretation of Art. 99 leads to anomalous if not absurd consequences. In that view, there being only one starting point of limitation, the claim would be either wholly barred or not at all. It was questioned, if only a trivial amount in excess of plaintiff's share had been paid more than three years before date of suit, but the remaining amount which formed the bulk of the payment was paid either once for all or on different occasions, all within three years before date of suit, was it to be held that the whole claim was barred by limitation?

"Under the general law the party seeking contribution has a cause of action to enforce contribution, at any rate as a personal obligation, as soon as he has made any payment in excess of his share and he need not wait till he makes the whole payment, if he means or is able to do so."[8] "Therefore, each time that an amount is paid by or levied from him in excess of his share he has a right of suit for contribution in respect of such payment, and when he brings the suit after making several such payments he really unites several causes of action in one and the same suit . . . and the law of limitation under Art. 99 will apply separately to each of such causes

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[4] *Doorgamonee* v. *Doorga Mohun,* (1865) 2 W.R. 266 and *Naboo Kristo* v. *Raj Ballabh,* (1865) 3 W.R. 134.

[5] *Boykunt* v. *Gour Monee,* 2 W.R. 159; *Kalee Shunker* v. *Huro Shunker,* (1867) 7 W.R. 29; *Ram Kristo* v. *Muddun Gopal,* (1869) 12 W.R. 194; *Bimola* v. *Tarasoonduree,* (1870) 14 W.R. 480.

[6] *Pattabhiramayya* v. *Ramayya,* (1896) 20 Mad. 23; *Rajah of Vizianagram* v. *Satrucherla,* (1903) 26 Mad. 686 (716)=13 M.L.J. 83 (F.B.); cf. *Ibu Hasan* v. *Brijbhukhan,* (1904) 26 All. 407=1904 A.W.N. 74.

[7] (1896) 20 Mad. 23.

[8] *Davies* v. *Humphreys,* 6 M. & W. 153.

> of action from the date of the respective payments, and the claim for contribution in respect of such payments as were made more than three years before date of suit would be barred by limitation."

Instead of the grammatical interpretation he was inclined to read the article as if between the words "had paid" and the "whole amount" in the two places in which they occur, the words "on account of" were inserted, and thus avoid the repugnance and absurdity that would otherwise result. But referring to this case, the **Allahabad High Court,** per Stanley, C.J., in *Ibu Hasan* v. *Brijbhukansaran,*[9] observed that,

> "it seems to me very questionable whether the learned Judge has not taken too great a liberty of interpretation with the article in question".

**The alteration in the language** of present article, in Act IX of 1908, by adding the words *"or more than his share of the",* after the word *whole* in both the places in which it occurs, is a distinct improvement, and brings the provision in acordance with the general law of contribution as explained in the Madras Full Bench ruling. The amendment has necessitated a change in the wording of column 3 also, by altering the starting period of limitation thus:—*"The date of the payment in excess of the plaintiff's own share".* The article now applies even where a party has paid only something more than his share of the debt.[10]

**Suits for contribution.**

**1603. SCOPE OF THE ARTICLE.**—This article is limited to suits for contribution based on claims with respect to **a joint decree, or payment on account of revenue,** by a co-sharer in a joint estate. It was observed by Bhashyam Ayyangar, J., in the Madras Full Bench ruling of *Rajah of Vizianagram* v. *Raja Setrucherla,*[11] that Art. 61 is the general article applicable to suits for money payable to the plaintiff for money paid for the defendant and Arts. 69, 81, 82, 99, 100 and 107 are articles applicable to special kinds of suits comprised in the general class described in Art. 61.

> "Having regard to the first portion of Art. 99 which relates to a suit for contribution by a joint judgment-debtor, the latter portion relating to co-sharers of a **joint estate** probably refers to that definite class of joint estates which are **registertd in the Collector's office** in the names of two or more co-sharers."

Article 99, does not apply to all kinds of claims for contribution, but is limited to cases where a person has paid the whole amount due on a **joint decree** against himself and others, or the whole revenue due from himself and his **co-sharers in respect of a joint estate.**[12]

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[9] (1904) 26 All. 407.

[10] Mitra's Limitation Act, Vol. II, p. 1365.

[11] (1902) 26 Mad. 686 (718) (F.B.).

[12] *Mulchand* v. *Narinjan Das,* 1900 P.L.R. 1900, p. 149.

**Other articles.**

**1604. Suits for contribution** are also covered by Arts. 61, 82, 100 and 107. Article 99 applies to a special kind of suit comprised in the general class to which **Art. 61** applies.[13] Similarly **Art. 82** applies to contribution suits by co-sureties. **Art. 100** to suits by co-trustee: and **Art. 107,** to suits by the manager of a joint-estate. When a suit for contribution does not fall within Art. 99, or any other specific article, the residuary **Art. 120** will apply: and, not Art. 115 of the Limitation Act, as **the right of contribution is not founded on contract, but on general principles of justice.**[14]

**Right of contribution.**

1605.

**Right of contribution.**

"**The right of contribution** has its foundations in, and is controlled by the principles of justice, equity, and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between parties jointly liable *ex contractu*."[15] "Every joint-debtor who has been compelled to pay more than his share of the common debt, has the right of contribution from each of his co-debtors. **The principle** is that one who has discharged a common liability can recover from his co-obligors only for the excess that he has paid over his share, and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation; hence, it follows as a corollary that no contribution can be claimed against a person who has paid more than his share of the debt. It is not necessary that the entire debt should have been satisfied by the plaintiff, but he must establish that he has paid more than his share of the joint liability. As soon as the plaintiff establishes this, he becomes entitled to contribution from every one of the joint debtors who has not paid up to the full extent of his share of the liability."[16]

However, the principles of equity or justice need not be invoked, if the provisions of Ss. 69 and 70 of the Contract Act are applicable.[17]

**Suits under this article.**

1606. APPLICABILITY OF THE ARTICLE.—As soon as one of several joint-judgment-debtors satisfies the joint-decree he becomes entitled to contribution from his co-judgment-debtor. A suit to recover such contribution is governed by Art. 99 of Sch. I of the Limitation Act, and limitation begins to run from the date when the decree is satisfied.[18] In a partnership business, where it was agreed between the plaintiff and defendants that each member should be at liberty to borrow money upon his individual credit, and to pay into the firm the money so borrowed to carry on the business, and the plaintiff conjointly with certain defendants, in accordance with that agreement, borrowed several sums of money upon promissory notes, and paid the amounts so borrowed into the business; and, afterwards decrees were obtained upon those promissory notes, and the plaintiff was obliged to pay up the decretal amounts, it was held that paintiff's suit for contribution was maintainable against the members of the firm, inasmuch as the money secured by the promissory notes did not become an item of the partnership account.[19] But, where there is no joint-decree, a **suit for contribution by a partner** of a firm who has paid the whole or more than his share of the amount of a debt due from all the partners is governed by Art. 61, Limitation Act.[20] Article 97 was applied where the suit was brought by one of two persons having a joint holding, who paid the *Mittadar's* dues for one year, and more than three years after the date of payment he sued the others for contribution. The suit was not for rent, but for contribution on account of a payment made by plaintiff in defendant's interest.

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[13] *Debi Sahai* v. *Gauri Shanker,* (1910) 13 O.C. 23=5 I.C. 440.

[14] *Matungini Debi* v. *Brojeswar Banerjee,* (1915) 27 I.C. 22=20 C.L.J. 205.

[15] *Ibid.,* 27 I.C. 22 (23, 24) (Cal.); Followed in *Registered Jessore Loan Co.* v. *Gopal Hari Ghose,* (1926) 94 I.C. 159=30 C.W.N. 366=1926 Cal. 657.

[16] *Matungini Debi* v. *Brojeswar Banerjee,* 27 I.C. 22 (24).

[17] *Registered Jessore Loan Co.* v. *Gopal Hari Ghose,* 94 I.C. 159 (161)=1926 Cal. 657=30 C.W.N. 366; also see *Rani Bhubaneswari Kuer* v. *Manir Khan,* 1928 Pat. 641=7 Pat. 613=9 P.L.T. 573=111 I.C. 84 (Principles of equity not applied where another remedy is already available, and no case of real hardship is disclosed).

**Suit for contribution between partners.**

There is no provision of law making such a claim a charge upon immoveable property.[21] However, in *Ramdutt Singh* v. *Harakh Narain Singh,*[22] where plaintiff lessee of certain villages, was under no obligation to pay the revenue, but the defendant having neglected payment, the plaintiff was compelled to do so, it was held that the plaintiff was entitled to recover the money under S. 9 of Act XI of 1859, and equally so under S. 69 of the Contract Act, and this liability was further imposed upon the estate of the defendant, and the case was governed by Art. 132, Limitation Act. Article 99 had no application, where the plaintiff paid the money, neither under a joint-decree, nor as revenue paid by a joint-proprietor in the estate. Similarly, in *Ibu Husain* v. *Ramdai,*[23]

**Suits not under this article.**

**Suit by lessee.**

**No joint decree nor co-sharer.**

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[18] *Mt. Lakhi* v. *Murat Tewari,* (1924) 83 I.C. 875=22 A.L.J. 734 =1924 All. 843.

[19] *Durga Prosonno Bose* v. *Raghunath Das,* 26 Cal. 254=3 C.W.N. 299 (Art. 99 applied: Partners were joint judgment-debtors).

[20] *Walaiti Ram* v. *Ram Kishen,* (1923) 72 I.C. 385=1924 Lah. 112 =5 L.L.J. 310; Relied on *Sriram Lalji* v. *Gopal Lalji,* 19 All. 244= A.W.N. (1897) 43.

[21] *Thanikachella* v. *Shudachella,* (1891) 15 Mad. 258.

[22] (1880) 6 Cal. 549=8 C.L.R. 209.

[23] (1889) 12 All. 110=10 A.W.N. (1890) 31.

where the owner of two villages sold under a decree obtained upon a mortgage claimed contribution proportionately against the owners of the other properties included in the mortgage, and the owner of the property sold was entitled to a charge on those other villages in respect of the several amounts, the suit for contribution was held governed by **Art. 132** of the Limitation Act.

**Charge on immovable property.**

The owner of a property which is mortgaged with other properties to secure a single debt acquires by virtue of the provisions of S. 82, and 100 of the Transfer of Property Act, 1882, a charge against such other properties when his property has been sold in execution of a decree on the mortgage and has contributed more than its rateable share of the mortgage-debt, and nonetheless if the owner of such property has neither redeemed the mortgaged property nor has the sale of his property alone discharged the mortgage-decree. A claim to enforce such a charge is governed by **Art. 132** of the Limitation Act.[24] The position of **a co-mortgagor redeeming a mortgage,** is that of an assignee of the original security, and the period of limitation applicable to a suit for contribution brought by him against his co-mortgagors is the same as that within which the original mortgagee could have brought his suit on his mortgage had he not redeemed.[25]

Where a joint-decree was passed against *A*, *B*, and *C*; and *A*, paid the whole amount thereunder, and then sued and obtained a decree for contribution against *B* and *C*; and later failing to realize the amount of decree against *B*, the plaintiff *A*, thereupon sued against *C*, for contribution in respect of the deficiency, it was held that the suit was governed by Art. 120, and not by Art. 61, 99 or 100 of the Limitation Act. Articles 61 and 99 were not applied as the amount *now* sued for was not for contribution in respect of a joint-decree (Art. 99), neither was it paid for the defendant (Art. 61).[26] Where rent, not revenue, is paid by one of the co-sharers in respect of the entire holding, a suit for contribution is governed not by Art. 99, but by Art. 61, Limitation Act.[27]

**1607. PAYMENT WHETHER CREATING CHARGE.**—Article 99 applies only to a suit for a *personal* relief, or decree for contribution, and not to a suit to enforce a charge, which is governed by Art. 132, Limitation Act.

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[24] *Bhagwan Das* v. *Karam Husain,* (1911) 33 All. 708=8 A.L.J. 854=11 I.C. 145 (F.B.).

[25] *Raj Kamini Debi* v. *Mukandalal Bandapadhya,* (1920) 57 I.C. 868 (Cal.).

[26] *Mulchand* v. *Narinjan Das,* 1900 P.L.R. 149.

[27] *Swarnamoyi* v. *Haridas,* 6 C.W.N. 903; cf. *Thanikachella* v. *Shudachella,* (1891) 15 Mad. 258.

**Calcutta.**

In *Khublal* v. *Pudmanund Singh,*[28] where the plaintiffs and defendants were the proprietors of two separate plots of land, separately assessed with Government revenue, but covered by the same *towzi* number, and plaintiffs paid the Government revenue due from the defendants in respect of their plot to prevent the two plots being brought to sale, it was held that the plaintiffs had no charge upon the property in respect of which the payment had been made, and the limitation applicable to the case was that provided by Art. 99 of the Limitation Act. A claim for contribution creates only a personal liability against the co-sharers on account of whose share the payment has been made, and does not create a charge on the estate.[29] A **Full Bench of the Calcutta High Court** has held that there is no general rule of equity to the effect

> "that whoever, having an interest in an estate, makes a payment in order to save the estate obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, **a co-sharer who has paid the whole revenue,** and thus saved the estate **does not** by reason of such payment **acquire a charge on the share of his defaulting co-sharer".**[30]

**Allahabad.**

Similarly, the **Allahabad High Court, in a Full Bench** decision, has observed,

> "that the Legislature **had** not given or recognized in the North-Western Provinces any such right of charge or lien in favour of a person paying Government revenue or provided any means by which such a charge could be enforced, and that any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments".[31]

**Bombay.**

The **Bombay High Court** has taken the same view in *Shivrao Narayan* v. *Pundlik Bhaire,*[32] where it was held

> "that the mere fact that the plaintiff was obliged to pay the assessment for the defendants' land in order to save his own right, under the circumstances, give him a right to claim contribution, but a charge is not incident to that right".

**Patna.**

The **Patna High Court** has followed the Full Bench of Allahabad and Calcutta High Courts in holding that one co-sharer paying the Government revenue for whole estate in order to save the estate from being sold is entitled to contribution under Art. 99, but there is no charge created in his favour over the property of the defaulting co-sharer, so as to make Art. 132, applicable.[33]

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[28] (1888) 15 Cal. 542.

[29] *Upendralal Mukerjee* v. *Girindra Nath,* (1897) 25 Cal. 565=2 C.W.N. 425.

[30] *Keni Ramdas* v. *Mozaffer Hosain,* (1887) 14 Cal. 809 (F.B.).; Overruled *Enayet Hosein* v. *Muddunmonee,* 14 Beng. L. R. 155; Approved *Kristo Mohini Dasi* v. *Kaliprosonno Ghose,* 8 Cal. 402.

[31] *Seth Chitor Mal* v. *Shib Lal,* (1892) 14 All. 273=12 A.W.N. (1892) 117 (F.B.).

[32] (1902) 26 Bom. 437; Diss. *Achut Ramchandra* v. *Hari Kampti,* (1886) 11 Bom. 313.

**Rangoon.**

This view is supported by a decision of Darwood, J., in the **Rangoon case** of *U Shwe Bwa* v. *Maung Thauk Kya*,[34] which notices the conflict of decisions amongst the High Courts of India on the case of payment of revenue by one co-heir, when holding that in the analogous case of a co-heir taking upon himself to save the property of the deceased by having the Court sale, in execution of a decree passed against all the co-heirs as representatives of the deceased set aside under the provisions of O. 21, R. 89, Civil Procedure Code, no charge is created on the shares of the other co-heirs for the proportionate amount.

**Cf. Madras.**

On the other hand, the **Madras High Court** seems to have consistently held the opposite view. In *Seshagirirao* v. *Pechu*,[35] Kernan, J., reasoned as follows:—

> "The lands of Defendant 4 and the plaintiff are both liable to a common burden, neither of them can get his land free from the claim for the revenue without paying the amount due on the whole land. It would be against equity and good conscience that the common burden should be thrown exclusively on either lot of land or on either of the parties."

In *Raja of Vizianagram* v. *Raja Satrucherla*,[36] the question was most exhaustively dealt with by Bhashyam Aiyangar, J., whose view, differing from that of Moore, J., was upheld on a reference to a Full Bench. The view of Patna High Court to the contrary notices the general principle laid down by the Engish authorities, that

> "a man by making a payment in respect of property belonging to another if he does so without request is not entitled to any lien or charge on that property for such payment". "The **general principle** is beyond all question that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

The balance of authority, as observed in the Patna case, both in England and in this country, is against the view taken in the Full Bench case of Madras, which has been followed in later cases by the same High Court.[37]

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[33] *Rani Bhubneswari Kuer* v. *Manir Khan*, 1928 Pat. 641=7 Pat. 613=111 I.C. 84=9 Pat. L. T. 573.

[34] 1928 Rang. 278=6 Rang. 500.

[35] (1887) 11 Mad. 452.

[36] (1903) 26 Mad. 686 (F.B.).

[37] *Raja of Vizianagram* v. *Raja Satrucherla*, (1903) 26 Mad. 686

It should be noticed that in the case of a person other than a co-sharer, a payment of revenue creates a liability not merely personal of the defendant, but also a liability imposed upon the defendant's estate. See *Ram Dutt Singh* v. *Horakh Narain Singh*[38] and *Kinu Ramdas* v. *Mozaffar Hosain,*[39] relying on the dictum of the Judicial Committee of the Privy Council in *Nogender Chunder Ghose* v. *Kamini Dasi,*[40] which though possibly intended to be applicable to payment of Government revenue by a *mortgagee,* is wide enough to include any person who is interested in making it.

1608. **VOLUNTARY AND INVOLUNTARY PAYMENT.**—In *Fuckorudden* v. *Mohima Chunder,*[41] where the plaintiff and defendant were jointly liable under a decree, in execution of which the plaintiff's property alone was sold, it was doubted if Art. 100 (now Art. 99) was applicable, as nothing was paid by the plaintiff. The same doubt was repeated in *Janki Koer* v. *Domi Lal,*[42] whether money realised by sale of plaintiff's property in execution of a joint decree against the plaintiff and his co-sharers is money paid within the meaning of this article, though in the **Madras High Court** it has been held that the word "paid" in Arts. 99 and 61, would include payments derived out of the sale-proceeds of the person seeking contribution.[43] In *Gobi Nath Munshi* v. *Chandra Nath,*[44] it was observed that "where the money is realised in execution and there is no actual payment of the money by the party, it has been doubted whether it is a payment within the meaning of Art. 61 or Art. 99". But yet it was pointed out that even if Art. 99 applied, the date when the decretal dues were realised by sale should be taken to be the date of payment. It has been held in *Gaharali* v. *Abdul,*[45] that the cause of action for a suit for contribution by a co-sharer who has deposited in Court the entire amount due under a rent-decree obtained by the landlord, arises on the date when the amount deposited is appropriated by the Court to the satisfaction of the decree and not on the date when it is withdrawn by the decree-holder.

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(F.B.); Followed in *Alayakammal* v. *Subbaraya,* 28 Mad. 493 (494) and *Kotayya* v. *Kotayya,* 90 I.C. 551=1926 Mad. 141=49 M.L.J. 117.

[38] (1880) 6 Cal. 549=8 C.L.R. 209.

[39] (1887) 14 Cal. 809 (F.B.).

[40] 11 M.I.A. 258 (P.C.).

[41] (1878) 4 Cal. 529.

[42] (1913) 20 I.C. 24=18 C.W.N. 480.

[43] *Raja of Vizianagram* v. *Raja Setracherlu,* 26 Mad. 686 (F.B.); also see and cf. *Pattabhiramayya* v. *Ramayya,* 20 Mad. 23 (Where the Calcutta view was doubted, that Art. 61 applies to such a case).

[44] (1920) 57 I.C. 884 (Cal.); Refers to 4 Cal. 524; 13 I.C. 457; 8 I.C. 1102; cf. 26 Mad. 686 (F.B.).

[45] (1929) 114 I.C. 134=1928 Cal. 361=56 Cal. 192.

**1609. STARTING POINT OF LIMITATION.**—Under this article, a plaintiff has a cause of action as soon as payment is made by him of the whole amount of a joint decree, or of the revenue due from the joint estate, or where payment has been made by him in excess of his share, and time would run from the date of payment. **Each time an amount is paid** by the plaintiff in excess of his share he has **a distinct and separate cause of action to sue for contribution**, and limitation will apply separately for each of such causes of action, that for contribution in respect of such payments as were made more than three years before the suit woud be barred.[46] Time under Art. 99 begins to run against the plaintiffs' from the date on which having paid off the whole of their own share, they begin to pay the share of the defendants.[47] The question as to whether as between persons against whom a joint decree has been passed there is any right of contribution at all, depends upon the question whether in the former suit they had acted under a *bona fide* claim of right, and had reason to suppose that they had a right to do what they did.[48] But as soon as one of several joint judgment-debtors satisfies the joint decree, he becomes entitled to contribution from his co-judgment-debtor. A suit to recover such contribution is governed by Art. 99, Sch. I of the Limitation Act, and limitation begins to run from the date when the decree is satisfied.[49] In an early Calcutta case, it was querried whether in a suit for contribution, on the ground that the plaintiff and defendants were jointly liable under a decree, in execution of which the plaintiff's property alone was sold, this article or Art. 118 (now 120) was applicable. But, it was held that the cause of action arose when the sale proceeds were drawn out of Court by the decree-holder.[50]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 100. | By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution. | Three years. | When the right to contribution accrues. |

### SYNOPSIS.

1610. Corresponding provision.
1611. Article explained.

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[46] *Raja of Vizianagram* v. *Setracherla*, 26 Mad. 686 (717) (F.B.); also see *Debi Sahai* v. *Gauri*, (1909) 13 O.C. 23=5 I.C. 440 and *Khub Lal* v. *Pudmanund*, (1888) 15 Cal. 542 (Plaintiff's claim in respect of all payments made more than three years before suit was barred).

[47] *Taja Khan* v. *Muhammad Khan*, 71 P.L.R. 1911=10 I.C. 839.

[48] *Suput Singh* v. *Imrit Tewari*, 5 Cal. 720=6 C.L.R. 62; also see *Matungini* v. *Brojeswar*, (1915) 27 I.C. 22 (Cal.).

[49] *Mt. Laktu* v. *Murat*, (1924) 83 I.C. 875=22 A.L.J. 737.

[50] *Fuakuruddeen* v. *Mohima Chunder*, (1878) 4 Cal. 529.

## NOTES.

**1610. CORRESPONDING PROVISIONS.**—This article is the same as Art. 100 of the previous Act XV of 1877 and Art. 101, Sch. II of Act IX of 1871. Under Act XIV of 1859, S. 2 made provision for similar cases.

**1611. ARTICLE EXPLAINED.**—This article applies to a suit for contribution by a co-trustee, against the estate of a trustee who is dead. A suit for contribution against the trustee *during his lifetime* would not be covered by this article, but would be governed by the residuary Art. 120 of the Limitation Act.[1] If the suit could be regarded as a suit by the beneficiaries, it would come within the operation of S. 10, Limitation Act.[2] As will be seen from the provisions of the Trust Act, 1882, the right of contribution accrues in favour of a trustee against a co-trustee in respect of a liability incurred from loss occasioned to the trust estate by their joint default, and time does not run as against the trustee suing for contribution until the right of the beneficiary has been established against the plaintiff co-trustee.[3]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 101. | For a Seaman's wages. | Three years. | The end of the voyage during which the wages are earned. |

## SYNOPSIS.

1612. Corresponding provisions.
1613. **Article explained:**
  (*i*) "Seamen".
  (*ii*) "Wages".

## NOTES.

**1612. CORRESPONDING PROVISIONS.**—This article is same as Art. 102 of Act IX of 1871, and Art. 101 of Act XV of 1877. Compare Art. 7, for the wages of a household servant, labourer or artisan.

**1613. ARTICLE EXPLAINED.**—(1) Sea-men, as opposed to watermen, are persons engaged in navigating ships upon the high seas. Their claim for wages is naturally made dependent upon the termination of the voyage. For the provisions for the payment of wages, and recovering their earnings, *see* 57 & 58 Vict. 60, Act I of 1859 and Act XIII of 1878, Ss. 1 and 2 and Act XXI of 1923

**(*i*) "Seamen."**

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1. *Ranga Pai* v. *Baba,* (1897) 20 Mad. 398 (403, 404)=6 M.L.J. 202.
2. *Ibid.*
3. *Robinson* v. *Harkin,* (1886) 2 Ch. 415.

(The Merchant Shipping Act). As to claim for wages for incomplete voyage, *see* Leake on Contract, 7th Edn., p. 41.

**(*ii*) "Wages."**

(2) This article applies only to a claim for wages, brought in a regular suit where such suit is maintainable. **Summary proceedings** under the Indian Merchant Shipping Act, may be taken under the provisions of Ss. 63 to 65 of Act XXI of 1923, which **do not fall within** the ambit of **this article.**

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 102. | For wages not otherwise expressly provided for by this schedule. | Three years. | When the wages accrue due. |

### SYNOPSIS.

1614. Corresponding provision.
1615. **Article explained:**
    (1) A residuary article.
    (2) Suits for wages.
1616. Starting point of limitation.

### NOTES.

**1614. CORRESPONDING PROVISIONS.**—This article is the same as Art. 102 of Act XV of 1877: there was no corresponding provision in Act IX of 1871.

**A residuary article.**

**1615. ARTICLE EXPLAINED.**—(1) *See* **Arts. 4, 7 and 101,** which make special provision for suits for wages with regard to three special classes of cases. This article is a residuary article for suits of the nature of wages not otherwise expressly provided for in the schedule. A **village carpenter** is an artisan within the meaning of Art. 7 of the Limitation Act, and a suit for wages by him is governed by Art. 7, and not by Art. 102, or Art. 56.[4] A **motor-car driver** is an *"artisan"* within the meaning of Art. 7, and a suit for his wages does not fall within Art. 102.[5] But, a suit by a **village watchman** (*bisardar*), for wages is governed by this article[6]; as also a suit **by a weighman** who may be regarded as a shop-keeper's assistant to recover his dues from his master.[7] A person who was appointed as a **salesman** by a dealer to assist him in the sale of goods, is not merely a labourer, and as such the suit is governed by Art. 102, and not by Art. 7.[8] Similarly, a suit for remuneration by a **wet-nurse** would be governed by Art. 102.[9] A **shahana** who is merely employed to watch crops and to see that they are not taken away, cannot be described as a labourer within the meaning of Art. 7, and a suit for his wages comes under Art. 102, the period being three years from the time the charges accrued.[10]

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[4] *Namdeo* v. *Ramkrishna Mahadeo,* 1934 Nag. 260=152 I.C. 885.

[5] *Sitaram* v. *Jagannath Singh,* (1936) 160 I.C. 1042 (Lah.) (Artisan defined); also see *Sewaram* v. *Lachhmi Narayan,* (1927) 104 I.C. 520=1927 Rang. 279=5 Rang. 477.

[6] *Ghasi Ram* v. *Umadutt,* 79 I.C. 576=1924 Oudh 189=26 O.C. 327=10 O.L.J. 348=9 O.L.R. 554.

[7] *Mutsadilal* v. *Bhagwan,* 48 All. 164.

**Suits for wages.**

(2) This article applies only to suits for wages as such brought by the person entitled to the wages.[11] In *Lachhmi Narayan* v. *Puttilal,*[12] where in a dispute between two persons concerning certain property, the plaintiff was made a *sapurddar,* and as such he made arrangements for the watching of crops, and had to pay money to watchmen engaged by him, it was held that a suit by plaintiff to recover the expenses so incurred by him, not on his own behalf, but on behalf of others, for which the plaintiff was entitled to be reimbursed by them, fell not within the terms of Art. 102, but either Art. 61, or Art. 120, applied to the case. A **suit by** plaintiff, a **broker for commission** due is **not a suit for wages** within the meaning of this article, for the money due on a contract of services cannot come under earnings of menial or mechanical workers.[13] The position of an **Archaka,** though he may have an hereditary tenure in the office is, essentially that of a servant.[14] Perquisites attached to the office of an *archaka* of a temple would fall under this article in respect of a suit by the temple servant against *the trustee.*[15] There is a vast distinction between a suit brought to establish a periodically recurring right and a **suit** brought **to enforce payments due as remuneration** for the performance of services arising out of that right.[16] A suit by the **dwaris of a temple** to recover dues which they claim to be paid to them as remuneration in respect of their services in connection with the temple is governed by Art. 120 of Sch. I, to the Limitation Act, and a claim relating

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8. *Musa Meah* v. *Shirazullah,* 1935 Rang. 235.

9. *Mohanlal* v. *Jumerat,* 17 I.C. 658=10 A.L.J. 395.

10. *Babu Lal* v. *Hukam Singh,* 1935 All. 102=152 I.C. 932=1934 A.L.R. 1078=1935 A.L.J. 78.

11. *Lachmi Narayan* v. *Putti Lal,* 1930 Oudh 420=128 I.C. 66=7 O.W.N. 760.

12. *Ibid.*

13. *Sushil Chandra* v. *Gauri Shanker,* (1916) 39 All. 81=36 I.C. 371=14 A.L.J. 873.

14. *Seshadri Ayyangar* v. *Ranga Bhattar,* (1912) 35 Mad. 631=10 I.C. 548; Relied in *Vedagiri Sastriar* v. *Jagath Guru Sankaracharya Swamigal,* 1935 Mad. 128=41 L.W. 40.

15. *Bhardwaja* v. *Arunachala,* (1917) 45 I.C. 414=41 Mad. 528=1918 Mad. 366; also see *Kuppu Rao* v. *Narasier,* (1915) 28 I.C. 956 (Mad.).

16. (*Sri*) *Baidyanath Jiu* v. *Hardatt Dwari,* (1926) 94 I.C. 826=5 Pat. 249=1926 Pat. 205.

to a period more than six years prior to the date of the institution of the suit would be barred by time.[17]

**1616. STARTING POINT OF LIMITATION.**—Wages due to an employee leaving his employer's service, would be due on the date when he left the service in the absence of any account stated and settled between the parties.[18] Where the wages are monthly wages, they accrue and become due on the final day of the month.[19]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 103. | By a Muhammadan for exigible dower (*muajjal*). | Three years. | When the dower is demanded and refused or (where, during the continuance of the marriage no such demand has been made), when the marriage is dissolved by death or divorce. |

## SYNOPSIS.

1617. Corresponding provisions.
1618. Article explained:
  Prompt dower.
1619. Dower debt.
1620. Applicability of Art. 116.
1621. Starting point of limitation.

## NOTES.

**1617. CORRESPONDING PROVISIONS.**—This article is same as Art 103 of Sch. II of Acts IX of 1871, and XV of 1877. There was no specific provision in Act XIV of 1859 corresponding to this article. In *Mohabu Bibi* v. *Amma,*[19-a] the **Bombay High Court** held that a suit by a Muhammadan widow for her dower was governed by the general clause (16) of S. 1 of that Act; but the **Calcutta High Court** applied three years' limitation to a suit for prompt dower.[20]

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[17] *(Sri) Baidyanath Jiu* v. *Hardatt Dwari,* (1926) 94 I.C. 826=5 Pat. 249=1926 Pat. 205.

[18] *Young* v. *MacCorkindale,* (1873) 19 W.R. 159.

[19] *Gajadhar Prasad* v. *Dharma Nand,* (1935) 154 I.C. 713=1935 A.L.J. 379=1935 All. 716.

[19-a] 10 Bom. H. C. R. 30.

1618. **ARTICLE EXPLAINED.**—*Mahr* or dower is defined

**Prompt dower.**

as a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.[21] This is the price of wife regarded as a property transferred under a civil contract. But it is not received at the time of marriage, though the provision is made for its recovery

> "to serve as a check upon the capricious exercise of the husband of his power to dissolve the marriage at his will".[22]

To attain this end, it is usual to split the amount of dower into two parts, one payable on demand, and the other payable on the dissolution of marriage by *death* or *divorce*. **The "prompt" dower is payable on demand,** and the other called "deferred", is payable on dissolution of marriage by death or divorce.[23] Prompt dower is a demandable debt not only before consummation, but after consummation, though the wife may not sue for her claim, or make any demand during the lifetime of her husband. This is recognised by the language of column three of this article. The **limitation does not run against the wife** during the lifetime of the husband, or the subsistence of the marriage relation, **if no demand is made. But, it starts running when the demand for dower is made, and has been refused.** The cause of action for recovery of the dower debt may continue unabated up till the death of the husband or the dissolution of the marriage by act of the parties. Under the provisions of this article, a wife runs no risk of her claim to prompt dower becoming barred by reason of her forbearance to claim it in her husband's lifetime.[24]

1619. Dower is a debt. The widows' claim for dower is a debt

**Dower-debt.**

payable out of the estate of her husband, and it must, like other debts, be paid before legacies, and before distribution of the inheritance.[25] The nature of the dower-debt was examined by the **Calcutta High Court** in the case of *Mir Mahar Ali* v. *Amani*,[26] and it was ruled that, according to Muhammadan Law, when the heirs of a Muhammadan woman claim from her husband dower which was not due or payable until her death, their claim is **a simple money claim, founded solely on the contract entered into by the husband.** The dower, like any other debt, must be paid before the estate divisible among the heirs can be ascertained, and that the suit to recover the dower-debt is nothing more nor less than a suit to enforce a simple money claim founded solely on the contract entered into by the husband.[27] This view is supported by the observations of their Lordships of the **Privy Council** in *Ranee Khajooroonissa* v. *Ranee Ryeesunnissa,*[28] namely, that prompt or exigible dower may be considered a debt always due and demandable, and certainly payable on demand, with the result that upon a clear and unambiguous demand and refusal, a cause of action would accrue, and the statute would begin to run. To the same effect is the remark of their Lordships in *Hamira Bibi* v. *Zubaida Bibi,*[29] that the dower ranks as a debt, and the right of the wife is no greater than that of any other **unsecured creditor of her husband,** subject to the reservation that if she lawfully, with the express or implied consent of the husband or his other heirs, obtains possession of the whole or part of his estate to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. A wife has a **right of retention,** or to remain in possession of the property of her husband, until the dower-debt, or part which is due and unpaid is satisfied.[30] The fact that the dower-debt is time-barred does not affect the right of the widow to continue in possession of her deceased husband's property.[31]

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[20] *Ranee Khejoorunnessa* v. *Ranee Ryeesunnissa,* (1870) 13 W.R. 371.

[21] *Abdul Kadir* v. *Salima,* (1886) 8 All. 149 (per Mahmud, J.).

[22] Mulla's Muahammadan Law, 6th Edn, p. 173.

[23] Mulla's Muhdn. Law, S. 221, p. 175.

[24] Wilson's Muhdn. Law; 1864 W.R. 252.

[25] Mulla's Muhdn. Law, S. 223, p. 176.

[26] 2 Beng.L.R.A.C.J. 306=11 W.R. 212.

**Where a husband executes a bond** for the amount of dower due to his wife promising to pay her the said amount on demand, to all intents and purposes the **dower-debt ceases to be due as dower,** and becomes payable as a loan, and a suit for the recovery of the same is not governed by Art. 103 of the Limitation Act.[32]

**Applicability of Art. 116 to registered instruments.**

**1620.** The Acts of 1859, 1871 and 1877 have drawn a broad distinction between registered and unregistered instruments. There is a series of Indian decisions mostly in suits on bonds, beginning in 1880, to be found in all the Indian High Courts: and this current of decision was recognised by their Lord-

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[27] *Mir Mahar Ali* v. *Amani,* 2 Beng.L.R.A.C.J. 306=11 W.R. 212; also see *Wafeah* v. *Saheeba,* 8 W.R. 307; *Janee Khanum* v. *Amatool Fatima,* 8 W.R. 51; *Mahabubibi* v. *Amina,* 10 B.H.C.R. 430.
v. *Amatool Fatima,* 8 W.R. 51; *Mahabubibi* v. *Amina,* 10 B.H.C.R. 430.

[28] 2 I.A. 235=24 W.R. 163=15 Beng.L.R. 306 (P.C.).

[29] 36 I.C. 87=43 I.A. 294=38 All. 581 (P.C.).

[30] Mulla's Muhdn. Law, p. 176; also see *Nurunnessa* v. *Muhd. Sakru,* 56 I.C. 8=47 Cal. 537=31 C.L.J. 14=24 C.W.N. 335; and *Abi Dhunisa* v. *Muhd. Fathi Udini,* 44 I.C. 293=41 Mad. 1026=35 M.L.J. 468 and see *Maina* v. *Vakil Ahmad,* 47 All. 250=1925 P.C. 63 (P.C.).

[31] *Ali Baksh* v. *Allahdad Khan,* (1910) 32 All. 551 (561); also see *Majid Mian* v. *Bibi Sahebjan,* 40 Bom. 34 (37) (Right of widow in possession is substantial and heritable).

[32] *Mt. Kubra Begam* v. *Fazal Husain,* (1927) 99 I.C. 553=1927 All. 268 (Mortgage-deed securing payment of dower-debt).

ships of the **Privy Council** in the case of *Tricomdas Cooverji Bhoja* v. *Gopinathji Thakur,*[33] as pointing out that Art. 116 is a generalised exception engrafted upon all articles which might, by stretch of language, be regarded as applicable to suits comprehended within the description of a suit for compensation for the breach of a contract.[34] In view of the principles expounded and applied in the long series of decisions which have now met with the approval of the Judicial Committee, it has been held by the **Calcutta High Court** that Art. 116 applies to suits for recovery of dower-debt when there is a registered dower-deed, although Arts. 103 and 104 would apply when there is no such registered instrument.[35] The view taken in *Ful Chand Bibee* v. *Nawab Ali,*[36] to the contrary is not sound. Where dower is payable under a registered instrument executed by a Muhammadan husband in favour of his wife, a **suit for recovery** of the amount of the **dower, whether** it is **brought by the wife** during her lifetime, **or whether** it is **brought by her heirs** after her death, is a suit for compensation for breach of contract in writing registered, and the period of limitation applicable thereto is that prescribed by Art. 116 of the Limitation Act. The distinction between prompt and deferred dower is immaterial in this connection.[37] The whole claim is based on contract or agreement by which the husband promised to pay her, and indirectly, her heirs, representatives and assigns, a certain amount of money under the marriage contract.[38] When it is sought to make the dower a charge on immoveable property, the case would (probably) be covered by Art. 132, Limitation Act.[39]

**Suit by wife's heirs.**

**1621. STARTING POINT OF LIMITATION.**—In *Ameeroon-Nissa* v. *Mooradoon-Nissa,*[40] their Lordships of the **Privy Council** held that the dower deed, mentioning a sum payable "when demanded by my wedded wife", gave the widow a right of suit without a previous demand, and that she was not obliged to sue her husband immediately, or in his lifetime. This ruling was distinguished and explained in *Ranee Khejooroonnessa*

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[33] (1917) 39 I.C. 156=44 I.A. 65=44 Cal. 759 (P.C.).

[34] *Mahommad Mazharal Ahad* v. *Mahammad Azimuddin,* (1923) 73 I.C. 17 (23)=1923 Cal. 507=27 C.W.N. 210=7 C.L.J. 108.

[35] *Ibid.,* 73 I.C. 17 (23)=1923 Cal. 507=37 C.L.J. 108=27 C.W. N. 210.

[36] 1 I.C. 740=36 Cal. 184=9 C.L.J. 105=13 C.W.N. 134.

[37] *Asiatulla* v. *Daras Mohammed,* (1922) 70 I.C. 169=50 Cal. 253=36 C.L.J. 379=1923 Cal. 152.

[38] *Ibid.,* 70 I.C. 169 (171)=50 Cal. 253.

[39] Woodman's Digest, p. 5057; Rustomji, p. 534; See *Janee Khanum* v. *Amatool,* (1867) 8 W.R. 51; and *Wafiah* v. *Saheeba,* (1867) 8 W.R. 307.

[40] 6 M.I.A. 211 (P.C.), at p. 229.

v. *Ryeesoonnessa Begum*,[40-a] as holding that though a woman's dower be prompt, yet she is not obliged to sue for it immediately nor in the lifetime of her husband. But the rule laid down by the Privy Council does not apply in a case in which a wife made the demand openly, deliberately and publicly after many years of separation, and when all attempts at reconciliation had failed. The latter finding in this case was reversed on appeal to Privy Council, where it was held that the wife's application to sue the husband in *forma pauperis* for her dower which failed on the opposition of her husband who denied his liability, did not amount to demand within the meaning of this article.[41] No doubt once there is demand followed by refusal limitation runs from the time and cannot be postponed.[42] An obligation to pay exigible dower can only be lost by time if a demand has been made and refused in clear and unambiguous terms more than three years before the suit, or if more than three years have elapsed after the death of the husband.[43] Limitation under this article is three years from the date when the dower becomes payable. Although prompt dower may be demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture. It is only upon her making such demand that it becomes payable. The demand must be specific and not conditional and ambiguous.[44] No amount of opposition on the husband's part would be sufficient to constitute a cause of action, unless the wife has made a previous demand. Where a jirga was sent to a woman who had applied for execution of a maintenance decree against her husband with the idea of getting her return to the husband, she expressed possible readiness to accompany her husband if he would pay her the dower. It was held that there was not a definite demand for dower to set aside the statute of limitation running against the wife.[45] Where a wife demanded only a portion of her dower from her husband, limitation as to her claim to the remainder will count from the date of her husband's death, and not from the date of her former demand.[46] The bar of limitation would not affect the right of a Mahomedan widow to continue to

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[40-a] 13 W.R. 371 (376).

[41] *Ranee Khejooroonnessa* v. *Ryeesoonnessa Begum*, 13 W.R. 371 s.c., on appeal, 15 B.L.R. 306 (P.C.).

[42] *Mt. Mullika* v. *Mt. Jumeela*, 11 B.L.R. 375 (P.C.); also see *Mahammad Mazharal Ahad* v. *Mahammad Azimuddin*, (1922) 73 I.C. 17 (23)=27 C.W.N. 210; *Mt. Zohra Bibi* v. *Ganesh Prasad*, (1923) 78 I.C. 106=1925 Oudh 267.

[43] *Abdul Hamid* v. *Sardar Begam*, (1930) 121 I.C. 372=1930 Lah. 202 (Tek Chand, J.).

[44] *Mt. Amtul Rasul* v. *Karim Baksh*, (1933) 142 I.C. 833=1933 Pesh. 31.

[45] *Ibid.*

[46] *Begoo Jaun* v. *Gashee Bebee*, (1866) 6 W.R. Civ. Ref. (Sir Barnes Peacock and Hon'ble Jackson, JJ.).

remain in posession of the deceased husband's property, and her heirs would be equally entitled to recover the balance of the debt due, if she dies without the debt being properly discharged.[47]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 104. | By a Mahomedan for deferred dower. | Three years. | When the marriage is dissolved by death or divorce. |

## SYNOPSIS.

1622. Corresponding provisions.
1623. Article explained.
1624. Applicability of Art. 116.
1625. Starting point of limitation.

## NOTES.

1622. **CORRESPONDING PROVISIONS.**—This article is same as Art. 104, Sch. II, Acts IX of 1871, and XV of 1877. Under Act XIV of 1859, the period of limitation was held to be three years as in the case of any other ordinary creditor.[48]

1623. **ARTICLE EXPLAINED.**—This article refers to "deferred dower", which is payable on dissolution of marriage by death or divorce. Mr. Baillie, in his Digest of Mahomedan Law, p. 92, states broadly that deferred dower is not exigible till the dissolution of marriage.[49] But, their Lordships of the Privy Council have considered that the question was not concluded by authority, and in *Mirza Bedar Bakht* v. *Mirza Khurram Bakht*,[50] their Lordships did not think it necessary to decide whether deferred dower, whenever no time for its payment is expressly limited by contract, must be presumed to be payable on the dissolution of the marriage by the death of either husband or wife, or whether it becomes demandable only on the death of husband. The admitted rule seems to be that laid down in Macnaghten's Principles, Ch. VII, Art. 22, to the effect that

**Deferred dower.**

> "when it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand".[1]

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[47] *Ali Baksh* v. *Allahdad Khan*, (1910) 32 All. 551 (561).

[48] *Mt. Amanee* v. *Meer Meher Ally*, (1869) 11 W.R. 212.

[49] *Omdutom Nisa Begum*, 1 S.D.A. Reports, p. 276.

[50] (1873) 19 W.R. 315 (P.C.).

[1] [According to Shiah Law, the rule is to regard the *whole* as prompt. But in Sunni Law, custom regulates the proportion, and in the absence of custom, the status of the parties and the amount of the dower settled would be considered by the Court—*See* Mulla's Muhdn. Law, S. 221, p. 175; cf. *Hoosein Khan* v. *Gulab Khatun*, (1911) 35 Bom. 386.] See *Eidan* v. *Mazhar Hasan*, 1 All. 483; and *Masthan Sahib* v. *Assan Bivi*, (1900) 23 Mad. 371 (F.B.) (Whole presumed to be prompt).

Under Mahomedan Law, deferred dower is payable on the dissolution of the marriage, whether by divorce or by death of either of the parties. When the heirs of a Mahomedan woman claim from her husband dower, which was *moowajjul* or deferred and not due or payable until after her death, their claim is a simple money-claim founded solely on the contract entered by the husband.[2] Under Art. 104, the accrual of cause of action for deferred dower has been fixed from the time "when the marriage is dissolved by death or divorce".

**Applicability of Art. 116.**

**1624.** As noticed in para. 1620, *ante,* where there is a registered dower-deed, a suit for recovery of prompt, or deferred dower-debt is governed by Art. 116, although Arts. 103 or 104 would apply when there is no such registered instrument.[3] When a charge on immoveable property is created for the dower, Art. 132 would seem applicable.[4]

**Notice of talak.**

**1625. STARTING POINT OF LIMITATION.**—In *Fulchand* v. *Namal Ali,*[5] where a Mahomedan widow brought a suit against the heirs of her deceased husband for the deferred portion of her dower, the fact of the absence of the wife was held not to make the *talak* void and inefficacious. But it was observed that **"it is necessary certainly for the purpose of dower that the fact of the pronouncement of *talak* should come to her notice.** Similarly, in In re *Raja Saheb Rasul Saheb,*[6] the *talaknama* was not held invalid where it was not communicated to the wife, but it was held, that

> "all that appears necessary is that the fact of the talak having been effected must come to the notice of the wife".

Accordingly, it has been held, in *Kathiyumma* v. *Urathel Marakkar,*[7] that Art. 104 must be read in the light of the rule of Mahomedan law above adverted. It provides that for a suit for deferred dower the period of limitation is three years from the date when the marriage is dissolved by divorce.

> "It is a part of the Mahomedan Law that, so far as a claim for dower is concerned, the marriage is dissolved only when it comes to the wife's notice".

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[2] *Mt. Amanee* v. *Meher Ally,* (1869) 11 W.R. 212.

[3] *Asiatulla* v. *Danis,* 50 Cal. 253=70 I.C. 169=36 C. L. J. 379=1923 Cal. 152; also see *Mahammad Mazharal Ahad* v. *Mahammad Azimuddin,* (1923) 73 I.C. 17 (23)=1923 Cal. 507=27 C.W.N. 210=7 C.L.J. 108.

[4] *Janee* v. *Amatool,* 8 W.R. 51; also see *Wafiah* v. *Saheeba,* (1867) 8 W.R. 307.

[5] (1909) 36 Cal. 184=1 I.C. 740.

[6] (1920) 44 Bom. 44=54 I.C. 573.

[7] 1931 Mad. 647=1931 M.W.N. 570=133 I.C. 375.

A suit by the heirs of the wife for deferred dower falls under this article.[8] But, where a Muhammadan widow died after being dispossessed by some of the heirs of her husband, a suit brought by one of her heirs to recover the plaintiff's share of dower-debt out of the assets in the hands of her husband was held not governed by this article.[9]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 105. | By a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee. | Three years. | When the mortgagor re-enters on the mortgaged property. |

## SYNOPSIS.

1626. Corresponding provisions.
1627. Scope of article.
1628. Claims to surplus collections in a redemption suit.
1629. Application of article.
1630. Starting point of limitation.

## NOTES.

1626. **CORRESPONDING PROVISIONS.**—This article is same as Art. 105 of Sch. II, Act XV of 1877. Under Act IX of 1871, the period of limitation commenced to run from "the date of the receipt" of the money. Under Act XIV of 1859, there was no specific provision for suits of this nature.

**Suit for recovery of surplus profits.**

1627. **SCOPE OF ARTICLE.**—This article contemplates suits where the mortgagee has given up the mortgaged property, after the mortgage-debt has been satisfied, and the mortgagor has re-entered on the mortgaged property otherwise than by means of a suit for redemption. The mortgagor in such a case has a cause of action to bring a suit for recovery of surplus collections received by the mortgagee and to such a suit Art. 105 would apply.[10]

**Claim for surplus collections in a redemption suit.**

1628. In a suit for redemption of a usufructuary mortgage, the mortgagor is bound to claim for surplus profits if any, payable by the mortgagee.[11] A claim to recover surplus profits made by a mortgagee is part of the redemption suit and is based on the same cause of action, such a claim ought to be tried in a redemption suit.[12] Accordingly it has been held that when a mortgagor takes possession of the mortgaged property, not in execution of a decree for redemption, but in some other way, then Art. 105 applies.[13] In *Baboo Gour Kishen Singh* v. *Sahay Fukeer Chand,*[14] a case under Reg. I of 1798, it was ruled that a suit for redemption does not debar the mortgagor from afterwards suing the mortgagee in possession for mesne profits payable between the date of suit and the execution of the decree for redemption. But, as pointed out in *Satyabadi Behara* v. *Harabati,*[15] the scheme of Transfer of Property Act is quite different. Where *A* successfully brought a suit for redemption on refusal of a valid tender, by mortgagee, of what was due to him on mortgage, and the plaintiff was put in possession, a subsequent suit for recovery of damages on account of wrongful detention of property by the mortgagee between the date of tender and the date of delivery of possession was held not maintainable as *res judicata.* However, the *dictum* in the Allahabad case of *Ram Din* v. *Bhup Singh,*[16] would not apply where **permission to bring a subsequent suit for surplus profits** has been given in accordance with O. 2, R. 2, Civil Procedure Code.[17] A **separate suit for mesne profits** for the period intervening between the date fixed for redemption of the decree, and the date of the actual delivery of possession was also held maintainable in a Calcutta case.[18]

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[8] *Asiatullah* v. *Danis Muhd.*, 50 Cal. 523 (527); also see ***Mahomed Ishaq*** v. *Akramul Haq*, 12 C.W.N. 84=6 C.L.J. 558.

[9] *Hamidullah* v. *Najjo*, 33 All. 568 (570)=8 A.L.J. 578=10 I.C. 282.

[10] *Prasanna* v. *Nilambar*, 26 C.W.N. 123=1922 Cal. 189=64 I.C. 75; also see *Sudarshan Das* v. *Ram Prashad*, (1911) 10 I.C. 402 (All.).

[11] *Ram Din* v. *Bhup Singh*, (1908) 30 All. 225; Relied on ***Baloji*** v. *Tamangouda*, (1869) 6 Bom. H. C. R. A.C.J. 97.

**Application of article.**

**1629.** In *Charles* v. *Jones,*[19] it has been held that a mortgagee makes his mortgage as a security for his debt and has no right to be in possession of the estate after he has paid himself what is due to him. This view was followed in *Haji Abdul Rahman* v. *Haji Noor Mahamed,*[20] which has been relied upon in *Abul Hasan* v. *Mt. Jagwanta,*[21] for the proposition that the mortgagor is entitled to claim interest on the surplus profits from the date of the satisfaction of the mortgage, the duty of the mortgagee

**Suit for recovery of mesne profits and interest.**

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[12] *Zakiul-Din* v. *Chunnilal,* (1927) 103 I.C. 290=10 N.L.J. 142=1927 Nag. 302.

[13] *Ram Din* v. *Bhup Singh,* (1908) 30 All. 225 (229, 230).

[14] (1902) 26 Bom. 661.

[15] (1907) 34 Cal. 223.

[16] 30 All. 225; Followed in 26 C.W.N. 123, *supra.*

[17] *Mt. Fayaz* v. *Kalu Singh,* 33 All. 244=7 A.L.J. 1201=8 I.C. 689.

[18] *Sahari Dutt* v. *Ainuddy,* 12 C.L.J. 620.

[19] 35 Ch. D. 544.

[20] 16 Bom. 141.

[21] (1916) 32 I.C. 729=2 O.L.J. 620.

being to place the said surplus at the disposal of the mortgagor (Section 76, Transfer of Property Act), and that the limitation applicable for the recovery of the said profits, and interest was that provided in Art. 105, Sch. I of the Limitation Act. Where after redemption of a usufructuary mortgage according to the terms of the deed without the intervention of a Court, a **suit** was brought by the mortgagor **for the recovery of the balance of collections** which remained in the hands of the mortgagee after deducting the interest for the years during which the collections had been made, it was held that Art. 105, Limitation Act, governed the suit.[22] In *Salik Ram* v. *Ashik Husain,*[23] Art. 105 was applied in respect of a period when, owing to tender of the mortgage-money having been made by the mortgagor, the mortgagee ceased to be entitled to retain the profits in lieu of interest and should have handed them over to the mortgagor. In *Ram Sukh* v. *Indar Kunwar,*[24] the Oudh Judicial Commissioner's Court has applied Art. 105 where a **suit by a mortgagor** was brought against his mortgagee after redemption of mortgage, **for compensation for loss caused** by the latter having cut trees standing on the mortgaged property, and time was held to run from the date of the redemption. But, where the profits had been received by the mortgagee after the mortgagor had deposited the redemption money in Court, it was held that a subsequent suit for recovery of surplus profits by the mortgagor was not a suit against the "*mortgagee*", because the collections were made by a person who had ceased to be a mortgagee, and consequently this article was not applicable.[25]

**1630. STARTING POINT OF LIMITATION.**—Under this article, the re-entry of the mortgagor in possession is the starting point of limitation.

Where a usufructuary mortgage contained a covenant that the mortgagee should, after deducting the interest stipulated for in the deed from the collections, pay over the balance annually to the mortgagor, the property being redeemable on payment of the principal money on the expiry of seven years, and after redemption without the intervention of Court, a suit was brought within three years from the date of the restoration of possession to the mortgagor, it was held to be within time under Art. 105 of the Limitation Act.[26]

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[22] *Bikramajit Singh* v. *Raj Raghubar Singh,* (1917) 38 I.C. 610=20 O.C. 18; Relied on *Salik Ram* v. *Ashik Husain,* 4 O.C. 355.

[23] 4 O.C. 355.

[24] (1919) 50 I.C. 152; Relied on 4 O.C. 355 and 33 All. 244.

[25] *Sahari Dutt* v. *Sheik Ainuddy,* 14 C.W.N. 1001 (1005)=12 C.L.J. 620=6 I.C. 336 (Art. 62 applied).

[26] *Bikramajit Singh* v. *Raj Raghubar,* (1917) 38 I.C. 610=20 O.C. 18.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 106. | For an account and a share of the profits of a dissolved partnership. | Three years. | The date of the dissolution. |

### SYNOPSIS.

1631. Corresponding provisions.
1632. **Scope of the article.**
Dissolved partnership.
1633-1638. **Suits not within Art. 106.**
1633. (*i*) Suits for dissolution (Art. 120).
1634. (*ii*) Suits for accounts without dissolution. (Art. 120 applied).
1635. (*iii*) Suits for declaration that partnership exists.
1636. (*iv*) Suits against sub-partner.
1637. (*v*) Suit by defendant partner to enforce rights.
1638. (*vi*) Suit on an adjusted partnership account.
1639-1642. **Suits within Art. 106.**
1639. (1) Suit for winding up dissolved partnership.
1640. (2) Suit for account, and share of profits.
1641. (3) Registered deed of partnership.
1642. (4) Old and new partnership.
1643. **Dissolution of partnership.**
(1) Partnership at will.
(2) Death or retirement, etc.
(3) Joint Hindu family.
1644. **Continuation of partnership.**
1645-1649. **Suit for account.**
1645. Period for which account may be taken.
1646. "Share of profits" includes capital assets.
1647. Partnership assets realised, after dissolution.
1648. Collection of partnership assets.
1649. Suit for contribution by a co-partner.
1650. **Starting point of limitation.**

### NOTES.

**1631. CORRESPONDING PROVISIONS.**—This article is same as Art. 106, Sch. II, Acts IX of 1871, and XV of 1877. Under Act XIV of 1859, there was no specific provision for such suits which were governed by the residuary clause 16 of S. 1 of that Act.[27]

**Suit for account of dissolved partnership.**

**1632. SCOPE OF THE ARTICLE.**—This article provides that a suit for an account and and a share of the profits of a dissolved partnership must be instituted within three years from the date of the dissolution. As observed in *Hara-Mohan* v. *Sudarsan,*[28] "it is plain that the section **applies only to a dissolved partnership.** The reason is obvious: it is an elementary principle that limitation cannot apply as between partners so long as the partnership continues[29]; it is different after there has been a termination of the partnership or discontinuance of it."[30]

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[27] *Bhutto Ram* v. *Puhul,* (1867) 7 W.R. 36; *Kalee Kristo* v. *Haran,* (1873) 19 W.R. 277.

[28] (1922) 66 I.C. 811=25 C.W.N. 847=1921 Cal. 538.

**1633-38. SUITS NOT WITHIN ART. 106.**—(1) Article 106 is inapplicable, where no dissolution has been alleged by the plaintiff, or proved by the defendants,[31] the burden of proving that the partners had ceased to stand to each other in the relationship of partners being on the defendants.[32] If the suit as framed is for dissolution of partnership, and under O. 20, R. 15, Civil Procedure Code, 1908, it is the Court that has to fix time from which partnership shall cease to exist, Art. 106 can have no application.[33] An action may be instituted between partners for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved.[34] To such a suit Art. 120, Limitation Act would apply and not Art. 106, which governs a suit for accounts and share of profits in respect of a partnership that had already been dissolved.[35] A dissolution of partnership is not a rescission of a contract, and as there appears to be no article specifically dealing with a suit for dissolution, the residuary Art. 120, Limitation Act would apply.[36]

**(*i*) Suit for dissolution of subsisting partnership.**

**1634.** (2) So long as a partnership continues the statute of limitation does not apply between the partners as to a claim for account.[37] The **Allahabad High Court** held in *Kassamal* v. *Gopi*,[38] that it is only in exceptional cases that a suit can be brought by one partner against another, which involves the taking of partnership accounts prior to dissolution.

**(*ii*) Suit for an account, without dissolution—Art. 120.**

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[29] *Foster* v. *Hodgson*, (1812) 19 Ves. 180 (183)=34 E.R. 485.

[30] *Noyes* v. *Crawley*, (1878) 10 Ch. D. 31=48 L. J. Ch. 112 and *Knox* v. *Gye*, (1872) 5 H.L. 656 (674)=42 L. J. Ch. 234.

[31] *Kapurchand* v. *Narinjanlal*, 20 P.R. 1897.

[32] *Maharaj Mal* v. *Hira Mal*, 37 P.R. 1897.

[33] *Narayanaswamy Mudali* v. *Ganghadara Mudali*, (1918) 48 I.C. 89=37 M.L.J. 353; cf. *Srinivasalu* v. *Ramakrishna*, 144 I.C. 573=1933 Mad. 353 (2)=37 L.W. 288 (Art. 106 applies to partnership already dissolved).

[34] Lindley on Partnership, p. 606.

[35] *Srinivasalu Naidu* v. *Ramakrishna*, (1933) 144 I.C. 573=1933 Mad. 353 (2)=37 L.W. 288=1933 M.W.N. 689; also see *Ramchand* v. *Subhan Baksh*, 69 P.R. 1902 (Art. 106 applies to terminated partnership) and (1908) 12 C.W.N. 455 (If there was no dissolution of partnership Art. 106 does not apply at all).

[36] *Khorasany* v. *Acha*, 1928 Rang. 160=6 Rang. 198=110 I.C. 349 (A suit by minor sons of a deceased partner whose mother had agreed to continue the partnership).

[37] *Gokul Krishna Das* v. *Shashimukhi Dasi*, (1912) 13 I.C. 23=16 C.W.N. 299=15 C.L.J. 204.

[38] (1886) 9 All. 120=6 A.W.N. (1886) 316; also see **Halsbury, Vol. 19, p. 171.**

This view is no doubt sound as a general principle that one partner should not be allowed to sue a co-partner for an account without at the same time claiming a final settlement of all questions between them, and a dissolution of partnership, but the **general rule is clearly subject to exceptions,** and these exceptions have been more numerous of late years in recognition of the necessities of commercial communities and the dictates of equity.[39] A partner can, under certain circumstances, bring a suit for accounts without suing for dissolution.[40] Thus, it has been held that **when the agreement of partnership expressly lays an obligation** on certain partners as managing partners to render accounts at the close of each year, a suit by the other partners for accounts without a prayer for dissolution of partnership can be maintained.[41] Such a suit by a partner against his co-partners alleging that an account of partnership has not been furnished according to express stipulation in the agreement of partnership, and asking for accounts has been held to be unexceptionable.[42] The **Madras High Court** has enunciated the rule that if a partner asks for an account, without asking for dissolution, the Court must be satisfied that there are special grounds for granting the prayer.[43] The view is, therefore, taken by the **Nagpur Judicial Commissioner's Court** that the authorities do not lay down an absolute rule debarring the suit by a partner for accounts of partnership prior to dissolution; and it has been held that it is only when the relief of rendition of accounts cannot be granted without a dissolution of partnership that it is necessary to sue also for dissolution.[44] However, it is ruled that **Art. 106,** Limitation Act, is **not apposite for such suits** where they are permissible, in special circumstances, without dissolution of partnership, as Art. 106 is only applicable to suits for accounts of a dissolved partnership: and they would come in under the residuary Art. 120.[45]

**(*iii*) Suits for declaration.**

**1635.** (3) A suit for **declaration that the plaintiff retired** from a partnership on a certain date **and that** so far as he was concerned **the partnership was dissolved** at that time, and for accounts and the share of the profits found due to him on such accounts being taken, is governed by Art. 106, Sch. I, Limitation Act.[46] But, where a suit is for a declaration that that plaintiff is a partner with defendant for accounts and for his share of the profits, this article would not apply, even though in such a case the Court might give a decree that the partnership was dissolved as the result of certain repudiations.[47] Similarly, a **suit for a declaration that a partnership existed** between certain persons, praying that it may be dissolved if it still subists, and if it had terminated, that the date of such termination may be fixed, and that a liquidator may be appointed, and so forth, is governed by Art. 120, and not by Art. 106 of Sch. I, Limitation Act.[48] A **suit for declaration that certain property**, attached in execution of a decree against one of the partners as belonging solely to him, **is not solely owned by** him, and that plaintiff has got a share in it, is not a suit for account or for share of profits of a *dissolved partnership* and is not governed by Art. 106: though it is possible that after a declaration of the nature claimed, the plaintiff or any other partner may institute a suit for dissolution and for profits.[49]

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[39] *Azim Khan* v. *Muhammad Riaz-ud-din,* 110 P.R. 1901.

[40] *Shib Ram* v. *Chinta Har,* 1933 Lah. 1032.

[41] *Harjimal Mela Ram* v. *Kirparam Brijlal,* 66 I.C. 478=2 Lah. 381 =1922 Lah. 495.

[42] *Raghubar Dayal* v. *Sheoram Das,* 1 A.L.J. 94.

[43] *Krishnaswami Naidu* v. *Jayalakshmi Ammal,* 130 I.C. 766=54 Mad. 671=1931 Mad. 300=60 M.L.J. 315=33 L.W. 307=1931 M.W.N. 497; also see *Narayanaswamy* v. *Ganghadara,* (1918) 48 I.C. 89 (Mad.) (A suit which is virtually for dissolution of a partnership, though in form one for accounts, is governed by Art. 120, and not by Art. 106, of the Limitation Act).

[44] *Brijraj* v. *Kisanlal,* (1933) 141 I.C. 277=16 N.L.J. 10=29 N.L.R. 34=1933 Nag. 127.

[45] *Ibid.*

**(iv) Suit against sub-partner — Art. 120.**

**1636.** (4) **Art.** 106 seems intended to deal with suits between partners *inter se,* and the words construed in their plain and natural sense, have been **held not to apply to actions between a principal partner and sub-partner.** A suit by a partner against his sub-partner, to recover a proportion of the loss resulting to principal partnership, does not relate either to "an account" or "share of the profits of a dissolved partnership".

> "What the plaintiff in such a suit claims is a share of his own share; with the profits of the main partnership as such, the suit has no concern."

Art. 61 is equally inapplicable, because

> "when a main partner pays his share of the loss he cannot be deemed to be paying it for, or on behalf of, his sub-partner".[50]

The suit, therefore, could only be governed by the residuary Art. 120 of the Limitation Act.[1]

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[46] *Kalidas* v. *Danpadi,* (1918) 43 I.C. 893=22 C.W.N. 104=27 C.L.J. 403.

[47] *Venkayya Naidu* v. *Lakshminarasayya,* (1919) 58 I.C. 969 (Mad.); Relied on (1908) 12 C.W.N. 455.

[48] *Harrison* v. *The Delhi and London Bank,* (1882) 4 All. 437=2 A.W.N. (1882) 87; cited in (1911) 15 C.L.J. 204.

[49] *Ananda Prasad* v. *Bhagwant Prasad,* 1933 All. 926.

[50] *Seenayya* v. *Ramalingayya,* 1934 Mad. 12=1933 M.W.N. 1382=38 L.W. 858=65 M.L.J. 789=148 I.C. 204=57 Mad. 347; Relied on *Kuppuswami* v. *Singaravelu,* 1923 Mad. 679=75 I.C. 849 and *Yerukola* v. *Yerukola,* 1922 Mad. 150=71 I.C. 177=45 Mad. 648 (F.B.).

[1] *Seenayya* v. *Ramalingayya,* 1934 Mad. 12=148 I.C. 204=57 Mad. 347; cf. *Karam Chand* v. *Basheshar Nath,* (1932) 138 I.C. 375=1932 Lah. 519=33 P.L.R. 713 (Art. 106 applied to a suit by a sub-partner against one of the partners, to whom he had advanced money in connection with his sub-partnership).

**(v) Suit by defendant partner to enforce rights.**

**1637.** (5) Where one of the partners sued for rendition of accounts of a dissolved partnership, and a decree declaring the rights of partners was passed on basis of Commissioner's report, which was not executable in form, a suit by an absentee partner defendant subsequently suing to enforce the rights declared in his favour in the former suit was held not governed by Art. 106, Limitation Act. It was, however, not considered necessary to decide whether Art. 122, or Art. 120 of the Limitation Act would apply to such a suit. It was observed that

> "the right to sue for enforcement of rights declared in a former judgment or decree is not restricted to cases where the former judgment or decree fixes a definite amount as payable by one party to another".[2]

**(vi) Suit on an adjusted partnership account.**

**1638.** (6) This article applies to a suit *"for an account"*, and "a share of the profits", that is, for an unascertained share of the profits of a dissolved partnership. Where, after dissolution of partnership, a suit was brought for rendition of accounts and for mesne profits, Art. 106, and not Art. 120, held to be applicable.[3] But, where on the partnership being dissolved, accounts were rendered, and the amount due from defendant to the plaintiff was definitely ascertained, and a **debit balance** was in fact signed in favour of the plaintiff **reciting a certain rate of interest** which would be payable, it was held that a suit to recover the principal represented by the balance *plus* interest at the stipulated rate, would be governed by Art. 64, and not by Art. 106, or Art. 115 of Sch. I of the Limitation Act.[4] An adjustment of account is a new cause of action.[5] Where the parties who were partners in a business comprising a number of transactions went into the accounts of the business and the defendant made an entry in the plaintiff's books admitting that a certain amount was due to the plaintiff from him as a result of the scrutiny into the accounts, it was held that the entry was an "account stated" within the meaning of Art. 64, Sch. I, Limitation Act, and the suit was not governed by Art. 106.[6] A suit on an adjusted partnership account is a suit on an account stated.[7]

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[2] *Ratanchand Kumaji* v. *Amichand,* 1934 Mad. 665=1934 M.W.N. 539=67 M.L.J. 413=40 L.W. 792.

[3] *Karam Chand* v. *Basheshamath,* 1932 Lah. 519=33 P.L.R. 713=138 I.C. 375.

[4] *Nandlal* v. *Partab Singh,* (1922) 69 I.C. 502=3 Lah. 326=1922 Lah. 425; cf. *Karam Chand* v. *Basheshamath,* supra.

[5] *Jahin Singh* v. *Choonee Lal,* (1911) 15 C.W.N. 882=11 I.C. 540.

[6] *Jairamsingh Bhagmal* v. *Sardarimal,* (1927) 108 I.C. 600=1928 Lah. 459.

[7] *Nobin Chunder* v. *Suroop Chunder,* (1866) 6 W.R. 328.

**1639. SUITS WITHIN ART. 106.**—(1) A suit for winding up the affairs of the partnership which terminated or was dissolved is governed by Art. 106, Limitation Act. As stated by Lindley on Partnership,

**(i) Suit for winding up dissolved partnership.**

> "so long, indeed as a partnership is subsisting and each partner is exercising his rights and enjoying his own property, the statute has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different and the statute begins to run."[8]

When a partnership is already dissolved, a suit brought for its winding up is within Art. 106, and in cases of terminated partnership, plaintiff must sue for an account within three years from the date of dissolution under this article.[9]

**Suit for accounts.**

**(ii) Share of the profits.**

**Share of capital.**

**1640.** (2) Under Art. 106, the relief by way of account is, of course, merely subsidiary and incidental to the final relief sought. If the plaintiff's claim, looking at the substance and not the letter of the plaint must fail as being beyond time upon the allegations in the plaint, the allegations of the defendants in reply are immaterial; accordingly, where upon the allegations in the plaint, a **relationship of partnership** subsisted between the uncle and his nephews, which was dissolved by the death of the uncle, a **suit** by his widow **for general acount and share in specific assets,** was held **governed by Art. 106,** Limitation Act, and not a suit by an heir to recover from mere trespasser, property which in reality belonged to the predecessor-in-title in severalty.[10] Where the cessation of the annual accounts and other circumstances led to an **inference of dissolution** of the partnership business between plaintiff's family which owned a half share with the defendant, it was held that a suit for settlement of accounts was governed by Art. 106 of the Limitation Act.[11] Where partnership formed between separated members of a joint family is not for a fixed term, and one of the members, by words and deed, has put an end to whatever partnership had ever existed, the only relief which such member is entitled to against the other member is an **account and share of the profits of the dissolved partnership,** and a suit asking for such relief must be brought within three years of the date of dissolution.[12] A suit for partition is not maintainable. **Where a member of a partnership firm dies,** there is a dissolution of the firm, and his widow or heir, is barred by Art. 106, Limitation Act, from suing for an account more than three years after his death, in the absence of proof of an agreement whereby the plaintiff became a partner in his place.[13]

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[8] *Sudarsanam* v. *Narasimhulu,* (1901) 25 Mad. 149 (164); also see *Haramohan* v. *Sudarshan,* (1922) 66 I.C. 811=1921 Cal. 538=25 C.W.N. 847; compare *Moung Tha Hnyin* v. *Mah Thein,* 27 I.A. 89=28 Cal. 53 (59) (P.C.) (There was no dissolution, and the plaintiff did not abandon his interest in the partnership).

[9] *Ram Pershad* v. *Rattan Chand,* 87 P.L.R. 1909.

[10] *Mt. Nehal Devi* v. *Kishen Kaur,* 97 P.R. 1910; also see and cf. *Amirchand* v. *Gujarmal,* 73 P.R. 1906 (Where plaintiff, a surviving partner, sued for contribution of losses of a dissolved partnership, Art. 106 was applied to the case, and the form was a transparent device to avoid the provisions of that article).

[11] *Joopoody Sarayya* v. *Pulavarti,* (1913) 19 I.C. 513=36 Mad. 185 =25 M.L.J. 128 (P.C.); Relied upon in *Srinivasalu* v. *Ramakrishna,* 144 I.C. 573=1933 Mad. 353 (2)=37 L.W. 288.

***(iii)* Registered deed of partnership.**

**1641.** (3) A suit for an account of a partnership dissolved more than three years before the filing of the plaint, is barred by limitation even if the instrument of partnership was registered.[14] A suit for taking accounts of a dissolved partnership even though registered, is governed by Art. 106, Limitation Act; and, the main characteristic of the suit is not altered, if in the course of taking such accounts, results of breaches of terms in the deed made by some partners may have to be considered, so as to make Art. 116 applicable. The suit is not thereby made a suit for compensation for breach of contract in writing.[15]

***(iv)* Old and new partnership.**

**1642.** (4) When a partner dies, the partnership comes to an end under the Contract Act. However, as observed in *Betjemann* v. *Betjemann*,[16]

> "when a partnership is determined by death, and the surviving partners continue to carry on the business, the statute of limitation was no bar to the taking of accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement".

Where, by the death of a partner, there was a complete dissolution of the partnership, in the absence of a contract to the contrary antecedent to the dissolution, the fact that the surviving partners did carry on the same business in partnership among themselves would only amount in law to the formation of a new partnership and the investing therein as capital the respective shares of the surviving partners in the profits of the dissolved parnership.[17]

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[12] *Bhagwati Pershad* v. *Babulal,* (1921) 63 I.C. 548=19 A.L.J. 525.

[13] *Mt. Jatti* v. *Banwarilal,* (1923) 4 Lah. 350=50 I.A. 192=45 M.L.J. 355 (P.C.).

[14] *Viravan* v. *Ponnayya,* (1898) 22 Mad. 14.

[15] *Kothandapani* v. *Sreemanavedam,* 1934 Mad. 162=1934 M.W.N. 22=39 M.L.W. 164=57 Mad. 378=66 M.L.J. 625=151 I.C. 81.

[16] (1895) 2 Ch. 474=64 L.J.Ch. 641=73 L.T. 2.

[17] *Ahimsa Bibi* v. *Abdul Kader Saheb,* 25 Mad. 26 (31); Relied

Therefore,

> "if the remaining partners continue the business, for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as that, for the account of old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership."[18]

The principle embodied in S. 253 (10) of the Indian Contract Act cannot apply when all that happens is that one of the existing partners becomes by operation of law, entitled on the death of his co-parcener, to a larger share in the partnership than he previously possessed in his individual right. The death of a member of joint Hindu family does not dissolve partnership of family with others. But even, if the death of a member has technically the effect of dissolving the partnership of which he was a member, the parties may expressly or by necessary implication agree to continue the partnership as if no dissolution had taken place.[19]

**Suit by heir of a deceased partner.**

**1642.** Their Lordships of the **Privy Council** have held in *Gopala Chetty* v. *Vijayaraghava,*[20] that it is contrary to the policy of the Legislature to allow a partner whose right to sue, for a general partnership account has been barred to sue for his share of specific payments received from debtors by one partner subsequently to the dissolution of partnership. The **Calcutta High Court** had held in *Mohit* v. *Rajnarayan,*[21] that the claim for **unrealised assets outstanding** on the death of a deceased partner would be barred under Art. 106 even if such assets were outstanding at the date of the suit. According to the view taken by the **Punjab Chief Court,**

**Assets realised after dissolution.**

> "a claim for a specific portion of partnership property or any particular assets acquired within three years of the institution of suit, is not maintainable, without a suit, in the first instance, for a general account, and *if the claim as to general account is barred,* the representatives

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in *Maharaj Kishen* v. *Hargovind,* 27 I.C. 69=101 P.R. 1914; also relied upon in *Munshilal Amansing* v. *Bishenlal Dattaram,* (1929) 118 I.C. 741 =1929 Sind 230 (On dissolution by death of a partner, surviving partners may continue, and the effect is technically the formation of a new partnership, requiring settlement of old account, to ascertain state of accounts of new partnership).

[18] *Abdul Jaffar* v. *Venugopal,* (1924) 80 I.C. 378=46 M.L.J. 503= 1924 Mad. 708; Relied on 25 Mad. 26 (31).

[19] *Maharaj Kishen* v. *Hargobind,* 101 P.R. 1914=27 I.C. 69; Followed in *Harichand* v. *Jugal Kishore,* (1922) 68 I.C. 722=1922 Lah. 349.

[20] 45 Mad. 378=74 I.C. 621=1922 P.C. 115 (P.C.) (*See* S. 1645, *post*).

[21] (1905) 9 C.W.N. 537.

of a deceased partner cannot sue the surviving partner for any particular asset belonging to the late partnership."[22]

Accordingly, it was held that the suit for general account in respect of the deceased partner's share in all the *Dukan* properties, moveable and immoveable, *if barred in respect of the moveable* part of the property, would be equally barred as regards the immoveable. The same view has been taken by the **Bombay High Court,** in *Ahmed Suleman* v. *Bhagwandas Visam & Co.,*[23] that if a suit for general partnership account and a share in partnership profits is itself barred, the plaintiff in such a suit cannot be allowed to proceed speculatively against any and every partnership asset which may have been realised by the defendant after dissolution and within the period of limitation. The earlier **Bombay** ruling in *Merwanji Hormusji* v. *Rustomji Burjorji,*[24] to the contrary, is no longer good law after the decision of the Privy Council above referred to. Where a member of a partnership firm dies, there is a dissolution of the firm, and a suit by heir of a deceased partner must be brought within three years of his death, unless by an agreement the heir of deceased has become a partner in his place.[25] As a result of the decision of the Privy Council in 45 Mad. 378 (P.C.), *supra,* it may be noted,

> "that even in cases where immoveable property forms assets of a partnership, a suit for partition or share of such immoveable property would be governed by Art. 106, for the right to a share of such property cannot be established unless a full account of the assets of the partnership is taken".[26]

## 1643. DISSOLUTION OF A PARTNERSHIP.—

**Partnership-at-will.**

(1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners. A partnership at will can be put an end to by a writ and plaint claiming dissolution.[27] This will be inferred from the date

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[22] *Mt. Nihal Devi* v. *Kishore Chand,* 97 P.R. 1910=8 I.C. 899; also see *Gobardhan* v. *Ganeshilal,* 11 I.C. 288; and *Niar Ahmad* v. *Abdul Hamid,* 30 All. 279=5 A.L.J. 278=A.W.N. (1908) 131 (*Held,* that a suit for division of immoveable property forming part of partnership assets after the dissolution of partnership, is governed by Art. 106).

[23] (1910) 34 Bom. 515=4 I.C. 837=11 Bom.L.R. 1354.

[24] (1882) 6 Bom. 628 (Suit by an ex partner against a former partner in a firm which had been dissolved, to share in a definite sum of money admitted as a partnership asset) ; also see and cf. *Sokhananda* v. *Sokhananda,* 28 Mad. 344.

[25] *Mt. Jath* v. *Banwarilal,* (1923) 4 Lah. 350=50 I.A. 192=45 M.L.J. 355 (P.C.).

[26] Mitra's Limitation Act, Vol. II, p. 1379; citing 30 All. 279; 38 Mad. 1099; 11 I.C. 288 (All.); 32 I.C. 853 (Pun.); 1929 Sind 182=125 I.C. 208; also 25 Mad. 149 and 49 Mad. 738=51 M.L.J. 410.

[27] *Sathappa* v. *Subrahmanyan,* 1927 P.C. 70=101 I.C. 17=53 M.L.J. 245 (P.C.).

when the will of one of the partners is shown to be against the continuation of a partnership.[28] The circumstances may show that a partner has in fact abandoned his interest in the concern.[29]

**Death or retirement.**

(2) In the absence of a special contract, the death of any partner dissolves a partnership.[30] (*See* S. 253 (10) of the Indian Contract Act.) Under S. 253 (7), Indian Contract Act, if from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the members. This, however, is subject to any agreement to contrary which may be established by proof of express declaration, or may be inferred from conduct.[31] Insolvency did not *per se* work a dissolution under the Indian Contract Act.[32] A partnership is not automatically dissolved by the **refusal and neglect** on the part of a partner to perform the duties undertaken by him.[33] **An expulsion** of a partner by another does not amount to a dissolution of the partnership and a suit by an expelled partner, for accounts, or for a dissolution and a share in the profits is governed by Art. 120.[34]

**Joint Hindu family.**

(3) Where one member of a joint Hindu family enters into a contract of partnership with a stranger, the other members of the family do not become partners, and cannot sue for dissolution of the partnership. The partnership is dissolved by the death of the member who is a partner, and limitation for a suit for an account of the partnership begins to run from the date of the death of the partner.[35] **Where the manager** of a joint Hindu family **enters into a partnership** for the family benefit with a person, a stranger to the family, the partnership is dissolved on the death of the manager in the absence of any agreement with the survivors.[36] A **suit for a declaration that the plaintiff retired from the partnership** on

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[28] *Syers* v. *Syers,* (1876) 1 App. Cas. 174. 1916 Lah. 410

[29] *Amirchand* v. *Jawaharmal,* (1916) 32 I.C. 853 (Pun.); Relied on 25 Mad. 149; and 28 Cal. 53=27 I.A. 189=5 C.W.N. 114 (P.C.).

[30] *Harichand* v. *Jugal Kishore,* (1922) 68 I.C. 722=1922 Lah. 349; *Ramanatha* v. *Yegappa,* 32 I.C. 427=30 M.L.J. 241.

[31] *Haramohan* v. *Sudarsan,* (1922) 66 I.C. 811=1921 Cal. 538=25 C.W.N. 847.

[32] *Maharajmal* v. *Hiralal,* 37 P.R. 1897.

[33] *Krishnamachariar* v. *Sankara,* (1920) 39 M.L.J. 257=25 C.W.N. 314 (P.C.).

[34] *Dwarkadas* v. *Chunilal,* (1908) 12 C.W.N. 455; *Din Mahomed* v. *Kaushi Ram,* (1929) 1930 Lah. 378=120 I.C. 613.

[35] *Rambhai* v. *Prayagdas,* (1924) 78 I.C. 198=20 N.L.R. 49=1924 Nag. 263; also see *Ramanathan Chetty* v. *Yagappa,* (1915) 32 I.C. 427=30 M.L.J. 241 (Death of managing member of a Hindu joint family, who was a partner in a partnership, dissolves the partnership).

[36] *Sokhananda* v. *Sokhanada,* 28 Mad. 344 [The latter part only of this case has been overruled by the Privy Council decision in *Gopala* v. *Vijiyaraghavachariar,* 74 I.C. 621=45 Mad. 378=1922 P.C. 115].

a certain date, and that so far as he was concerned the partnership was dissolved at that time, and for accounts being taken, is governed by Art. 106, Limitation Act.[37] In the case of a joint Hindu family being in partnership with certain individuals, the partnership is not, as a rule, dissolved by the death of a member.[38]

**Continuation of partnership.**

**1644.** It may be that notwithstanding the death or retirement of a member, the partnership may be carried on as a continuing firm. **Neither stoppage of business nor refusal** of a partner to make further advances of capital **can be treated as a dissolution** of the firm.[39] The partnership may go on **for the purpose of realizing the assets,** even if it would not do any more business, and until those assets are realised, the final dissolution of the partnership could not take place.[40] Section 253 (10) of the Contract Act, which provides for the dissolution of a partnership on the death of a partner must be read as qualified by the introductory words "*in the absence of any contract to the contrary*".[41] Where parties to a contract agree expressly or by necessary implication to continue the partnership, as if no dissolution had taken place, upon the death of one of them, a suit for accounts would not be barred under Art. 106, Limitation Act.[42] Under S. 253, Indian Contract Act, partners may agree that on the death of any of them his nominee or legal representatives shall be entitled to take his place. Whether in a particular case there has or has not been such an agreement, **may be proved by an express declaration** to that effect **or** may be **determined from the conduct of the parties.**[43] The onus is on plaintiff to prove that the partnership existed up to within three years prior to the suit.[44] Where in a partnership mutual accounts ceased to be rendered annually, as before, but a final account showing a division of capital and revenue was made, it was held that there was a presumption of dissolution of partnership between the parties.[45] Where in a previous suit up to some stage the parties were urging successfully that the partnership was still subsisting, and there was no definite date which the defendants could point out at which the partnership was dissolved, a suit brought within three years from the date of previous decree was held to be within time under Art. 106, Limitation Act.[46]

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[37] *Kalidas* v. *Danpadi,* (1918) 43 I.C. 893 (Cal.).

[38] *Maharajkishen* v. *Hargobind,* 27 I.C. 69=101 P.R. 1894.

[39] *Haramohan* v. *Sudarsan,* (1922) 66 I.C. 811=1921 Cal. 538=25 C.W.N. 847; Followed in *Din Muhd.* v. *Kanshi Ram,* (1929) 120 I.C. 613=1930 Lah. 378.

[40] *Sathappa* v. *Subrahmanyan,* 1927 P.C. 70=101 I.C. 17=53 M.L.J. 245; also see Wood, 4th Edn., p. 1451; cf. *Ruplal* v. *Gianchand,* (1931) 134 I.C. 527=1931 Lah. 300 (Agreement that certain partners shall collect outstandings, as trustees created a relationship of principal and agent, apart from that of original agreement: Art. 89 applied).

[41] *Harichand* v. *Jugal Kishore,* (1922) 68 I.C. 722=1922 Lah. 349.

[42] *Ibid.,* 68 I.C. 722=1922 Lah. 349; also see *Mt. Jati* v. *Banwari,* 1923 P.C. 136=4 Lah. 350=50 I.A. 192=28 C.W.N. 785 (P.C.); and *Gokul* v. *Sashi,* 15 C.L.J. 204=16 C.W.N. 299 and *Khorasamy* v. *Acha,* (1928) 6 Rang. 198.

[43] *Haramohan* v. *Sudarshan,* (1922) 66 I.C. 811=1921 Cal. 538=25 C.W.N. 847.

[44] *Joopoody Sarayya* v. *Pulavarti,* (1913) 19 I.C. 513=36 Mad. 185 =25 M.L.J. 128 (P.C.); Relied in *Srinivasalu* v. *Ramakrishna Naidu,* 144 I.C. 573=1933 Mad. 353 (2).

**Period for which account may be taken.**

**1645. SUIT FOR ACCOUNT.**—A suit for account brought under this article, would be carried back **to the last settlement or commencement of the partnership.**[47] Where there is a complete dissolution of partnership by death of a partner, but the surviving partners carry on the same business in partnership with themselves, this would only amount in law to the formation of a new partnership, and as noticed in S. 1642 *ante,* in a suit for an account and share of the profits of the new partnership, on its dissolution, it will be necessary incidentally to take an **account of the profits of the old partnership merely for the purpose of ascertaining the capital contributed to the new partnership** by each of its surviving partners.[48] **The ordinary principle** in these matters, as explained by Rankin, C.J., is that unless it is shown that there has been an adjusted account at a later date, the account of partnership will begin from the commencement of the partnership.[49]

**Share of profits, means share in capital.**

**1646.** The expression "**share of the profits**" in Art. 106, is not restricted to a claim to a share of the *profits* alone. But, it has been held that the article **applies equally to a claim for a share in the *capital*.**[50] If the claim as to general account and for a share of the profits is barred by time under Art. 106, Limitation Act, the claim for any particular assets, moveable or immoveable, belonging to the dissolved partnership is equally barred.[1]

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[45] *Joopoody Sarayya* v. *Pulavarti,* (1913) 36 Mad. 185=25 M.L.J. 128 (P.C.).

[46] *Sathappa* v. *Subramanian,* 1927 P.C. 70=53 M.L.J. 245.

[47] *See* Lindley, on Partnership, 9th Edn., p. 431; also see Lightwood, pp. 239, 240.

[48] *Ahinsa Bibi* v. *Abdul Kader,* (1901) 25 Mad. 26; Relied in *Munshilal* v. *Bishenlal,* 1929 Sind 230=118 I.C. 741; and *Maharajkishen* v. *Hargobind,* 101 P.R. 1914=27 I.C. 69 and *Abdul Jaffer* v. *Venugopal,* (1924) 80 I.C. 378=1924 Mad. 708=46 M.L.J. 503.

[49] *Shawal Ram* v. *Tansukhdas,* 33 C.W.N. 1104; also see *Gokul* v. *Sashimukhi,* (1911) 15 C.L.J. 204.

[50] *Mt. Nehal Devi* v. *Kishenkaur,* 97 P.R. 1910.

[1] *Ibid.,* 97 P.R. 1910; also see *Niaz* v. *Abdul,* 30 All. 279; *Mohideen* v. *Syed Meer,* 38 Mad. 1099; and *Venkata* v. *Subba Rao,* 49 Mad. 738.

**Partnership assets realised after dissolution.**

**1647.** In *Ahmed Suleman* v. *Bhagwandas*,[2] it was similarly held, by the **Bombay High Court,** that the plaintiff in a suit for account cannot be allowed to proceed speculatively against any and every partnership asset which may have been realised by the defendant after dissolution and within the period of limitation. Their Lordships of the **Privy Council,** have expressed the same views in *Gopala* v. *Vijayaraghava*,[3] relying on *Knox* v. *Gye*.[4] If on an account stated a release is given, the release will be limited to that account, and will not bar the right of an executor to have an account of subsequent receipts.[5] **The rule of law** was stated thus:—

**Settlement of accounts: Subsequent falling in of assets—Method of disposal.**

> "If a partnership has been dissolved, and the accounts have been wound up and each partner has paid what he had to contribute to the debts of the partnership and received his share of the profits of the mutual rights and obligations having been thus all discharged, and then it turns out afterwards that there was some item to the credit of the partnership which was either forgotten or treated as valueless by reason of the supposed insolvency of the debtor or for any other cause, which item afterwards becomes of value and falls in, it ought to be divided between the partners in proportion to their shares in the original partnership. There is no reason why one should have it more than the other."[6] "At any rate, in all cases where for any reason it did occur that after the dissolution and complete winding up of a partnership an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their share in the former partnership."[7] "If on the other hand, no accounts have been taken and there is no contract that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken: and if it is too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share."[8]

**Collection of partnership assets.**

**1648.** A claim to recover a sum of money due from one of the partners in a firm must form part of the enquiry in an action for winding up the partnership, and no separate suit will lie for such relief after a suit for an account is barred by limitation.[9] Where, after dissolution of partnership, there is an agreement that certain partners shall collect the outstandings, and deposit them in the bank after paying off liabilities, this creates a relationship of principal and agent between the partners, apart from that of original agreement.[10]

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[2] 34 Bom. 515 (*See* S. 1642, *ante*).

[3] 49 I.A. 181=45 Mad. 378=74 I.C. 621=1922 P.C. 115 (P.C.).

[4] (1871) 5 H.L. 656=42 L.J.Ch. 234.

[5] Per Lord Westbury in *Knox* v. *Gye*.

[6] *Gopala* v. *Vijayaraghava,* 74 I.C. 621=45 Mad. 378=1922 P.C. 115=49 I.A. 181 (P.C.).

[7] *Ibid.*

[8] *Ibid.*

[9] *Ramasami* v. *Muthiah,* (1925) 85 I.C. 991=48 Mad. 482=47 M.L.J. 829=1925 Mad. 279=21 L.W. 75.

**Suit for contribution by a co-partner.**

**1649.** Monies borrowed by partners on their individual credit and deposited in partnership business, in pursuance of an agreement between themselves, do not become an item of partnership account, and a suit for contribution by a partner paying in excess of his share is maintainable, if he has to pay up decrees obtained upon the borrowings.[11] A partnership debt is a debt of the partnership firm, and not merely a debt which is somehow connected with the partnership. Individual partners undertaking to raise money to pay off partnership debts cannot call the new debt a partnership debt.[12] Where with respect to dealings arising out of a partnership, a suit for accounts had become barred, it is not open to one partner to call upon his co-partner to contribute twards one item of liability which had been discharged by him.[13] Where plaintiff, a surviving partner, sued the representatives of his deceased partner for a certain amount as contribution due from them in respect of losses of a dissolved partnership, but admittedly no accounts had taken place between the parties, it was *held* that whatever the form of the suit, it was in fact a suit for an account and payment of the sum found due, and that Art. 106 applied to the case, looking at the substance and not the form of the suit.[14] In a suit for contribution brought by one or more members of a partnership which has come to an end, if the plaintiff is in possession of the partnership accounts or property, he is bound to render an account of profit and loss and give the defendant credit for his share of the profits, if any, even though the claim for rendition of accounts is barred by time. This is on the principle that he who seeks equity must do equity.[15]

**1650. STARTING POINT OF LIMITATION.**—Art. 106 of the Limitation Act, enacts that where a suit is for taking partnership accounts or share in the profits of the partnership, the date from which limitation begins to run is the **dissolution of the partnership.**[16] If a suit for general partnership accounts and a share in partnership profits is itself barred, the plaintiff cannot be allowed to recover such **outstand-**

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[10] *Ruplal* v. *Gianchand,* 1931 Lah. 300=134 I.C. 527.

[11] *Durga* v. *Raghunath,* 26 Cal. 254; also see and cf. *Walaiti Ram* v. *Ramkishen,* (1923) 72 I.C. 385=5 L.L.J. 310 (Art. 61, applied to a suit for contribution by a partner who has paid in excess of his share of the partnership debts).

[12] *Arunachallam* v. *Nottam Beer,* 1928 Mad. 588=27 M.L.W. 597=110 I.C. 484=1928 M.W.N. 394.

[13] (1924) 48 M.L.J. 4.

[14] *Amirchand* v. *Gujar Mal,* 73 P.R. 1906.

[15] *Kalamal* v. *Saharamal,* (1916) 35 I.C. 910 (Pun.).

[16] *See* S. 1643, *ante.*

**ings** as were **realised** by the defendants **after dissolution** and within the period of imitation.[17] In case, the partnership is continued by agreement for the purpose of realising the assets, until those assets are realised, the final dissolution of the partnership cannot take place.[18] A suit for the dissolution of partnership not entered into for a fixed term and for rendition of accounts is governed by Art. 106, and the period prescribed commences from the date of the business being closed, although assets were being realised after that, and rents recovered from tenants in occupancy of the immoveable property belonging to the partnership.[19]

**Duration of partnership.**

In a suit for dissolution of partnership and rendition of account, it appeared that the partnership was entered into for the purpose of doing excavation work and *such other work* as the defendants might undertake to do. It was held that the partnership was not dissolved on the date the parties received final payment for their bill for excavation work, and that the question whether any other work was as a matter of fact undertaken by the parties during the time that the said contract work was being done was immaterial for the purpose of determining the duration of the partnership.[20] In *Hansrajmal* v. *Somjimal*,[21] there was a partnership between *A* and *B*. The last purchase on account of the partnership was made in 1920; and, in June 1922, *A* passed to *B* a promissory note for a certain amount, without making it a final settlement of accounts. It was held that in the absence of any particular date on which one partner informed the other that the partnership was coming to an end, the partnership only came to an end when *B* died, and not on the date when the promissory note was executed.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 107. | By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate. | Three years. | The date of the payment. |

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[17] *See* S. 1642, *ante; Ahmed Suleman* v. *Bhagwandas*, (1910) 34 Bom. 515=4 I.C. 837=11 Bom. L. R. 354 (Limitation started from date of actual dissolution, and not from the date fixed for dissolution by the partnership agreement); also see *Mt. Nihaldevi* v. *Kishorechand*, 97 P.R. 1910=8 I.C. 899; *Gopala* v. *Vijayaraghava*, 45 Mad. 378=74 I.C. 621=1922 P.C. 115 (P.C.).

[18] *Sathappa* v. *Subrahmanyan*, 1927 P.C. 70=101 I.C. 17=53 M.L.J. 245; cf. *Ruplal* v. *Gian Chand*, (1931) 134 I.C. 527=1931 Lah. 300.

[19] *Amir Chand* v. *Jawahir Mal*, (1916) 32 I.C. 853=49 P.W.R. 1916.

[20] *Mani Singh* v. *Dial Singh*, (1917) 42 I.C. 459=162 P.W.R. 1917.

[21] (1930) 126 I.C. 746=1930 Sind 148.

## SYNOPSIS.

1651. Corresponding provisions.
1652. Scope and applicability.
1653. Starting point.

## NOTES.

**1651. CORRESPONDING PROVISIONS.**—This article is the same as Art. 107, Sch. II, Act XV of 1877; which had substituted the words *"by the manager of a joint estate of an undivided family"* for the words "by a Hindu manager of a joint estate," appearing in Act IX of 1871. This **change of law** was made to bring within this article the case of those Mahomedans who have adopted, or, in the case of Hindu converts to Islam, have retained, the Hindu law of property.

Under Act XIV of 1859, there was no specific provision for suits of this nature, and the residuary article, S. 1, cl. (6) applied under that Act. See *Ramkisto* v. *Muddun Gopal Roy*,[22] where time was held to run from the date of payment.

**1652. SCOPE AND APPLICABILITY.**—This article applies to suits by the manager of a joint family for contribution. The change in the law, noticed in S. 1651, above, makes the provision applicable to all families, not necessarily Hindu families, who are by custom governed by the Hindu Law of Property.

**1653. STARTING POINT.**—In *Aghore* v. *Girish*,[23] where **money** was **borrowed by the manager** of a joint Hindu family ***on his personal security*** for purposes of family necessity, it was held that his **right to contribution** arose **when he expended the money** and limitation ran against his claim from that date and not from the date on which he repaid the debt, and released his property. If, however, the loan is taken by the plaintiff *as manager*, his cause of action for contribution would arise, under Art. 61, only when he repays the money. In *Ramkrishna* v. *Madan*,[24] (a case under Act XIV of 1859), the manager of a joint estate borrowed money for family purposes, and paid off his debt by a second loan which he paid off from his private funds. It was held that limitation started not from the date of the payment of the second loan, but from the date when the money was first borrowed. Similarly, in *Sankar* v. *Gouri*,[25] (a case under Act IX of 1871), it was held that the period of limitation commenced to run from the **date of the first loan,** and not from the date of the fresh bond executed in favour of the creditor to pay off the first loan.

Where a money decree had been passed against the *karta* of a joint Hindu family, and the debt was created for the *family*

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[22] 12 W.R. 194.
[23] 20 Cal. 18.
[24] 12 W.R. 194.
[25] 5 Cal. 321.

*use;* and, after separation, the *karta* in lieu of the money decree took upon himself the whole liability, and sued the other separated members for contribution, it was held that the joint family debt was wiped out **when the whole liability had been taken on himself,** by the *karta,* and that, therefore, the time for the suit for contribution began to run from this latter date, and that the case came appropriately under Art. 99.[26] The Calcutta case of *Aghore Nath* v. *Girish Chunder,*[27] was distinguished on the ground that the debt was considered to be the personal debt of the manager, and it was supposed that he had expended that amount for the purposes of the family.

Where the members of the partnership who sue are themselves the managing members of the family, Art. 107 of the Limitation Act would apply. A **managing member is entitled to sue for contribution** in respect of a payment made by him **and is not bound to sue for or wait till partition** to get his claim against the joint family adjusted.[28] In *Tirupatiraju* v. *Rajagopala,*[29] the suit was brought after division in the family for contribution in respect of the moneys recovered by a creditor from the person who was joint family manager. It was held that Art. 61 governed the suit, the **cause of action** arising **when the money was actually repaid** by him. In a suit for contribution, the cause of action is based on grounds of equity, and comes into operation only **when the plaintiff was compelled to discharge** and in fact actually discharged not only his proper share of the liability but also the liability of the defendant.[30] The fact that when the plaintiff discharged the liability, the claim against the defendant was barred, was immaterial.[31]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 108. | By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease. | Three years. | When the trees are cut down. |

**SYNOPSIS.**

1654. Corresponding provision.
1655. Scope and applicability.
1656. Starting point of limitation.

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[26] *Sat Rohan* v. *Bharath,* 1931 A.L.J. 651=134 I.C. 452=1931 All. 652 (653).

[27] 20 Cal. 18.

[28] *Velayappa Moothan* v. *Krishna Moothan,* (1918) 44 I.C. 428=34 M.L.J. 32.

[29] (1898) 8 M.L.J. 271.

[30] *Marivada Chinna* v. *Veerapurani,* (1910) 8 I.C. 1102.

[31] *Ibid.,* 8 I.C. 1102; also see *Kandana Venkata* v. *Achanta,* (1919) 52 I.C. 414 (Mad.) (Art. 61 applied).

## NOTES.

**1654. CORRESPONDING PROVISION.**—This article is same as Art. 108, Sch. II, Act IX of 1871, and Act XV of 1877. The residuary clause 16, S. 1, applied to such suits under Act XIV of 1859.[32]

**1655. SCOPE AND APPLICABILITY.**—This article applies to *suits* by a lessor for the recovery of *value of trees,* cut down by his lessor contrary to terms of the lease. The article would not apply to a customary debit claimed by the plaintiff against the tenants, of the value of trees cut by them from the value of improvements due to them.[33] The article is inapplicable where trees are cut not by the defendant but by his tenants. To such a suit Art. 48 or 49 would be applicable.[34]

**1656. STARTING POINT.**—In *Indubhushan* v. *Kelly,*[35] a case under Act XIV of 1859, where the lessee cut down trees during the term of the lease, limitation period was held to run **from the time when the contract was broken,** and not from the date of plaintiff's knowledge of the breach. **Under English law** also, when a tenant fells timbers, statute runs from the time of felling, or at all events, if the landlord should waive the tort and sue for money had and received, from time when the timber became money in the hands of the wrongdoer.[36] But, when the tenant for life is also owner of the first estate of inheritance, the statute would not begin to run till the death of the tenant for life.[37]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 109. | For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant. | Three years. | When the profits are received. |

## SYNOPSIS.

1657. Corresponding provisions.
1658. Article explained—Scope of article.
1659. " " —Property belonging to plaintiff.
1660. Wrongfully received.
1661. Received—actually or impliedly.

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[32] *Jaddu Bhoosun* v. *Kenney,* 3 W.R. (S.C.C.) 9.

[33] *Pumpalia Vengalia* v. *Kunhamina,* (1914) 25 I.C. 704.

[34] *Mahomed* v. *Ali Fakir,* 2 I.C. 955.

[35] (1865) 3 W.R. (S.C.C.) Ref. 9.

[36] Darby, p. 43; Rustomji's Limitation Act, p. 541; Mitra's Limitation Act, Vol. II, p. 1382, citing *Higginbotham* v. *Hawkins,* (1872) L.R. 7 Ch. App. 676; *Seagram* v. *Knight,* (1867) L.R. 2 Ch. App. 628.

[37] *Birche-Wolfe* v. *Birch,* (1870) L.R. 9 Eq. 683; Darby, p. 43.

1662. Contrary view—actually received.
1663. Starting point—Receipt of profits.
1664. Cause of action not considered.

## NOTES.

1657. **CORRESPONDING PROVISIONS.**—There was no corresponding provision to this article, under **Act XIV of 1859,** and such suits were governed by the residuary article, in S. 1, cl. 16 of that Act.[38] The cause of action was said to accrue on a date on which mesne profits of property became annually due.[39] According to Jackson, J., in *Luckhee* v. *Deendyal,*[40]

> "**the cause of action as to wasilat** accrued, on the date on which the plaintiff, but for the fact of dispossession, would have received such wasilat, and when, consequently, they have or might have been received by the defendant, and the plaintiff is entitled to recover *on any cause of action so accruing* at any time within (six years) next preceding the commencement of the suit".

In **Act IX of 1871,** the corresponding provision was made in Art. 109, Sch. II of that Act. The words *"which have been"* after the word "plaintiff" in the first column were not given in that Act. The third column ran as follows:—

> "when the profits are received, or where the plaintiff has been dispossessed by a decree afterwards set aside on appeal".

Under Act XV of 1877, the third column of the corresponding provision in Art. 109, contained the following words after *"when the profits are received," viz.,*

> "or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal *when he recovers possession*".

These words, now omitted, were no longer needed in view of the change in S. 144 (2), Civil Procedure Code, 1908, which says that no suit shall be instituted for the purpose of obtaining any restitution, etc.[41]

**Scope of article.**

**Applies to suit for mesne profits against trespasser.**

1658. **ARTICLE EXPLAINED.**—This article is in every day use in the class of suits which it primarily contemplates, namely, **suits for mesne profits against a trespasser.**[42] It has no application at all **to a suit by one co-sharer against another** for a share of the rent collected by the latter, the rent being due in respect of land

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[38] *Lalla Gobinda* v. *Munohur,* (1864) 1 W.R. 65; *Munne Ram* v. *Turungo,* (1867) 7 W.R. 173.

[39] *Issurrenund* v. *Parbutty,* (1865) 3 W.R. 13; *Koer Ramaput* v. *Furlong,* (1865) 3 W.R. 38; *Fuzzul Mahomed* v. *Raj Coomaree,* (1866) 6 W.R. 113; *Ram Chunder* v. *Ambika,* (1867) 7 W.R. 161.

[40] (1870) 14 W.R. 82; also see *Unnoda* v. *Ranee Surnomoyee,* W.R. Sp. No. 163 (F.B.) (Under Act XIV of 1859, the period of limitation for suing for mesne profits was six years).

[41] *Rangaswami* v. *Alagayammal,* (1914) 28 I.C. 85=2 L.W. 169.

[42] *Bhubaneswar* v. *Dwarkeswar,* (1922) 66 I.C. 876=34 C.L.J. 508

**Inapplicable to suits against co-owner, or co-sharer.**

held by the co-sharers not separately but jointly.[43] A **suit between co-owners for a share of the profits is governed by Art. 120,** and not by Art. 109, because in such a case the property cannot be said to *belong* to the plaintiffs alone nor could the profits received by the other co-owners be held to have been *wrongfully received* by them.[44] That is why, in several cases, that the proper conception even in respect of a claim in the nature of damages between co-owners is that it is a claim for compensation and not a claim for mesne profits.[45] It has been also held that in such cases the period of limitation is that prescribed by **Art. 120,** and not that prescribed by Art. 109.[46] In *Maung Po Nyun* v. *Ma Saw Tin,*[47] Art. 120 and not Art. 109 was applied by **Rangoon High Court** where properties in respect of which mesne profits were claimed were originally joint properties in possession of a co-owner, and no partition was effected in terms of decree in previous suit. The possession at the date of the claim being that of co-owners the defendants as such were lawfully entitled to receive rents and profits. Similarly, in *Suraj Narain Singh* v. *Narbada Prasad,*[48] the **Oudh Chief Court** held that a **suit by a tenant-in-common** against another **for an account of the profits collected** by the latter and for recovery of the plaintiff's share thereof, is governed by **Art. 120** of Sch. I of the Limitation Act, and not by Art. 62 of the said schedule. The **Nagpur Judicial Commissioner's Court** has taken a similar view in *Budhilal* v. *Mokham*

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=1921 Cal. 77; also see *Chattro Kumari Devi* v. *Mohan Bikram,* (1930) 121 I.C. 337=1931 Pat. 114.

[43] *Bhubaneswar* v. *Dwarkeswar,* 66 I.C. 876 (877) (Art. 120 applied).

[44] *Patel Siddalingana* v. *Tatana Gowdra Bhimana,* 1935 Mad. 731=41 L.W. 138=1935 M.W.N. 107=67 M.L.J. 487=156 I.C. 640; also see *Pirthe Pal* v. *Jawahir Singh,* (1887) 14 Cal. 493 (509)=14 I.A. 37 (P.C.) (A claim for an account of the profits of a joint estate by one member of joint family against another, is not a claim for mesne profits); cf. *Shankar* v. *Hardeo,* (1888) 16 Cal. 397 (413)=16 I.C. 71 (P.C.) (Family members entitled to specific and definite shares under partition).

[45] *Siddalinga* v. *Bhimana,* 1935 Mad. 731 (733); Relied on *Watson & Co.* v. *Ramchand Dutt,* (1891) 18 Cal. 10=17 I.A. 110 (P.C.); *Midnapore Zemindary Co.* v. *Naresh,* 1924 P.C. 144=51 I.A. 293=51 Cal. 631 (P.C.); and *Raghubans Narain* v. *Khub Lall,* 1931 P.C. 209=133 I.C. 730=58 I.A. 299=11 Pat. 22 (P.C.).

[46] *Robert Watson & Co.* v. *Ramchund Dutt,* (1896) 23 Cal. 799; *Midnapore Zemindary Co.* v. *Naresh,* 1925 P.C. 93=29 C.W.N. 270 (P.C.) and *Subba Rao* v. *Rama Row,* 1917 Mad. 948=32 I.C. 899=40 Mad. 291=30 M.L.J. 341.

[47] 1931 Rang. 150=131 I.C. 511.

[48] (1929) 115 I.C. 99 (Oudh); Relied on 32 I.C. 899=40 Mad. 291 =30 M.L.J. 341 and 71 I.C. 177=45 Mad. 648=1922 Mad. 150 (F.B.); cf. *Bharat Singh* v. *Gur Prasad Singh,* 1935 Oudh 515 (Art. 109 applied to a claim for mesne profits by reversioners against transferees of a widow of a deceased Hindu);

*Chand*,[49] where it was held that if a person prevents his **co-tenants** from obtaining from a field such profits as it is capable of yielding and takes possession of the whole field as his own, he is **liable to account for mesne profits,** and the article applicable to a suit for such mesne profits is **Art. 120,** and not Art. 109 of Sch. I to the Limitation Act.

**Profits belonging to the plaintiff.**

**1659.** It has been noticed in S. 1658, above, that Art. 109 is not applicable to the case of property jointly owned by co-owners, and Art. 120 applies to a suit for mesne profits or compensation claimed by one co-sharer against another. It is further to be pointed out that Art. 109 contemplates that the **profits must belong to the plaintiff.** The **Bombay High Court** took the view in *Govindrao* v. *Jivanji*,[50] that Art. 109 refers to "*profits* (of immoveable property) *belonging* to the plaintiff", instead of "*property* belonging to, etc.", and this construction though it seemed somewhat strained to Walsh, J., in *Harpal* v. *Ram Sarup*,[1] on appeal, the **Allahabad High Court** took the same view as the Bombay High Court. It was held that a **suit by a usufructuary mortgagee for mesne profits** of the mortgaged property against defendant who is in wrongful possession of the property is governed by Art. 109, Limitation Act.[2]

**Suit by second auction-purchaser to recover rent received by first.**

Where defendant purchased certain land at an auction-sale in execution of a mortgage-decree and leased it out to certain persons at a certain rent, part of which was received by him; and subsequently the property was sold in execution of a prior-mortgage-decree and was purchased by plaintiff who recovered the balance of the rent from the lessees; it was held that **suit to recover** from the defendant **the amount paid** to the latter **by the lessees** was governed by **Art. 109,** Limitation Act: and that the limitation began to run from the date when the rent was received by the defendant.[3]

**"Wrongfuly received".**

**1660.** The words "*wrongfully received*" in Art. 109 of Sch. I of the Limitation Act **include receipt of profits under a claim or title that cannot be legally sustained.**[4] Possession taken under a decree reversed in appeal comes under this article;

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[49] 105 I.C. 777=1928 Nag. 65.

[50] 2 Bom. L. R. 201.

[1] (1916) 34 I.C. 173 (All.).

[2] *Ram Sarup* v. *Harpal,* (1916) 39 All. 200=15 A.L.J. 33=39 I.C. 663 [on appeal from 34 I.C. 173 (All.)]; cf. *Beharilal* v. *Shiva Narain,* 84 I.C. 631=1924 All. 884=22 A.L.J. 866=47 All. 17 (30) ("Property . . . . belonging to").

[3] *Muhammad Abbas Ali Khan* v. *Gokul Chand,* 86 I.C. 398=1925 All. 52.

[4] *Rangaswami* v. *Alagayammal,* (1915) 28 I.C. 85 (Mad.).

"as possession may be wrongful even though taken in execution of a decree or order".[5] "Possession taken by a person pending an appeal is subject to the result of the appeal and must be deemed to have been without legal title if the original decree or order is reversed and is in this sense wrongful as against the person dispossessed."[6]

To apply Art. 109, the profits must have been "*wrongfully*" received by the defendant. It has no application, therefore, to a suit by one co-sharer against another for a share of the rent collected by the latter, the rent being due in respect of land held by the co-sharers not separately but jointly.[7] *See* S. 1058, *ante*. This article makes provision for cases where profits when actually received were wrongful. It has no application to cases where profits rightfully received by the defendant, were wrongfully retained by him.[8] In *Beharilal* v. *Shiva Narain*,[9] this article was not applied where the property did not belong to the plaintiff, and it could not be said that the defendant who put himself forward as a trustee received the profits wrongfully. In *Holloway* v. *Guneshwar*,[10] the word "*wrongfully*", was held to mean wrongfully *in law*: and where the sale was set aside, but the *order* by reason of which the sale had been held and the order for possession was not set aside, the Court was of opinion that the profits which had been received while the defendant was in possession were not wrongfully received. This view was not followed in *Saraj Ranjan* v. *Prem Chand*,[11] and it was held that Art. 109, Limitation Act would apply to a suit for the recovery of mesne profits from a purchaser at a sale under *Patni* Regulation which is afterwards set aside by the Civil Court. This view is supported by the opinion in *Peary Mohun Roy* v. *Khelaram*,[12] where a *patni mahal* was sold under the regulation for arrears of rent and defendant came into possession. Subsequently, the plaintiff sued for setting aside the sale and obtained a decree and took possession; and his suit for mesne profits wrongfully received by the defendant, which were receivable by the plaintiff, was held to be governed by Art. 109, Limitation Act. The same principle applies to the case in *Kishnanand* v. *Kunwar Partab Narain Singh*,[13] although in that case the property was not sold under the regulation, and the defendant there was put in possession by the settlement officer at the instigation of the manager under the Taluqdar's Relief Act, XXIV of 1870. The **Madras High Court** is of opinion that a suit for profits of immoveable property belonging to the plaintiff which have been *wrongfully received* by the defendant who dispossessed the plaintiff, in execution of a decree afterwards set on appeal, is not cognizable by a Court of Small Causes.[14] A suit by a mortgagor for recovery of surplus profits received by a mortgagee in possession is not governed by Art. 109, because the mortgagee was not wrongfully receiving the profits, and such a case is specifically provided in Art. 105, Limitation Act.[15]

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[5] *Rangaswami* v. *Alagayammal*, (1915) 28 I.C. 85 (87) (Mad.).

[6] *Ibid*.

[7] *Bhubaneswar* v. *Dwarkeswar*, (1921) 66 I.C. 876=34 C.L.J. 508 =1921 Cal. 77.

[8] Dr. Pal's Limitation, p. 741.

[9] 47 All. 17 (30)=1924 All. 884=22 A.L.J. 866=84 I.C. 631 (638).

[10] 3 C.L.J. 182.

[11] (1918) 43 I.C. 781=27 C.L.J. 257=22 C.W.N. 263.

[12] (1909) 35 Cal. 996=1 I.C. 157=8 C.L.J. 181=13 C.W.N. 15= 4 M.L.T. 419.

[13] 10 Cal. 785=11 I.A. 88 (P.C.).

**Received—actually or impliedly.**

**1661.** The **Madras High Court** (Davies and Bhashyam Ayyangar, JJ.), observed, in an order of reference to Full Bench, in the case of *Savarimuthu* v. *Aithurusu Rowthar,*[16] that

> "Art. 109 of the Limitation Act has always been held to apply to a claim for mesne profits, at the option of the plaintiff, the actual profits which the person in wrongful possession received, or the profits which he might, with ordinary diligence have received".

This is supportable with reference to the **definition of mesne profits** in S. 2 (12) of the Civil Procedure Code;

> "*Mesne profits* of property mean those profits which the person in wrongful possession of such property *actually received, or might with ordinary diligence have received* therefrom, together with interest on such profits."

A similar view was taken by the **Calcutta High Court, in** *Saraj Ranjan* v. *Premchand,*[17] where it was held that under Art. 109, the plaintiff would be entitled to recover mesne profits which had in fact been received without wilful default, within three years before the institution of the suit.

**Contrary view—actual receipt.**

**1662.** But, Mitra in his work on Limitation draws attention to the fact that

> "both the first and third column in the article refer to *actual receipt* and not to a claim for profits which the defendant should have received but for want of ordinary diligence, that would more be a claim for compensation or damages than a claim for profits actually received".[18]

In *Ramasami* v. *Authi Lakshmi,*[19] where plaintiff sued for mesne profits, in respect of a land found to lie waste, Art. 109 was not applied as there had not been any *receipt* of mesne profits. The

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[14] (1901) 25 Mad. 103 (F.B.).

[15] *Bikramajit Singh* v. *Raj Raghubar Singh,* (1917) 38 I.C. 610= 20 O.C. 25; also see *Muhammad Faiyaz Ali* v. *Kallu Singh,* 33 All. 244 (248).

[16] (1901) 25 Mad. 103 (104, 105)=11 M.L.J. 428 (F.B.).

[17] (1918) 43 I.C. 781=27 C.L.J. 257=22 C.W.N. 263.

[18] Mitra, Vol. II, p. 1384; also see Dr. Pal, p. 741.

[19] (1910) 34 Mad. 502=8 I.C. 162 (Art. 39 applied).

**Calcutta High Court** has held in *Abbas* v. *Fassihuddin,*[20] that under Art. 109, the defendant is liable for the mesne profits received, or which have with due diligence been received *during* the three years before the date of the suit and not *before.* The period of three years fixed has no reference to the time when rents fall due. With reference to the definition of "mesne profits" in the Code of Civil Procedure it was observed that **if the defendant was excluded from possession,** there could not be actual or even implied receipt of the profits, as they could not have been received with ordinary or extraordinary diligence.[21] Under the definition of mesne profits, where a decree was passed for "future mesne profits from the date of suit," the **Allahabad High Court** held it to include mesne profits actually received after the date of suit, whether on account of arrears of rent for previous years or for the current year.[22] Under Act XIV of 1859, it was held that where the amount of rent or mesne profits received by the defendant could not be ascertained until after the end of the year the receipt of such rents and profits could not be said to have been received until the end of that year.[23] The liability to mesne profits is *ex delicto,* and the defendant is liable as for a tort, and not for a breach of the contract; but any way it would arise every time he received rent.[24] A separate cause of action in respect of the wrongful receipt by a defendant of the rents and profits of land belonging to the plaintiff accrues immediately upon the *receipt* by the defendant of each several sum.[25]

**1663. STARTING POINT.**—For the purposes of limitation, mesne profits must be regarded as accruing due from day to day, unless shown to fall due otherwise; so that all mesne profits due for the period antecedent to the three years previous to the institution of the suit are barred.[26] As observed in *Abbas* v.*Fassihuddin,*[27]

> "there is nothing in the Act to fix the period" (for a defendant's liability for mesne profits), "with reference to the time when rents fall due. It is the **actual receipt of rents,** whenever they may have fallen due which creates the liability."

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[20] 24 Cal. 413; Relied on *Harodhun* v. *Joy Kristo,* 11 W.R. 444.

[21] *Abbas* v. *Fassihuddin,* 24 Cal. 413.

[22] *Lallu Singh* v. *Gur Narain,* (1926) 92 I.C. 768=1926 All. 404.

[23] *Byjnath Pershad* v. *Badhoo Singh,* (1868) 10 W.R. 486.

[24] *Harpal* v. *Ram Sarup,* (1916) 34 I.C. 173 (All.) s.c. on appeal 39 All. 200.

[25] *Ibid.;* also see *Unnoda Gobind* v. *Surnomoye,* 1864 W.R. Sp. No. 163 (F.B.).

[26] *Hays* v. *Padmanand,* (1903) 32 Cal. 118; Relied on *Abbas* v. *Fassihuddin,* (1897) 24 Cal. 413.

[27] (1897) 24 Cal. 413.

Dr. Pal, in his work on Limitation states that

> "the language used in the third column is very clear, and unless the running of the time can be held to be stopped by any other principle of law or equity, *it will run from the date when the* profits are received. The date when such profits *fall due* or when with due diligence these *could have been received,* or the date *when cause of action arose,* etc., is altogether immaterial and irrelevant."[28]

In *Saraj Ranjan* v. *Prem Chand,*[29] where the defendant had obtained possession under a sale subsequently set aside, Doss, J., was of opinion that "it is only when the sale is finally set aside by a suit or the decree is finally reversed on appeal, that the possession by virtue of the ultimate judicial declaration becomes wrongful, not merely from the time when such declaration is pronounced but *ab initio, i.e.,* from the time the unsuccessful party or the purchaser was installed into possession," and he held that the plaintiff could recover mesne profits for the whole time during which the defendant had been in possession. Richardson, J., differed holding that the claim for mesne profits for more than three years before suit was barred. On the hearing of the Letters Patent Appeal by three Judges the opinion of Richardson, J., prevailed.

**Starting point not related to cause of action.**

1664. It should be observed that the starting point of limitation in this article is **date of *actually receiving the profits*** by the defendant, and it has nothing to do with the accrual of of plaintiff's cause of action.[30] In *Holloway* v. *Guneshwar,*[31] this article was not applied where the plaintiff could not have sued the defendant or the tenants of the property for rents or profits until he had the sale set aside. And, in *Dwijendra* v. *Jogesh,*[32] where in a suit for possession of property, and mesne profits under four lease-deeds the compulsory registration of which was pending in litigation for a number of years, the starting point was taken to be the date of the decision in respect of the registration of the lease-deeds, before which the plaintiff's suit for mesne profits was not maintainable. But the correctness of these rulings has been doubted by Mitra, in his work on Limitation, on the ground that accrual of a cause of action to the plaintiff is entirely different from the date of the receipt of the profis.[33] In *Sarat Kamini Dasi* v. *Nagendra Nath Pal,*[34] Mukerji, J., held that when the will of the Legislature is clearly expressed it ought to be followed, without regard to consequences. As regards Art. 109 of Sch. I to the Limitation Act which applies to a suit for recovery of profits wrongfully collected by the defendant, it was held that this article does not admit of any consideration as to when the cause of action may have accrued to the plaintiff, and the latter's claim to profits received beyond three years must be held to be barred. Reliance was placed on the authority of *Peary Mohun* v. *Khelaram Sarkar,*[35] where it was observed that no question arises on the words of the article when the cause of action arose. The **Lahore High Court** has followed this view in *Basheshar Dass* v. *Diwan Chand,*[36] holding that the observations in *Dwijendra Narain* v. *Jogesh Chandra,*[37] with regard to the time of the accrual of the cause of action are, therefore, not really relevant for the purpose of determining the starting point of limitation under this article. The limitation cannot start from the date of an adjudication of the rights between the parties even where a claim to mesne profits is in dispute, as held by the Allahabad High Court in *Ram Charn Sahu* v. *Goga.*[38] This view was accepted by the **Lahore High Court,** that the cause of action under Art. 109 arises when the mesne profits are received by the defendant and not when the plaintiff's right is declared.[39] A recent ruling of the **Rangoon High Court,** has held to same effect in *Ma Pwa Thein* v. *Ma Me Tha,*[40] that in a suit for mesne profits under Art. 109, the starting point is the date from which the profits are received. The safe practice, in a case of disputed rights to mesne profits is for the plaintiff to institute a suit for mesne profits before the time expires and let it be stayed pending the disposal of the former litigation.[41] But the rule is ,well-established that under this article the period of limitation begins to run when the profits are received, and plaintiff is entitled to recover mesne profits only for a period of three years before suit.[42]

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[28] Cf. *Sarat Kamini Dasi* v. *Nagendra Nath Pal,* (1925) 29 C.W.N. 973=89 I.C. 1000 (Principle of suspension of limitation not applicable to Art. 109, Limitation Act).

[29] 43 I.C. 781=22 C.W.N. 263=27 C.L.J. 257; Relied in *Devichilai Iyengar* v. *Raghupathi Venkatachariar,* (1925) 88 I.C. 967=1926 Mad. 46=49 M.L.J. 317.

[30] *Peary Mohun* v. *Khelo Ram,* 35 Cal. 995=1 I.C. 59=13 C.W.N. 15.

[31] (1905) 3 C.L.J. 182; cf. *Saraj Ranjan* v. *Prem Chand,* (1917) 43 I.C. 781=22 C.W.N. 263.

[32] (1923) 39 C.L.J. 40=79 I.C. 520.

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[33] *Peary Mohun* v. *Khela Ram,* (1908) 35 Cal. 996; *Sarat Kamini* v. *Nagendranath,* (1925) 89 I.C. 1000=29 C.W.N. 973.

[34] (1925) 89 I.C. 1000=29 C.W.N. 973=1922 Cal. 235.

[35] (1909) 1 I.C. 159=35 Cal. 996=13 C.W.N. 15=8 C.L.J. 181 =4 M.L.T. 419.

[36] (1933) 146 I.C. 939=1933 Lah. 615=34 P.L.R. 1085.

[37] (1924) 79 I.C. 520=39 C.L.J. 40=1924 Cal. 600.

[38] (1927) 49 All. 565 (571)=102 I.C. 96=25 A.L.J. 125=1927 All. 446.

[39] *Basheshar Dass* v. *Diwan Chand,* 146 I.C. 939=1933 Lah. 615, *supra.*

[40] 1936 Rang. 80.

[41] *Ram Charn* v. *Goga,* (1927) 49 All. 565.

[42] *Muhammad Abbas Ali Khan* v. *Gokul Chand,* (1925) 86 I.C. 398 =1925 All. 52; *Chattra Kumari Devi* v. *Mohan Bikram,* (1930) 121 I.C. 337=1931 Pat. 114 (The trespasser cannot be asked to render accounts); also see *Suraj Prasad* v. *Somra Mahto,* (1922) 68 I.C. 903=2 Pat. L. T. 648.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 110. | For arrears of rent. | Three years. | When the arrears become due. |

### SYNOPSIS.

1664. Corresponding provisions.
1665. Scope and applicability.
1666. Illustrative cases.
1667. Assignment of rent.
1668. Customary dues and cesses.
1669. Registered lease—Privy Council decision.
1670. Registered lease—High Court decisions.
1671-1673. Starting point—Special and local law.
1672. Cause of action—When arrears become due.
1673. Suspension of cause of action.

### NOTES.

**1664. CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, the corresponding provision was made in cl. 8 of S. 1, which had a prescribed period of three years commencing from the time when the cause of action arose.

This article is the same as Art. 110 of Sch. II of Acts IX of 1871 and XV of 1877.

**1665. SCOPE AND APPLICABILITY.**—This article is specifically limited to **suits for arrears of rent,** which ordinarily represents that which is paid by the occupier of immoveable property for its use; but, it contemplates a suit **by a landlord against his tenant.** A suit against *a co-sharer* landlord to recover a share of rent realised by him would be governed by **Art. 120,** Limitation Act.[43] A suit for rent against a person not entitled to recover it by the real owner would fall under **Art. 62,** Limitation Act.[44] A suit for compensation for use and occupation of premises by plaintiff against defendant where no relationship of landlord and tenant is established between the parties would be governed by **Art. 115,** Limitation Act.[45]

**1666. ILLUSTRATIVE CASES.**—

**Suit for compensation for use and occupation.**

(1) In *Debnath Roy* v. *Gudadhur,*[46] where a suit for compensation for use and occupation of premises was brought by plaintiff against defendant, there being no relationship of landlord and tenant between the parties, **Art. 120** was **applied.**

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[43] *Bhubeneswar* v. *Dwarkeswar,* 66 I.C. 876 (Cal.).

[44] *Mahabir Prasad* v. *Mt. Parsandi,* (1923) 74 I.C. 939=45 All. 410=1923 All. 532.

[45] *Chengiah* v. *Umadi,* (1910) 6 I.C. 766=7 M.L.T. 419.

[46] (1872) 18 W.R. 132; cf. *Ram Runjan* v. *Ramlall,* (1879) 5 C.L.R. 62 (Defendant was purchaser of a share in *putni* tenure, and the plaintiff, the Zamindar, there was relationship of landlord and tenant between the parties).

**Co-owner tenant of part of joint property.**

(2) Similarly, in *Madar Sahib* v. *Kader Moideen*,[47] where the owners of the moiety of a house rented the other moiety from its owners, the plaintiffs, for a specified period but continued in possession of the whole house for a number of years after the expiry of the term without the assent of the plaintiffs, and without paying any rent, it was held that as, after the expiry of the term, the relationship between the parties was not based on an express or implied contract, the plaintiff's suit for recovery of rent was not governed either by **Art. 110**, or by Art. 115, but by the residuary **Art. 120, Limitation Act.**

**Money left in deposit with tenant for payment to superior landlord.**

(3) Where money was left in deposit with a tenant for payment to the superior landlord, and it could not be recovered as rent under terms of the contract, the suit was taken as one for damages.[48]

**Suit for arrears of assessment.**

(4) The term "*rent*" is used in the Bombay Land Revenue Code, (Bombay Act V of 1879) only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists. Where plaintiff was the *Inamdar* of a certain village, and defendant held certain lands in the said village, but he was not placed in possession thereof either by the plaintiff or his predecessor in title under any agreement, it was held that plaintiff's suit to recover from the defendant five years **arrears of assessment,** was within time under **Art. 120,** and Art. 110 was not applicable, the relationship between the parties being that of superior and inferior holder and not that of landlord and tenant.[49]

**Suit by joint tenants for compensation for use and occupation.**

(5) Where some of the joint tenants of certain lands took the use and occupation of part of the joint lands, to the exclusion of the other joint tenants, who afterwards brought a suit for compensation for such use and occupation, it was held that the period of limitation for such a suit was governed by **Art. 120**.[50]

**Assignment of rent.**

**1667.** A right to receive from the tenant the rent then due to the landlord may be assigned; and the assignment would not deprive it of that character so far as the tenant is concerned.[1] A suit by an assignee who is not a landlord is not recognised anywhere in the Bengal Tenancy Act. As soon as the title of the assignee is complete he is entitled to claim rent, even without notice of assignment.[2] Such a suit must be governed by **Art. 110,** Limitation Act, whereby limitation is restricted to three years from the date on which it fell due. It does not fall under Art. 2 (*b*) of

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[47] (1916) 33 I.C. 705=39 Mad. 54.

[48] *Lachhmi Missir* v. *Deoki Kuar,* (1913) 19 I.C. 752 (Cal.); cf. *Basanta Kumar* v. *Ashutosh,* 27 Cal. 67=4 C.W.N. 31.

[49] *Sadashiv* v. *Ramkrishna,* 25 Bom. 556 (558).

[50] *Robert Watson & Co.* v. *Ram Chunder Dutt,* (1896) 23 Cal. 799.

[1] *Srish Chunder* v. *Nachin Kazi,* (1900) 27 Cal. 827=4 C.W.N. 357 (F.B.); Followed in *Gajadhur Prasad* v. *Thakur Prasad,* (1917) 38 I.C. 102=1 P.L.J. 506=3 P.L.W. 179; also see *Sheikh Munsar* v. *Lokenath,* 4 C.W.N. 10.

[2] *Pearey Lal* v. *Madhoji,* (1913) 19 I.C. 865 (Cal.).

Sch. III of the Bengal Tenancy Act, but under Art. 110, Limitation Act, and the plaintiff cannot take advantage of the longer period of limitation allowed by the Bengal Tenancy Act.[3] An **assignment of land revenue** by the Government, creates only a personal claim against the persons who, but for the assignment, would have been liable to pay the revenue to Government. The claim by assignee was not a claim for rent under the Rent Recovery Act falling within Art. 110 of the Limitation Act and consequently it fell within Art. 120.[4]

**Customary dues and cesses.**

**1668.** A suit by the District Board in charge of a *chattram* to recover a certain sum as the **arrears of merais or customary dues** not claimed by plaintiff as landlord, but as due to the *chattram* by custom, was held to be governed by Art. 120, and not by Art. 110 as a suit for rent.[5] A suit for the penal amount recoverable under S. 58 of the Cess Act is not a suit for recovery of **arrears of cess** payable under the Act within the meaning of Ss. 41 and 47 of the Cess Act, but is an ordinary money claim governed by the three years' period of limitation.[6] ***Dak cess*** claimed under the contract by which the rent is payable, is claimed practically as part of the rent, that is to say, as a part of what is lawfully payable in money for use and occupation of the land held by the tenant.[7] The word *"rent"* in S. 65 of the Bengal Tenancy Act, 1885, includes **road cess** payable by the landlord.[8] **Chowkidari tax,** when legally recoverable is paid quite as much on account of the occupation of the property as that which is expressly called the rent, and is part of the ground rent quite as much as the latter.[9] **Jodi** is merely favourable rent and not, a charge on the land, and the period of limitation for a suit to recover arrears of *jodi* is three years under Art. 110, Limitation Act.[10] A suit for rent on the expiry of a *kanom* is governed by Art. 116, and not by Art. 110 of the Limitation Act.[11]

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[3] *Hayat Majid* v. *Hazarilal,* (1921) 63 I.C. 424 (Pat.); Followed *Ahmedullah Bhuiya* v. *Kamiruddin,* 2 I.C. 989; also see *Mohendranath* v. *Kailash Chandra,* 4 C.W.N. 605.

[4] *Kasturi Gopala Ayyangar* v. *Anantaram Thivari,* (1902) 26 Mad. 730.

[5] *Venkatavaraga* v. *The District Board,* (1892) 16 Mad. 305.

[6] *Bhuneswari Kuer* v. *Gopal Saran,* (1928) 118 I.C. 733 (1)=8 Pat. 358=1929 Pat. 331 (332).

[7] *Watson & Co.* v. *Sreekristo,* (1893) 21 Cal. 132.

[8] *Nobinchand Nuskar* v. *Bansenath,* (1894) 21 Cal. 722.

[9] *Assanulla Khan* v. *Tirthabashini,* (1895) 22 Cal. 680.

[10] *Sambasadasiva Chiniva* v. *Bandar Maddulappa,* (1923) 74 I.C. 968=1924 Mad. 73=1923 M.W.N. 524.

[11] *Ammotti* v. *Sankaran,* (1917) 37 I.C. 83=(1916) 2 M.W.N. 117.

**Registered lease —Privy Council.**

1669. Their Lordships of the Privy Council have held in *Tricandas Cooverji* v. *Gopinath*,[12] that where a registered *kabuliyat* provides for a minimum royalty to be paid even if no coal is cut from the mines leased, a suit for the minimum royalty is a suit for rent. A suit for rent due under a registered lease is governed by the six years' period of limitation under Art. 116, Limitation Act.[13]

**Allahabad.**

**Bombay.**

In *Ram Narain* v. *Kamta Singh*,[14] the **Allahabad High Court** took the view that in a suit for rent based on a registered lease, Art. 110 and not Art. 116 applied. This was disapproved by their Lordships upholding the opposite view taken by the **Bombay High Court** in *Lalchand* v. *Narayan*,[15] following the current of decisions to be found in all the Indian High Courts. Their Lordships of the Privy Council, agreeing with this view accepted "the interpretation so often and so long put upon the statute by the Courts in India," observed that "the decisions could not now be disturbed."

**High Court decisions.**

1670. The decisions in different High Courts referred to above may be briefly noticed.

**Lahore.**

(1) A suit to recover rent reserved by a registered instrument is governed by Art. 116, Limitation Act.[16]

**Calcutta.**

(2) A suit for recovery of arrears of royalty and commission, is not one for rent within the meaning of Art. 110, Limitation Act, but is governed by Art. 116.[17] This view is supported by *Umesh Chunder Mundul* v. *Adarmoni Dasi*,[18] *Raniganj Coal Association, Ltd.* v. *Jadoonath Ghose*,[19] and *Bholanath Dass* v. *Raja Durga Prosad Singh*.[20] The Privy Council decision is followed in *Fatechand* v. *Nagendra Kishore*,[21] that in a case of registered lease the correct article that is to be applied to a suit for arrears of rent is Art. 116 and not Art. 110. The provisions laid down in Art. 116, Limita-

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[12] 1916 P.C. 182=44 Cal. 759 (P.C.).

[13] *Ibid.*

[14] (1903) 26 All. 138=1903 A.W.N. 210; Followed in *Jaggilal* v. *Sriram*, (1912) 34 All. 464=10 A.L.J. 1=16 I.C. 146.

[15] (1913) 37 Bom. 656=21 I.C. 315=15 Bom.L.R. 836.

[16] *Abdul Samad* v. *The Municipal Committee*, (1922) 67 I.C. 939 (Lah.); *Jesaram* v. *Daulat Shah*, 4 P.R. 1902 Rev.

[17] *Peareylal* v. *Madhoji*, (1913) 19 I.C. 865=17 C.L.J. 372.

[18] 15 Cal. 221.

[19] 19 Cal. 489.

[20] 27 Cal. 205=4 C.W.N. 76.

[21] 1931 Cal. 790=133 I.C. 102 (1)=53 C.L.J. 522.

tion Act, as to registered contracts have been held to apply to leases granted for building purposes and for establishing godowns; not being leases for agricultural or horticultural purposes.[22] A rent suit under Bengal Tenancy Act (VIII of 1885) is always governed by the three years' rule of limitation according to Sch. III of that Act, whether the *kabuliyat* be registered or not: the Limitation Act, Art. 110, will not apply to such a suit.[23]

**Bombay.**

(3) Art. 116, Limitation Act, covers suits for debts or sums certain due upon registered instruments, and according to **Bombay High Court,** a suit for arrears of rent due on a registered lease is governed by the said article, and not by Art. 110, Limitation Act.[24] This view dissented from the Allahabad decision, and their Lordships of the Privy Council have upheld this view, and all other rulings agreeing with it.[25]

**Madras.**

(4) In *Vythilinga Pillai* v. *Thetchanamurti,*[26] the **Madras High Court** held that a suit to recover arrears of rent upon a registered contract is governed by Art. 116, Limitation Act. Compensation is used in the same sense as in Contract Act, S. 73. In *Ambalavana* v. *Vaguran,*[27] where a suit for rent accrued due more than three years before the date of plaint, on the basis of a registered contract between the landlord and tenant, which was signed only by the latter, the suit was held not barred by limitation. The same principle has been applied to cases in *Ramakrishna Chetty* v. *Subbaraya,*[28] and in *Chengiah* v. *Thimma Nyanim.*[29] These authorities were followed in *Ramanadhan Pattar* v. *Achuta Varier.*[30] A suit for rent on the expiry of a *kanom* is governed by Art. 116 and not by Art. 110, Limitation Act.[31] The period of limitation applicable to a suit to recover arrears of rent from the assignee of a person holding under a registered *kanom* deed is contained in Art. 116, Limitation Act.[32]

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22. *Ahmed Buksh Mallik* v. *Bipin Behary,* (1911) 11 I.C. 6 (Cal.).

23. *Iswari* v. *Crowdy,* 17 Cal. 469; *Mackenzie* v. *Haji Syed,* 19 Cal. 1 (F.B.); *Kalicharn* v. *Harendra,* 4 C.L.J. 553.

24. *Lalchand Nanchand* v. *Narayan Hari,* (1913) 21 I.C. 315=37 Bom. 656=15 Bom.L.R. 836.

25. 44 Cal. 759=25 C.L.J. 279 (P.C.), *supra*; *see* 6 Cal. 94=6 C.L.R. 579; 3 Mad. 76; 6 Bom. 75; 15 Cal. 221; 9 Bom. 320.

26. (1880) 3 Mad. 76.

27. (1895) 19 Mad. 52=5 M.L.J. 228.

28. (1913) 18 I.C. 64=24 M.L.J. 54=1913 M.W.N. 303.

29. 6 I.C. 766=7 M.L.T. 419.

30 (1914) 23 I.C. 753=1914 M.W.N. 323.

31. *Ammoti* v. *Sankaran,* 37 I.C. 83 (Mad.); Cf. *Seydarakath* v. *Valiarath,* 6 I.C. 754=1910 M.W.N. 186 (Art. 110 applied where the question was of tenant holding over after the expiration of an ordinary lease).

32. *Kannan Narayanan* v. *Muthalpuredath,* (1920) 56 I.C. 241=11 L. W. 328; Not Followed *Naduvil* v. *Varadaraju,* 24 I.C. 481=26 M.L.J. 283.

**Patna.**

(5) The **Patna High Court** follows the Calcutta view in holding that a suit to recover the rent reserved in a registered *kabuliyat* is governed by Art. 116, and not by Art. 110 of the Limitation Act.[33] A suit by an assignee for arrears of rent is governed by Art. 110, and the fact that the assignee is suing on a registered lease does not extend the period to six years under Art. 116, Limitation Act.[34]

**Local and Special Acts.**

**1671-73. STARTING POINT OF LIMITATION.**—Suits for rent founded on registered contracts in respect of lands subject to the provisions of the Bengal Tenancy Act, are governed by the limitation provided in that Act.[35] A **rent suit** brought **under the Bengal Tenancy Act** is always **governed by the three years rule** of limitation according to Sch. III of that Act.[36] Article 116 has no application to cases of this description.[37] But, suits for arrears of rent not coming under Sch. III of Bengal Tenancy Act, will be governed by Art. 116, if based on a registered document, *e.g.*, suits for arrears of rent brought by the assignee of a landlord, which is not covered by the provision in Bengal Tenancy Act.[38]

The last day on which a **suit for recovery of arrears of rent** can be instituted **under S. 29, Bengal Act VIII of 1869,** is the last day of the third year from the close of the year in which the rent becomes payable.[39]

In Art. 110 of the Limitation Act, "arrears of rent" means arrears of rent ascertained. Accordingly, it has been held, by their Lordships of the Privy Council, that where it is necessary for the landlord to take **proceedings under the Madras Rent Recovery Act, VIII of 1865,** to have the proper rate of rent ascertained, the period of limitation in a suit for arrears of rent runs from the date of the final decree determining the rent, and not from the close of the *fasli* year for which the rent is payable.[40]

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[33] *Mackenzie* v. *Rameshwar Singh,* (1916) 34 I.C. 754=1 P.L.J. 37; Follows 19 Cal. 489.

[34] *Gajadhar Prasad* v. *Thakar Prasad Singh,* (1917) 38 I.C. 102=1 P.L.J. 506.

[35] *Mackenzie* v. *Haji Syed,* 19 Cal. 1 (F.B.).

[36] *Iswari* v. *Crowdy,* 17 Cal. 469; *Kali Charan* v. *Harendra,* 4 C. L.J. 553.

[37] *Peareylal* v. *Madhoji,* 19 I.C. 865 (869) (Cal.).

[38] *Mahendra* v. *Kailash,* (1898) 4 C.W.N. 605.

[39] *Kashikant* v. *Rohinikant,* (1880) 6 Cal. 325=7 C.L.R. 342 (F.B.). also see *Narpat Singh* v. *Mahidhar Jha,* (1930) 122 I.C. 241=1930 Pat. 54=8 Pat. 851.

[40] *Rangayya* v. *Bobba Sriramulu,* (1930) 31 I.A. 17=27 Mad. 143=8 C.W.N. 162 (P.C.) (O.R. 19 Mad. 21); compare *Arunachellam* v. *Kadir Rowthan,* 29 Mad. 556 (557) (Tender of patta, not for ascertainment of rent, but condition precedent to institution of suit); Followed in (1910) 20 M.L.J. 927=8 M.L.T. 345=34 Mad. 438.

**Cause of action.**

1672. **WHEN ARREARS BECOME DUE.**—(*i*) The cause of action, with reference to limitation, in a suit for rent, accrues on the **date on which rent is payable by custom, or contract,** irrespective of whether potta has been tendered or a suit to enforce acceptance of patta, under the (Madras) Rent Recovery Act, 1865, is pending.[41] In a **suit for arrears of rent due under a decree** given under S. 10 of the Rent Recovery Act, the period of limitation in Art. 110, Limitation Act, commences from the date when the plaintiff was in a position to sue for rent, *i.e.*, the date of the decree.[42] When a tenant has executed a ***muchalka* specifying the date on which the various instalments of rent are payable,** the period of limitation for a suit by the landlord for the rent is to be computed from such dates.[43] A *muchalka* given by a tenant at the end of a *fasli*, containing an undertaking to pay instalments of rent at dates then passed amounts to an acknowledgment of liability for the purposes of S. 19, Limitation Act.[44]

**Competency to sue.**

(*ii*) **When there is no one competent to sue there can be no cause of action,** and consequently limitation cannot run because there is no one against whom it can run. Accordingly, where a person as trustee of a temple and a *mutt* unites in himself the function of landlord and tenant, the cause of action for a suit to recover arrears of rent arises when there is some one in existence who can enforce payment of such arrears, as for instance, when a receiver is appointed, at which time the "arrears become due" within the meaning of S. 110, Limitation Act.[45]

**Suspension of cause of action.**

1673. (*i*) The period of limitation is extended when there has been a suspension of the cause of action, or where the cause of action has accrued not on the date indicated in column 3 of the schedule to the Limitation Act, but on a subsequent date for no fault of the plaintiff.[46] Time runs from the date on which the rights of the party suing are finally settled giving birth to his cause of action, and once it starts running it cannot be stopped by any act which does not bring about any change in those rights.[47]

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[41] *Kumarasami Pillai* v. *President, District Board,* (1898) 22 Mad. 248; also see *Satrucherla* v. *Ganta,* 15 I.C. 393=22 M.L.J. 451.

[42] *Sobhanadri* v. *Chalamanna,* (1894) 17 Mad. 225=4 M.L.J. 5 [Approved in 27 Mad. 143=31 I.A. 17 (P.C.)].

[43] *Venkatagiri Rajah* v. *Ramasami,* (1897) 21 Mad. 413.

[44] *Venkatagiri Rajah* v. *Sheikh Bade Saheb,* (1898) 22 Mad. 32.

[45] *Deivasikamani* v. *Govinda Rao,* (1923) 72 I.C. 5=1923 Mad. 461=46 Mad. 579=44 M.L.J. 318.

[46] *Ranee Surno Moyee* v. *Shooshee Mokhee,* 12 M.I.A. 244=11 W. R.P.C. 5=2 B.L.R. (P.C.) 10; Followed in *Bijoy Chand* v. *Nilmoni,* (1925) 85 I.C. 1007, Cal.; also see *Huro Pershad* v. *Gopaldas Dutt,* 9 Cal. 255=9 I.A. 82=12 C.L.R. 129 (P.C.) and *Narpatsingh* v. *Mahidhar Jha,* 1930 Pat. 54=8 Pat. 851.

*Illustrations.*

(1) In *Hurrokumar Ghose* v. *Kali Krishna Thakur*,[48] where the plaintiff's **right to sue for excess rent** under the provisions of the Bengal Tenancy Act arose after the service of notice on the defendant, the plaintiff could not be allowed to rely on a declaratory decree obtained by him, as the cause of action for arrears of rent.

(2) Where the **sale of a patni taluk is subsequently set aside,** and the *patnidars* are put in possession of the taluk, the suspension of the Zemindar's right to recover rent is put an end to, on the date of such restoration, and limitation for the recovery of rent commences from the date of such restoration of possession to the patnidars. A dismissal of appeal preferred from the order setting aside the sale does not affect the question of limitation.[49]

*(ii)* When the landlord unsuccessfully sues for possession of the land, or for declaration that the lease is invalid, or takes some other proceedings under the tenancy law which makes it possible throughout for the landlord to have sued for recovery of arrears of rent accruing due, there is no suspension of limitation saving the bar for the rent suit under Art. 110, Limitation Act.[50]

*Illustrations.*

(1) Rent accrues due when it is payable irrespective of the **tender of patta,** or the time when it was tendered, because the tender of *patta* is **not necessary to complete the landholder's right** to rent against his ryot.[1]

(2) The limitation for a suit to recover arrears of rent accruing due whilst the landlord was **prosecuting a suit for the ejectment of the tenant** on the ground of forfeiture is not extended by reason of the continuation of the ejectment.[2] Similarly the **pendency of a suit for possession** does not save the limitation for the rent suit, where the limitation started running from the end of *fasli,* in the absence of any contract to the contrary.[3]

(3) The rent accruing during the pendency of **proceedings under S. 46, Bengal Tenancy Act,** to have a fair and equitable rent assessed by the

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[47] *Bijoy Chand* v. *Nilmony, supra,* 85 I.C. 1007 Cal.; also see *Bijoy Chand* v. *Khoka,* (1924) 84 I.C. 425=1924 Cal. 1059=40 C.L.J. 97.

[48] (1889) 17 Cal. 251; Relied in *Secretary of State* v. *Zemindary,* (1921) 59 I.C. 98 (Mad.).

[49] *Bijoychand* v. *Nilmoney,* 85 I.C. 1007 and *Bijoychand* v. *Khoka,* 84 I.C. 425, *supra.*

[50] *Huro Pershad* v. *Gopaldas Dutt,* (1882) 9 Cal. 255=12 C.L.R. 129=9 I.A. 82 (P.C.) [Dist. 12 M.I.A. 244 (P.C.)].

[1] *Satrucherla Veerabadra* v. *Gantakumari,* 15 I.C. 393=22 M.L.J. 451=11 M.L.T. 212=1912 M.W.N. 441; Relied upon in *Muthiah Chettiar* v. *Ramasami,* (1913) 20 I.C. 689; also see *Kuthimathi* v. *Muthusamia,* 37 Mad. 540 (543).

[2] *Aswinikumar Nag* v. *Sitha Nath Basu,* (1917) 39 I.C. 865.

[3] *Bhavaraju* v. *Yenumala,* (1914) 23 I.C. 942 (Mad.); also see *Nagendranath* v. *Sadhuram Mandal,* (1920) 57 I.C. 992 (Cal.); cf. *Hemchandra* v. *Kali Prosanna,* 30 Cal. 1033=30 I.A. 177=8 C.W.N. 1 (P.C.) (Suit for *enhancement* governed by different considerations).

Court, is not suspended by virtue of the proceedings, and a suit after the termination of such proceedings to recover such rent is governed by Art. 2 (*b*) of Sch. III of Bengal Tenancy Act.[4]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 111 | By a vendor of immoveable property for personal payment of unpaid purchase money. | Three years. | The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion), the date of the acceptance. |

SYNOPSIS.

1674. Corresponding provisions.
1675. Unpaid purchase-money.
    (1) Charge on property.
    (2) Personal claim.
    (3) Vendor's charge.
1676. Scope and applicability.
1677. Registered sale-deed: Art. 116.

## NOTES.

1674. **CORRESPONDING PROVISIONS.**—This article corresponds to Arts. 111 of Acts IX of 1871, and XV of 1877. The wording of the clause was for suits by a vendor of immoveable property *"to enforce his lien for unpaid purchase money"*. The change in the language of the present Act is to remove doubts as to the applicability of this article to suits for personal remedy of vendor against the vendee, for the unpaid purchase-money. Under Act XIV of 1859, suits of this nature were governed by twelve years' limitation.

1675. **UNPAID PURCHASE-MONEY.**—(1) Unpaid purchase-money is a charge on the property in the possession of the vendee, and a suit to enforce it against the property so charged was held to fall under Art. 132, even under the old Act.[5]

**Charge on property.**

(2) The personal claim to recover the money from the defaulter or his property, falls under Art. 111, and the limitation for the personal remedy is three years.[6]

**Personal claim.**

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[4] *The Port Canning Company* v. *Heirs of Bahirmolla,* (1926) 92 I.C. 37=1926 Cal. 693=43 C.L.J. 45.

[5] *Chunilal* v. *Bai Jethi,* (1897) 22 Bom. 846; *Virchand* v. *Kumaji,* (1892) 18 Bom. 48.

[6] *Ibid.,* (1897) 22 Bom. 846; Relied on *Dulabai* v. *Sakharam,* P.J., 1886, p. 112; *Gangabai* v. *Venkaji,* P.J., 1886, p. 169.

(3) The Bombay view above-noted was followed by the **Allahabad High Court**, in *Harlal* v. *Mohandi,*[7] dissenting from the Madras ruling in *Natesan* v. *Soundararaja.*[8] Their Lordships of the Privy Council explained in *Webb* v. *Macpherson,*[9] that "the charge which a vendor obtains under S. 55 of the Transfer of Property Act, 1882, is different in its origin and nature from the vendor's lien given by the English Courts of Equity to an unpaid vendor. The Indian Act gives a statutory charge upon the estate to an unpaid vendor unless it is excluded by contract, and such a charge is not excluded by a mere personal contract to defer payment of a portion of purchase-money, or to take the purchase-money by instalments, nor by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge."[10] A **Full Bench of the Allahabad High Court** held in *Munir-un-nissa* v. *Akbar Khan,*[11] that a suit for the enforcement of the payment of purchase-money by sale of the purchased property is a **suit to enforce a statutory charge** differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase-money, and that the article of Limitation Act applicable is Art. 132, and not Art. 111. If the personal remedy is barred under Art. 111, the vendor is still entitled to enforce his charge within 12 years under Art. 132, Limitation Act.[12] Where a suit is brought by the plaintiff as an unpaid vendor against vendee for recovery of part of purchase-money, the suit is one to enforce charge on immoveable property within Art. 132.[13]

**Vendor's charge.**

**1676. SCOPE AND APPLICABILITY.**—The change in the new Act makes it clear that the three years' period of limitation is prescribed under this article, only for suits to enforce the personal liability of the purchaser. This is not concerned with the equitable lien of the vendor, on the property, for the unpaid purchase-money, in provinces where the Transfer of Property Act is not in force.[14] Article 111 governs suits for unpaid purchase-money payable to or to the order of the vendor under an agreement to sell, and, as the third column shows, is independent of rights arising by the deed of sale because the *terminus a quo* is the date fixed for completing the sale on the date of acceptance of the title whichever is later.[15] In 1933 P. C. 143, it was held by their Lordships of the Privy Council that Art. 111 did not apply to a case where no time was fixed for completing the sale and the purchase-money was not payable till some date after conveyance of the property.[16]

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[7] (1899) 21 All. 454.

[8] (1897) 21 Mad. 141.

[9] (1903) 30 I.A. 238=31 Cal. 57 (P.C.).

[10] *Ibid.*; Followed in *Ramakrishna* v. *Subramaniya,* (1905) 29 Mad. 305 (F.B.); [O.R. *Natesan* v. *Soundararaja,* 21 Mad. 141 and *Avuthala* v. *Dayamma,* (1900) 24 Mad. 233].

[11] (1908) 30 All. 172 (F.B.); Followed 21 All. 454.

[12] *Bashir Ahmed* v. *Nazir Ahmed,* 43 All. 544; *Meghraj* v. *Abdullah,* 25 I.C. 208 (All.).

[13] *Guljarimal* v. *Maghimal,* 1933 Lah. 109=141 I.C. 435=14 Lah. 380=34 P.L.R. 156.

[14] *Tirumalrao* v. *Municipal Commissioners,* (1878) 3 Bom. 172.

A suit for the recovery of a sum of money fixed to be paid to a co-sharer by another co-sharer, to adjust the difference between the price of the properties which fall to their respective shares in partition is governed for purposes of limitation by Art. 120, and not by Art. 111, Limitation Act.[17]

**Conveyance containing vendee's contract.**

**1677. REGISTERED SALE-DEED.**—Article 116 applies not only to a suit for a specified sum of money due on a registered bond but also to a suit where the vendee having agreed to apply a portion of the purchase-money to the payment of a previous debt due by the vendor fails to apply it in that way and a suit is brought to recover that amount from him.[18] Where **a sale-deed contains the contract of sale** which has preceded the actual sale, Art. 116 may apply even though the sale-deed contains an acknowledgment that the consideration has been paid which in fact it has not been paid.[19] But the **mere recital** in a sale-deed that the consideration has been paid **is not a "contract in writing"** to pay the consideration within the meaning of Art. 116, Limitation Act. The plaintiff sues in such a case to enforce his personal remedy in spite of the document and not under it, and Art. 116 is inapplicable.[20] Where a registered sale-deed contains a **contract by which the vendor is to be indemnified** in case the vendee fails to complete the sale, limitation for a suit by the vendor against the vendee is six years from the time when the vendor is damnified.[21] Where the vendor's creditors had recovered the money from the vendor on the **purchaser's default to pay**, it was held that the article applicable was Art. 116 and that time began to run when the plaintiff actually suffered the loss, which was the date when the purchaser's agreement became impossible of performance by reason of the payment by the vendor himself.[22] The **suits** which a vendor is entitled to bring **for the reserved amount against the purchaser** before himself paying the amount or suffering some other damage are cases in which he alone is entitled to benefit by the payment. But, where the benefit of the payment of the reserved amount accrues partly to the purchaser himself and only partly to the vendor, that it is not possible for the vendor to sue the purchaser for the whole amount reserved, in such cases he can only sue for the portion of the amount the non-payment of which is likely to affect him, and this can only be properly determined when he has either made the payment himself, or has suffered some other damage by the purchaser's default. The basis of the suit in such a case is the **contract of indemnity which the agreement in the sale-deed implies** and can be held to be broken only when the plaintiff has actually suffered loss.[23] **Article 116 applies,** not merely to a suit for compensation for breach of contract in the narrower sense of the word compensation but also **to a suit for money payable under the terms of the contract,** and it is applicable in all cases in which the contract is in writing and registered, notwithstanding that there may be an article directly applicable to the class of contract in question.[24] **A conveyance is not properly speaking a contract.** It is the completion by the seller of a previously made contract to sell. The vendee's failure to pay the purchase-money, is not a breach of contract expressed in writing in the conveyance itself, **unless the vendee's promise is set out in a registered conveyance which is accepted by him.**[25]

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[15] *Navamani* v. *Vedamanicka*, 1933 Mad. 424.

[16] *Ram Raghubir Lal* v. *United Refineries, Ltd.*, 1933 P.C. 143; Followed in *Gurbachansingh* v. *Shamlal*, 1934 Lah. 296 (1).

[17] *Gurdas Mal* v. *Baijnath*, (1928) 111 I.C. 29=1928 Lah. 662.

[18] *Ram Rachahya* v. *Raghunath Prasad*, 1930 Pat. 46=8 Pat. 860=122 I.C. 244; also see *Makund Lal* v. *Bhola Rai*, 1931 All. 419=131 I.C. 686 (Art. 116 applied to suit by vendor for recovery of balance of purchase-money undertaken by vendee to pay to vendor's creditors).

[19] *Seshachala* v. *Varadachariar*, (1901) 25 Mad. 55; Followed 24 Mad. 233.

[20] *Ibid.*, 25 Mad. 55=11 M.L.J. 318; also see and cf. *Gurbachan Singh* v. *Shamlal*, 1934 Lah. 296 (1).

[21] *Abdul Qadir* v. *Mt. Bilas Kaur*, 1933 Lah. 793=144 I.C. 362=14 Lah. 646=34 P.L.R. 734.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 112. | For a call by a company registered under any statute or Act. | Three years. | When the call is payable. |

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[22] *Ammani Bai* v. *Anant Narayan,* 1931 Bom. 365=133 I.C. 267.

[23] *Navamani Nadar* v. *Vedamanicka Nadar,* 1933 Mad. 424=56 Mad. 724=144 I.C. 550=64 M.L.J. 526; also see *Baijnath* v. *Parmeshwari Dayal,* 1934 Oudh 240=149 I.C. 529=11 O.W.N. 691 **(Amount kept with vendee to pay various mortgages, surplus to be paid to vendor—claim for surplus governed by Art. 116, period starting from date of breach *i.e.*, when in a suit for redemption by vendee the Court found that a smaller sum than the amount left with vendee was due).**

[24] *Ram Raghubar Lal* v. *United Refineries,* 1931 Rang. 139=9 Rang. 56=134 I.C. 737.

[25] *Ibid.,* 1931 Rang. 139 (140)=9 Rang. 56; also see *Vinayakrao* v. *Shripatrao,* (1926) 97 I.C. 185=1926 Nag. 429=9 N.L.J. 107 (Undertaking to pay vendor's mortgage debt, embodied in the registered sale-deed—Suit for compensation for breach governed by Art. 116); also see *Mehar Chand* v. *Shanti Sarup,* 1929 Lah. 395=118 I.C. 145 (Art. 116 applied).

## SYNOPSIS.

1678. Corresponding provisions.
1679. Scope:—Suit by a company.
1680. Company in liquidation—Suit by liquidator.
1681. Liability of contributory—Time-barred claim.
1682. Suit by company to recover overdue call.
1683. Starting point—Date of default.

## NOTES.

**1678. CORRESPONDING PROVISIONS.**—This article is the same as Art. 112, Sch. II, Act. XV of 1877. In Art. 112 of Act IX of 1871, which corresponded to this article, time was made to run from the time "When the call is *made*", instead of the present provision "When the call is *payable*".

**Suit by Company for unpaid call.**

**1679. SCOPE.**—This article contemplates suits by a registered company in respect of calls payable to recover the amount of calls from a member of the company (*before* it goes into liquidation).

**Suit by liquidator for unpaid call.**

**1680.** There is a clear distinction between suits for calls brought by a company itself where there is no winding up, and suits not brought by the company itself but by the liquidator after a winding up order. It would appear, at first sight, that a suit filed by a liquidator in the name, and on behalf of a company, is practically a suit for a call by a registered company. But, it has been pointed out in *Parell Spinning and Weaving Company* v. *Manek Haji,*[26] that though the liquidator is substituted for and enforces the rights of the company, yet the liability of a shareholder **after a winding up order** is not for calls. The winding up creates new rights, and new liabilities which did not exist before, and the statutory **liability of a shareholder is to contribute to the assets of the company.** Accordingly, **Art. 120** has been applied to a suit brought, not by the company, but by the liquidator, to recover (along with other calls after liquidation), the amount of unpaid calls made by the directors of the company *before* liquidation in respect of the shares in the company held by the defendant as a member of the registered company.[27] In *In re Whitehouse & Co.,* Sir G. Jessel, explained the liability of a shareholder to contribute in these words:—

> "That is a new liability; he is to contribute; it is a new contribution. It is a liability to contribute to the assets of the company; and when we

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[26] (1886) 10 Bom. 483.

[27] *Parell Spinning and Weaving Company* v. *Manek Haji,* 10 Bom. 483; cited in 17 Bom. 469; also see *Harchand Rai* v. *Ranglal,* 70 P.R. 1903 (Art. 120 applied to a *suit* to recover unpaid calls on shares in a company); cf. *Karam Chand* v. *Jullundhar Bank, Ltd.* (In liquidation), 1927 Lah. 543=102 I.C. 705=9 L.L.J. 293=29 P.L.R. 64 (Suit by an assignee of liquidator—Art. 112 or 120 applied—Starting point date of calls made by liquidator).

look further into the Act, it will be seen that it is a liability to contribution to be enforced by the liquidator. It is quite true that a call made before the winding up is a debt due to the company, but that does not affect this new liability to contribution."[28]

**Liability of contributory for time-barred claims.**

1681. Under the Companies Act (VI of 1882, **S. 61)** is created a new liability in the shareholders, and that liability includes contribution, not only in respect of calls made since the winding up, but also in respect of unpaid calls made before the date of the winding up, *whether barred by limitation* at that date or not.[29] In view of S. 61 of the Companies Act (now S. 156, Companies Act, 1913) **it does not affect the liability created by the section that the debt was barred.**[30]

"It is a **statutory right of the creditors** of a company to enforce against the contributories of an insolvent company through the Court the obligation which the shareholders took upon themselves when they originlly subscribed in the event of insolvency subsequently overtaking the company."[31]

As soon as the **list of contributories** is settled **the liability of the contributory is** founded on a different footing from the one on which it rested till then.[32] Before the order of contribution is passed the liability is a **contractual** liability. **Subsequent to that** order it is **a new** liability which may be described as **a statutory liability.**[33] Accordingly the *making* of an order of contribution under S. 186 of the Companies Act is not controlled by any limitation, though the *enforcement* of such order is subject to the general law of limitation applicable to execution applications.[34] The view is generally held, and the law on this point is perfectly clear that the fact that the calls in suit by a liquidator were barred by time as against the company is immaterial.[35] On liquidation a member of a company is liable in respect of unpaid calls even though as against the company the realisation of such calls may have become barred by limitation under Art. 112, Limitation Act.[36] **The**

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[28] In re *Whitehouse & Co.*, 9 Ch. Div. 595 (599), cited in 10 Bom. 483 (486).

[29] *Sorabji Jamsetji* v. *Ishwardas Jagjivandas,* (1895) 20 Bom. 654 (658); Followed in *Vaidiswara Ayyar* v. *Sivasubramania,* (1907) 31 Mad. 66.

[30] *Ibid.,* 20 Bom. 654 (658) and 31 Mad. 66 (67).

[31] Per Walsh, J., in *Jagannath Prasad* v. *U. P. Flour and Oil Mills Co., Ltd.,* 1916 All. 317=35 I.C. 159=38 All. 347=14 A.L.J. 349 =5 I.C. 159.

[32] *The People's Industrial Bank, Ltd.* v. *Mahesh Charan Sinha,* 93 I.C. 631=1926 Oudh 289=3 O.W.N. 237=13 O.L.J. 49.

[33] *Ibid.*

[34] *Ibid.,* 93 I.C. 631=1926 Oudh 289; cf. Art. 181, Limitation Act (An *application* by the Official Liquidator for calls is not subject to *any* limitation).

[35] *Prayan Prasad* v. *Gaya Bank and Trades Association,* 1931 Pat. 44=10 Pat. 249=130 I.C. 534.

[36] *The Dehradun Mussoorie Electric Tramway Co.* v. *Pannalal,*

**principle** of these decisions, above noticed, is that when a company goes into liquidation, S. 156 of the Companies Act, 1913, (S. 61, old) creates a new liability on the shareholders in respect of such calls, which is distinct from and independent of the rights which the company had against them before the winding up.[37]

**1682. SUIT BY COMPANY, TO RECOVER OVER-DUE CALL.**—Article 112, will apply, according to its strict interpretation, to a suit by a company, before liquidation, against a member of the company in respect of over-due calls made by the directors under the articles of Association.[38] Where under one of the Company's articles provision was made that

**Liability to pay calls on forfeiture of shares.**

> "any member whose shares have been forfeited shall, notwithstanding, be liable to pay, and shall forthwith pay to the company all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of the forfeiture together with interest thereon, from the time of forfeiture until payment, at nine per cent. per annum, and directors may enforce the payment thereof if they think fit,"

and defendant, a shareholder, did not pay calls and, therefore his **shares** were **forfeited** and the company filed a suit to recover the amount of unpaid calls, it was *held* that there was a **special contract under which cause of action arose when the company forfeited the shares,** and the suit to recover what was due from the defendant on his shares was within time, if filed within 3 years of the **date of forfeiture.**[39] In a similar case, where the articles of association provided, that

> "a person whose share has been forfeited shall cease to be a member in respect of the forfeited share, but shall, notwithstanding, remain liable to pay to the company all *moneys* which, at the date of forfeiture, were presently payable by him to the company in respect of the shares, etc."

**Art 115, application of.**

Art. 115, was held to apply to an **action for debt against a shareholder in respect of his liability under the articles of association** in spite of the forfeiture of his shares, and his ceasing to be a member. Article 112 could not be applicable under the circumstances.[40] Where *D* was a subscriber of a certain private limited

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(1928) 113 I.C. 91=1928 All. 272=50 All. 476=26 A.L.J. 256; Followed 38 All. 347=14 A.L.J. 349=5 I.C. 159.

[37] *Pokhar Mal* v. *Flour and Oil Mills Co., Ltd.,* 1934 Lah. 1015=36 P.L.R. 287 (Tek Chand, J.); Relied on 1932 P.C. 240 and 9 Ch. Div. 595.

[38] *Parell Spinning and Weaving Co.* v. *Manek Haji,* (1886) 10 Bom. 483 (486).

[39] *Habib Rowji* v. *Standard Aluminium and Brass Works, Ltd.,* 1925 Bom. 321=27 Bom. L. R. 574=88 I.C. 96=49 Bom. 715.

[40] *Maneklal Mansukhbhai* v. *Suryapur Mills Co., Ltd.,* 1928 Bom. 252=52 Bom. 477=110 I.C. 33=30 Bom. L. R. 549; also see and cf. *Ramaseshayya* v. *T. Cotton Press,* 1926 Mad. 615=49 Mad. 468 (Art. 120, and not Art. 115, applied to a suit by a shareholder of a limited company for recovery of arrears of dividend).

liability company, and not having paid in full, his share was forfeited, and eventually a voluntary liquidator brought a suit in respect of unpaid calls, it was held that **Art. 115** of the Limitation Act **applied to the suit by the liquidator,** period of three years commencing from the **date of forfeiture** of shares when defendant ceased to be a member.[41]

1683. **STARTING POINT.**—Where a company forfeited the shares of a member more than three years **after the calls on the shares had become payable,** and instituted a suit against the member for money payable in respect of the forfeited shares, it was *held* that the forfeiture of the shares could not revive claims to share money which had become barred under Art. 112 of the Limitation Act at the time of forfeiture, and the suit was not maintainable.[42]

**Mortgage of unpaid calls—date of default.**

Where *A,* a limited company mortgaged its unpaid calls to *B,* another company, and the mortgage was not redeemed, and *B* company obtained a decree on the mortgage and in execution of the decree purchased the security mortgaged to them, that is, the unpaid calls, and sometime after *A* company had gone into liquidation, *B* company as the purchaser of mortgage security, namely the unpaid calls instituted suits for recovery of money due by the defaulting shareholders, making *A* company a party to the suits, it was held that the suits were governed by Art. 112, and time began to run from the **date of the default**: and was not interrupted by the subsequent liquidation, or impleading of the *A* company.[43]

A suit against a shareholder to enforce liability in respect of his shares, if brought within three years from the date at which his name is inscribed in the register as the holder of such shares, is not barred by limitation.[44] Where the liquidator of a registered company, sued the defendant as a shareholder of the company to recover sums due from him in respect of his shares, it was held that the debt due from the defendant did not become recoverable until he was registered as a shareholder.[45] In *Habib Rowji* v. *Standard A and B Works, Ltd.,*[46] the defendant had applied for a certain number of shares in the plaintiff company which were duly allotted to him; but, the defendant failed to pay either the allotment money, or the amount of the calls; whereupon he was served with a notice to comply with the terms of Articles of Association, and in default his shares were forfeited. It was held that on the forfeiture of defendant's shares he ceased to be a member, and that it was only by virtue of the said Articles of Association that he became a debtor to the company for the amount of calls, etc., and that, accordingly, the period of limitation for a suit to enforce the new obligation began to run from the date on which the shares were forfeited and not the respective dates on which the allotment money and the amount of calls became due.

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[41] *Bishambar Nath* v. *The Agra Electric Stores,* 1932 All. 342=1932 A.L.J. 354=54 All. 541=140 I.C. 502.

[42] *The Shri Mahalakshmi Sugar Corporation, Ltd.* v. *Jasjit Singh,* (1933) 146 I.C. 825=1933 Oudh 285=10 O.W.N. 447.

[43] *Pabna Dhana Bhandar Co., Ltd.* v. *Promoda Chandra Roy,* 1932 Cal. 382=54 C.L.J. 588=137 I.C. 380.

[44] *Chotalal Chaganlal* v. *Dalsukhram Hargovindas,* (1892) 17 Bom. 472.

[45] *Malichand Dharamchand* v. *Dalsukhram Hargovindas,* (1892) 17 Bom. 469.

[46] (1925) 88 I.C. 96=49 Bom. 715=1925 Bom. 321=27 Bom. L. R. 574; Relied on in *Maneklal Mansukhbhai* v. *The Suryapur Mills,* (1928) 110 I.C. 33=1928 Bom. 252=52 Bom. 477=30 Bom. L. R. 549.

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 113. | For specifie performance of a contract. | Three years. | The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. |

### SYNOPSIS.

1684. Corresponding provisions.
1685. Scope of the article.
1686. Laches of plaintiff.
1687-1688. **Suits within Art. 113.**
1687. Suits based on sale.
1688. Suits based on exchange, lease, etc.
1689-1694. **Suits not within Art. 113.**
1689. Enforcement of award by suit.
1690. Suits for money based on award.
1691. Suits for recovery of immoveable property.
1692. Suits for possession on the lease.
1693. Suits based on previous compromise.
1694. Suits for mortgage money.
1695. Defence of suits.
1696. Doctrine of part-performance.
1697. Starting point of limitation.

### NOTES.

**1684. CORRESPONDING PROVISIONS.**—This article is same as Art. 113 of Sch. II, Limitation Act XV of 1877; and it corresponds to Art. 113 of Sch. II of the Limitation Act IX of 1871, where the period was to run from the time "*when the plaintiff had notice that his right was denied*". There was no specific provision for such suits under Act XIV of 1859, and Cl. (16), S. 1, governed with a period of six years' limitation.[47]

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[47] (*Lalla*) *Ram Sahoy* v. (*Bibee*) *Chowbain*, (1874) 22 W.R. 287.

**1685. SCOPE.**—This article relates to specific performance of contracts. As explained by their Lordships of the Privy Council in *Ranjit Singh* v. *Maharaj Bahadur Singh,*[48]

> "a suit for specific performance is essentially a suit for enforcing a stipulated obligation relating to property. The word 'contract' itself primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights . . . . the enforcement of which is secured not by a suit for specific performance, but by a suit for possession".

**Contract distinguished from conveyance creating title.**

The article will apply only in the case of enforcement of a stipulated personal obligation relating to property.[49] When the matter no longer lies in **contract,** but has ripened into a complete **conveyance,** and the claim is based not on any *contract,* but on *title derived under the contract,* the suit will not be a suit for specific performance of a contract.[50] The article, therefore, deals with the performance of **contracts which are still executory.** The terms of the article relate to *any* contract such as contract to sell, lease, exchange, etc.[1] Chapter II of Specific Relief Act I of 1877 deals with the substantive law relating to specific performance of contracts.[2] This is an **equitable relief** given by Courts in cases of breach of contract in the form of a judgment that the defendant do actually perform the contract according to its terms and stipulations.[3] The grant of the relief **in form of specific performance is discretionary with the Court.**[4]

**Laches of plaintiff.**

**1686. DISCRETION OF COURT.**—It is well-established that a grant of equitable relief by specific performance of contract, rests in the discretion of Court to be exercised judicially in view of attending circumstances. **The principle** prevails in spite of the enactment of the law of limitation that delay by plaintiff in performing his part of the contract is a bar to his enforcing specific performance unless it has been caused by the circumstances of the case or waived by the conduct of the parties.[5] The **Lahore High Court** has held, in a number of cases, that delay may in certain cases, be evidence of abandonment or acquiescence. But mere

**Delay defeats equity.**

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48. (1918) 45 I.A. 162=46 Cal. 173 (P.C.).

49. *Ibid.*

50. *Sheo Prasad* v. *Udai Singh,* (1880) 2 All. 718.

1. *Subbaraya Pillai* v. *Raja of Karvetnagar,* (1922) 45 Mad. 641=49 I.A. 335=44 M.L.J. 740 (P.C.).

2. *See* S. 12 *et seq.,* Act I of 1877.

3. Nelson, Specific Relief Act, S. 12.

4. *Sreelal* v. *Hari Ram,* 1926 Cal. 181=88 I.C. 737; *Bahadur Chand* v. *Muhammad Ismail,* 79 I.C. 201 (Lah.).

5. Halsbury's Laws of England, Vol. 27, p. 67.

**delay, which is short of limitation, and which does not amount to waiver, abandonment,** or acquiescence, and which in no way alters **the position of the defendants,** does not disentitle the plaintiff to **sue for specific performance.**[6] In no case does mere lapse of time **deprive the plaintiff of his right** to specific performance, unless **it be held that *there has been*** abandonment, acquiescence or waiver, **or, at least, an alteration** in the position of the defendant, in that **the other party** has been put in a situation in which it would not be **reasonable** to place him, if the remedy were afterwards to be **asserted.**[7]

**Other High Courts,** have similarly held that where plaintiff's delay has not resulted in causing any prejudice to the defendant, or wherever there has been no such delay as would amount to waiver or acquiescence by plaintiff of his right to enforce specific performance, the Court will not refuse relief under S. 22, Specific Relief Act, merely on ground of plaintiff's laches or delay short of period of limitation.[8]

As a general rule, it may be stated that where the suit is within time under Art. 113, Limitation Act, and the delay is not so great as to induce the Court to hold that the plaintiff has forfeited his right under the agreement, the Court will not refuse equitable relief.

*Illustration.*

A delay of one month was not considered fatal[9]; but a delay of some twenty months, and longer has been deemed as disentitling the plaintiff from the relief of specific performance, coupled with other circumstances.[10] It being discretionary with Courts to give a decree in such cases, the equitable relief has been refused where the plaintiff had exhibited gross carelessness on his part,[11] or delayed much too long in asking for his relief.[12]

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[6] *Jungal Singh* v. *Ghulam Muhammad,* 67 I.C. 700=3 Lah. 376=1922 Lah. 461; *Gopali Ram* v. *Dewak Ram,* (1923) 75 I.C. 743=1923 Lah. 604.

[7] *Allahditta* v. *Jamnadas,* 117 I.C. 225=1929 Lah. 679=30 P.L.R. 285.

[8] *Kissen Gopal* v. *Kally Prosunno,* (1905) 33 Cal. 633; *Kedarnath* v. *Manu Bibi,* (1911) 16 C.W.N. 247; *Surya Prakasa Rayadu* v. *Lakshmi Narasimha,* (1914) 23 I.C. 560=26 M.L.J. 518; *Marudanayagam Pillai* v. *Munusamy Pillai,* (1916) 37 I.C. 776 (Mad.); *Batulan* v. *Nirmaldas,* (1918) 44 I.C. 244 (Pat.); *Satya Kinkar* v. *Shiba Prasad Singh,* (1919) 52 I.C. 452 (Pat.).

[9] *Haridhan* v. *Bhagabatt,* 41 Cal. 852=23 I.C. 214.

[10] *Mulpuri* v. *Sanagavarapu,* 26 I.C. 121=27 M.L.J. 482; *Lachman Das* v. *Kharaka Singh,* 57 P.R. 1919=51 I.C. 704; *Naroo Shanker* v. *Rajumal,* 1921 Sind 197=15 S.L.R. 21; *Nawal Begum* v. *Creet,* (1905) 27 All. 678.

[11] *Maharaj Das* v. *Gian Singh,* 27 I.C. 481=52 P.W.R. 1915.

[12] *Munir Mohammad* v. *Rama,* (1920) 58 I.C. 23 (Nag.).

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1687. **SUITS WITHIN ART. 113.**—A suit, if otherwise one for specific performance will not cease to be so merely because a **claim to recover possession is added, as merely ancillary to the right to specific performance.** For instance, where the vendor agrees to sell, and the vendee to buy immoveable property, contingent on the vendor's title being declared in a pending suit, a **suit by the vendee for execution of a conveyance and for possession** of the property, is virtually one for the specific performance of a contract to which Art. 113, Limitation Act would apply; Art. 144 cannot apply for the claim for possession is dependent on the right to specific performance.[13] A **sale** of land worth more than Rs. 100 **without registration,** as required by S. 54, Transfer of Property Act, **is in law a mere contract to sell, and** a suit for specific performance of such a contract is governed by Art. 113.[14] This article applies to **suits to compel the execution of registered documents** by way of specific performance of the contract of sale.[15]

**Suits based on sale.**

*Illustrations.*

(1) Where certain villages originally belonging to plaintiff's father were sold in Court-auction to defendant, who consented to receive a stated sum and sell the villages to plaintiff's father; and plaintiff sued to recover possession from the defendants of the villages on payment of such sum as might be found due, it was held by their Lordships of the Privy Council that the contract was a **contract to sell the villages,** and plaintiff's suit was a suit for specific performance of that contract governed by Art. 113, Sch. I to the Limitation Act.[16]

(2) Similarly, where a **provision was made in a partition** that if inequality in shares is discoverable subsequently person having excess is bound to **make good deficit in other share,** and such provision was confirmed by subsequent oral agreement, it was held that a suit for possession on strength of above clause in the covenant was governed by Art. 113, as a suit to enforce specific performance of a contract.[17]

(3) Where a **contract of lease** has been executed **by which the lessee is entitled to be put in possession,** but plaintiff claimed that the right to enjoy had not been transferred to him by possession, and he asked that the contract to be put in possession of the property be carried out, this is a specific performance of the contract.[18]

1688. Where plaintiffs sued the defendants for the recovery of equivalent land under the covenant of exchange, on being dispossessed of certain land as a result of some legal proceedings by other

**Suit based on exchange.**

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[13] *Muhiaddin Ahmed* v. *Majlis Rai,* (1884) 6 All. 231.

[14] *Ma Shwe On* v. *Maung Kywet,* (1915) 32 I.C. 536 (L.B.).

[15] *Maung Ne Dun* v. *Ma Le,* (1915) 32 I.C. 573 (L.B.).

[16] *Subbaraya* v. *Raja of Karvetnagar,* 49 I.A. 335=45 Mad. 641=37 C.L.J. 426=27 C.W.N. 408 (P.C.).

[17] *Natarajan* v. *Palaniandi,* 1935 Mad. 559.

[18] *Suraj Patish* v. *Mt. Atul Bibi,* 1935 All. 569=1935 A.L.J. 662.

persons in respect of the property exchanged, it was held that this was a suit for specific performance of contract within the meaning of Art. 113, Limitation Act.[19] Where a compromise between the parties recited an exchange of certain properties which would be effected on a certain date, a suit by plaintiff to recover the property agreed to be transferred to him, was held to be one for specific performance of a contract governed by Art. 113, Limitation Act.[20] But, **Art. 143** was applied to a suit for recovery of possession of plaintiff's property, where property obtained from defendant in exchange was sold away in execution of a decree of third party against the defendant.[21] Where there had been exchange of lands between the parties, and there was a special contract to indemnify the party as and when the deprivation took place, the suit was held governed by **Art. 116, read with Art. 83**, and not by Art. 113, Limitation Act.[22]

**1689-94. SUITS NOT WITHIN ART. 113.**—(1) Section 30 of the Specific Relief Act, I of 1877, provides that the provisions of Ch. II of the Act, ("of the specific performance of contracts") shall, *mutatis mutandis*, apply to awards. The scope of S. 30 has been explained by the Allahabad High Court in the case of *Kuldip* v. *Mahant*,[23] where it was observed that

**Enforcement of award by suit.**

> "all that this section lays down is, that when the question is one of specific performances, the Court has the same powers, and should proceed upon the same principles, in the case of an award as in that of a contract".

But, it is now established that an award though it springs out of the agreement of reference, is not converted into a contract, and a suit for specific performance of an award is not a suit for a specific performance of a contract falling within Art. 113, Sch. I of the Limitation Act.[24] A suit to enforce an award even though it is signed by the parties, is not a suit based on a contract. Consequently, Art. 113 or Art. 115 does not apply to the suit, but Art. 120, Limitation Act.[25]

**Award is not a contract.**

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[19] *Hari* v. *Raghunath*, (1888) 11 All. 27 (F.B.).

[20] *Khushi Muhammad* v. *Hayat*, (1923) 72 I.C. 1040=1923 Lah. 672.

[21] *Srinivas* v. *Johnsa Rowther*, 42 Mad. 690.

[22] *Srinivasa* v. *Rangasami*, 31 Mad. 452.

[23] 34 All. 43.

[24] *Maung* v. *Ma*, 49 I.C. 62=3 U.B.R. 109; also see *Bhoja Hari* v. *Beharilal*, 33 Cal. 881 (885); *Kuldip* v. *Mahant*, 34 All. 43; and *Maung Ne Dun* v. *Maung Cho*, (1922) 70 I.C. 517.

[25] *Harbhajmal* v. *Diwan Chand*, 102 P.R. 1915=32 I.C. 88 (89); cf. *Radhakishen* v. *Delhi Cloth Mills*, 32 P.R. 1913=16 I.C. 804 (Art. 115 applicable to a new contract between the parties).

**Principles applicable.**

(2) However, all the **principles** applicable to ordinary actions of the nature of specific performance of contracts apply to suits to specifically enforce an award, these not being subject to any special equities.[26] An award will be enforced by the Court, if that which is ordered by the award, is a matter which, if the subject of an agreement, would have been proper for specific performance,[27] and the acts to be done under the award must in their nature, be such as the Court would enforce, if found in an ordinary agreement.[28]

**Suits for money based upon award.**

**1690.** (3) In some early cases, it was held that a suit for money based on an award which directs its payment, falls within Art. 113, Limitation Act.[29] The **Allahabad High Court,** held in *Kuldip* v. *Mahant,*[30] and in *Sheo Narain* v. *Beni Madho,*[31] that a suit to recover money, principal with interest, awarded by an arbitration award was not a suit for specific performance of a contract, and was not governed by Art. 113, but was governed by Art. 116, or Art. 120, Limitation Act. The earlier Allahabad rulings were not followed by the **Madras High Court** in the case of *Sornavalli* v. *Muthayya,*[32] and the **Calcutta High Court,** in *Bhoja Hari* v. *Beharilal,*[33] has clearly pointed out that

"when a Court orders the defendant to pay money to plaintiff which the former ought to have paid under the terms of an award but had not paid,"

the Court is not really enforcing specific performance at all, but is directing payment of compensation for non-compliance with the terms of the award. The **Bombay High Court,**[34] and the **Sind Judicial Commissioner's Court,**[35] have applied Art. 120, Limitation Act to a suit to enforce an award. It was held by the **Bombay High Court** in *Fardunji* v. *Jamsedji,*[36] that a suit on an award to recover a certain sum of money allowed by the arbitrator is not a suit for specific performance. In a recent **Allahabad** case,[37] Sir Suleman, C.J., has held that where a civil dispute as to right to share of offerings was referred to arbitration, and an award was made directing defendant to deliver half of offerings, but it was not filed, and plaintiff sued for recovery of half the offerings or in the alternative for the price, that the case was not one of the execution of a decree into which an award had been incorporated, but rather of an enforcement of a right based on an award which had declared that the title was with plaintiff, that the plaintiff had a remedy in a Court of law to claim delivery of property, and in the event of failure, to get the value. A **suit to recover damages on the basis of an award,** would not come under Art. 115, nor under Art. 113. The proper article is Art. 120, Limitation Act.[38] Where an award directed that the defendant should pay a certain sum per year to the plaintiff for the use of land belonging to the latter, a suit for the recovery of the sums so due for three years past is not a suit for specific performance of the award and not governed by Art. 113, Limitation Act.[39]

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[26] Fry on Specific Performance, p. 1593.

[27] 1 Swan, p. 54.

[28] Collet, Specific Relief Act, S. 30; also see and cf. *Talewar* v. *Babori,* 26 All. 497 (499); *Mabbul* v. *Munshi,* 32 P.L.R. 761=135 I.C. 202=1932 Lah. 24 (25) (Suit by a party to award to recover the property agreed to be transferred to him under compromise of parties).

[29] *Sukho Ram* v. *Ram Sukh,* (1883) 5 All. 263; *Raghubar Dayal* v. *Madan Mohan,* 16 All. 3; also see *Daji* v. *Waman,* 1889 B.P.J. 334.

[30] (1911) 34 All. 43=8 A.L.J. 1138=11 I.C. 705.

[31] 23 All. 285.

[32] (1900) 23 Mad. 593; Followed in *Somasundaram* v. *Rangasami,* (1915) 31 I.C. 816 (Mad.).

[33] (1906) 33 Cal. 881=4 C.L.J. 162; Followed in *Hardhian Singh* v. *Delhi Cloth and General Mills,* (1912) 16 I.C. 804=32 P.R. 1913.

[34] *Rajmal* v. *Maruti,* 1921 Bom. 389=45 Bom. 329=59 I.C. 755.

[35] *Somjimal* v. *Talomal,* 6 S.L.R. 148=19 I.C. 376.

[36] 28 Bom. 1=5 Bom. L. R. 405.

**Suit for recovery of immoveable property.**

1691. (4) Suits for recovery of immoveable property based on an award would fall under Art. 144 of the Limitation Act. It was held in *Bhoja Hari* v. *Beharilal,*[40] by the Calcutta High Court, that a suit for recovery of possession of land, or a declaration of plaintiff's right thereto is not governed either by Art. 116, or Art. 120, but falls under Art. 144 of the Limitation Act. Similarly, the **Bombay High Court,** has held that a **suit for recovery of possession** of land on declaration of plaintiff's right thereto cannot be regarded as a suit for specific performance of a contract.[41] However, a **suit to obtain a conveyance of property** awarded by the arbitrators, where the award merely decides the question of title would not be governed by Art. 144, Limitation Act, but would come under Art. 113. Where under an award of arbitrators the defendant had a possessory charge on a certain property for a specified sum, the plaintiff had twelve years from the date of the award to sue for its recovery.[42]

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[37] *Maman* v. *Lala,* 1933 All. 748=47 I.C. 816=1933 A.L.J. 690.

[38] *Khubchand* v. *Jethanand,* 23 S.L.R. 417=1929 Sind 168 (169)=117 I.C. 153.

[39] *Govindlal Maneklal* v. *Manek Chowk,* 151 I.C. 156=1934 Bom. 140=36 Bom.L.R. 174.

[40] 33 Cal. 881=4 C.L.J. 162 (Citing 23 Mad. 593, and 23 All. 285, etc.).

[41] *Govindlal* v. *Manek Chowk,* 1934 Bom. 140 (141)=36 Bom.L.R. 174 (F.B.).

[42] *Surat Singh* v. *Umrao Singh,* (1923) 77 I.C. 113=1922 All. 410=20 A.L.J. 611.

In *Srinivasa* v. *Johnsa Rowther,*[43] where the parties to a deed of exchange expressly covenanted that if there should arise any dispute in the matter of enjoyment of lands exchanged, each should return to the other what is taken, a suit to recover possession of lands given by plaintiff to defendant, in the event of lands obtained by plaintiff being sold away in execution of a decree against the defendant, it was held that the suit was not one for specific performance of a contract under Art. 113, but a suit for possession governed by Art. 143 of the Limitation Act.

**Suits for possession on the lease—Art. 144.**

1692. (5) Their Lordships of the **Privy Council** have explained in *Ranjit Singh* v. *Maharaj Bahadur Singh,*[43-a] that the word "**contract**" primarily means a transaction which creates personal obligation, but it may, though less exactly, refer to transactions which create real rights. It is in the latter sense that it is used in S. 51 of the Bengal Village Chaukidari Act, and the rights reserved to *patnidars* and others on the transfer to the Zemindar of *chaukidari chakran* lands, are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession, falling under **Art. 144**, and not Art. 113 of the Limitation Act.

"It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of S. 51, they are, therefore, rights contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. . . . A suit for specific performance is essentially a suit for enforcing a stipulated obligation relating to property".[44]

Where some of the *patnidars* and *darpatnidars* brought a suit, making the remaining *patnidar* a defendant, to recover possession of *chakran* lands found to be a part of the *patni,* held that this was not an action for specific performance of contract, but for possession of *chakran* lands included in the *patni.*[45] The decision in *Ranjit Singh* v. *Radha Charan Chandra,*[46] that a suit to recover possession of property under a *patni* lease by which the lessor is to hand over possession of the property in future, is one for specific performance of a contract is not sustainable. A suit to recover possession of land leased under an *arthamulgeni* lease is not based on the *contract* to deliver possession contained in the lease deed, but on the completed *title* to possession acquired under the lease, and the period of limitation applicable to such a suit is that provided in Art. 144, Limitation Act.[47]

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[43] 42 Mad. 690 (691).

[43-a] (1918) 48 I.C. 262 (P.C.).

[44] *Ibid.,* 48 I.C. 262=1918 P.C. 85=46 Cal. 173=45 I.A. 162 (P.C.).

[45] *Banwari Thukunda Deb* v. *Bidhu Sundar,* (1908) 35 Cal. 346 [Diss. from (1907) 34 Cal. 564]; Followed in *Harak Chand* v. *Charuchandra,* (1910) 8 I.C. 766=15 C.W.N. 5.

[46] (1907) 34 Cal. 564; cf. *Kazi Newaz* v. *Ramjadu,* (1904) 34 Cal. 109 and *Hari Narain* v. *Mukundlal,* (1900) 4 C.W.N. 814; Diss. from in (1908) 35 Cal. 346, *supra.*

**Suits based on previous compromise.**

**1693.** (6) A suit for possession of land founded not on *contract* only, but on *title* to the land acknowledged and defined by a deed of compromise is not a suit for specific performance of a contract, but a suit for possession of immoveable property, to which Art. 144 applies.[48] If the deed of compromise contains an express or implied agreement to surrender possession of land, the possession of the defendants will be adverse only from the date of the compromise by reason of defendants having refused to carry out their promise.[49] Where the property is *moveable,* and the Court has to deal with the claim on equitable principles apart from any question of partnership or contract, Art. 120 applies.[50]

**Suit for mortgage money.**

**1694.** (7) A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by Art. 113 (for specific performance of a contract) is applicable. The period of limitation governing such a suit is that provided in Art. 116, Limitation Act.[1] In *Kalka Singh* v. *Hinayat,*[2] it was held by Oudh Judicial Commissioner's Court, that a suit for possession by enforcement of a clause in a mortgage deed that the mortgagee had a right to possession on failure to pay interest was not a suit for specific performance of a contract.

**Defence of suits.**

**1695.** Although the provisions of this article may prevent the defendant from suing for specific performance of a contract of sale, still he is not precluded from pleading the contract in defence to a suit for possession by the vendor.[3] A **Full Bench** of the **Rangoon High Court**[4] has held that to a suit by the legal owner for possession of immoveable property of a value of Rs. 100 or upwards it was a valid defence that the defendant was given possession of the property by the legal owner under a contract for sale as defined in S. 54 of the Transfer of Property Act. Similarly a **Full Bench** of the **Madras High Court,**[5] has held that part-performance by way of delivery of possession and an enforceable right on the defendant's part to specific performance was each a good defence to the action where the plaintiff had agreed to sell all lands worth more than Rs. 100 to the defendant, had received consideration, and had put the defendant in possession, but had not executed a conveyance.

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[47] *Mogera Nandi* v. *Parameswara Udpa,* (1907) 31 Mad. 51.

[48] *Rani Mewakaur* v. *Rani Hulas,* (1874) 13 B.L.R. 312=1 I.A. 157 (166) (P.C.).

[49] *Betts* v. *Mahomed Ismail,* (1876) 25 W.R. 521.

[50] *Commercial Bank* v. *Allavooddeen,* (1900) 23 Mad. 583 (592).

[1] *Naubat Singh* v. *Indar Singh,* (1890) 13 All. 200=11 A.W.N. (1891) 5.

[2] (1907) 10 Oudh Cas. 218.

[3] *Maung Po Kywe* v. *Maung Po Thin,* 7 Rang. 288=119 I.C. 744=1929 Rang. 251; Relied on *Maung Po Tha* v. *Maung Ba Din,* 1921 U.B. 10.

[4] *Maung Myat Tha Zan* v. *Ma Dun,* (1924) 2 Rang. 285=1924 Rang. 214 (F.B.).

**1696.** The Engish doctrine of part-performance applies in India as being a pirnciple of natural justice, to prevent the success of frauds in land transactions. According to **Allahabad High Court,**[6] S. 54 of the Transfer of Property Act is not inconsistent with the principle laid down in *Mahomed Musa* v. *Aghore Kumar,*[7] and it does not prohibit the vesting of title to or interest in property unless effected by a formal transfer. The **Bombay High Court**[8] has held that, no doubt to establish the application of that principle, it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged. The **Madras High Court**[9] has taken the view that there is no principle of equity limiting the doctrine of part-performance only to cases where the vendee's right to enforce specific performance is not barred. The defendant-vendee who is, and is entitled to remain in possession though no sale-deed has been executed in due time, will not be able to sue the plaintiff for sale-deed, but he can acquire good title by remaining in possession for twelve years. According to the **Calcutta High Court,** in *Kalipada Basu* v. *Fort Gloster Jute Manufacturing Co.,*[10] the doctrine of part-performance is applicable only in those cases where specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. This limitation as to applicability of the doctrine has been recognised in several cases of the **Calcutta High Court.** See *Bibi Jawahir* v. *Chutterput Singh,*[11] *Singheeram* v. *Bhagabat,*[12]

**Part-performance.**

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[5] *Vizagapatam Sugar Development Company* v. *Muthuramareddi,* 1924 Mad. 271=46 Mad. 919 (F.B.).

[6] *Mt. Salamat-uz-zamani Begam* v. *Masha Allah Khan,* (1918) 43 I. C. 645=(1917) 40 All. 187.

[7] 28 I.C. 930=42 Cal. 801=42 I.A. 1 (P.C.).

[8] *Sandu Valji* v. *Bhikchand,* (1923) 47 Bom. 621=1923 Bom. 473; also see *Ramappa* v. *Yellappa,* 1928 Bom. 150=30 Bom.L.R. 427=52 Bom. 307=109 I.C. 532.

[9] *Jogamma* v. *Pothanna,* (1924) 48 M.L.J. 287=1925 Mad. 763=88 I.C. 903.

[10] (1927) 100 I.C. 866 (871)=1927 Cal. 365=31 C.W.N. 348; Relied on *Mahomed Musa* v. *Aghore Kumar,* 28 I.C. 930=42 Cal. 801=42 I.A. 1 (P.C.).

[11] 2 C.L.J. 343.

[12] 6 I.C. 632=11 C.L.J. 543.

*Secretary of State* v. *Forbes,*[13] *Bepin Behary Mitter* v. *Tinkowrie,*[14] *Khagendranath* v. *Sonatan,*[15] and *Syam Kishore* v. *Umesh.*[16] In *Ariff* v. *Jadunath,*[17] where there was part-performance of the contract on the part of the landlord in the shape of the delivery of the possession of land, this afforded a good defence to the action for ejectment, notwithstanding that the right of the tenant to enforce performance was barred at the date of the suit. It would appear that in cases not governed by S. 53, Transfer of Property Act, the doctrine of part-performance cannot be relied on any longer so as to override the statutory requirements as to creation of a valid title; and if the claim for specific performance under Art. 113, Limitation Act, is barred by time, the doctrine cannot be of any use.[18]

**Old law.**

**1697. STARTING POINT.**—(1) Under the corresponding Art. 113 of Act IX of 1871, the starting point was the time *"when the plaintiff had notice that his right was denied"*.[19] In a suit for the specific performance of an agreement to grant a *patta* when required, the limitation ran from the date when the plaintiffs applied to the defendants, and the latter finally refused to make the grant.[20] Until specific performance was demanded no cause of action arose, and limitation only began to run from the demand.[21]

**Two alternative cases.**

(2) Under the present Act, as under Act XV of 1877, time runs, in the first place, from the date fixed for the performance. If any date is fixed, no demand or refusal is necessary. In the next place, if no such date is fixed, then in that case time will run from the date when plaintiff got notice that the performance is refused.[22] The **Rangoon**[23] and **Madras High Courts**[24] have

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[13] 17 I.C. 180=16 C.L.J. 217.

[14] 9 I.C. 374=15 C.W.N. 976=13 C.L.J. 271.

[15] 31 I.C. 987=20 C.W.N. 149.

[16] 55 I.C. 154=24 C.W.N. 463=31 C.L.J. 75; also see *Gajendra Nath* v. *Ashraf Hoosain,* 69 I.C. 707=27 C.W.N. 159=1923 Cal. 130 =36 C.L.J. 48; *Pitamber Gain* v. *Ram Charan,* 76 I.C. 365=28 C.W.N. 157=1924 Cal. 483 and *Puchhalal* v. *Kunj Beharylal,* 20 I.C. 803=18 C.W.N. 445=19 C.L.J. 213.

[17] 1929 Cal. 101=33 C.W.N. 333=55 Cal. 1090=112 I.C. 865 s.c. on appeal 58 I.A. 91=60 M.L.J. 538 (P.C.).

[18] *Ariff* v. *Jadunath,* 58 I.A. 91=60 M.L.J. 538 (P.C.); also see *Samuvier* v. *Ramasubbiar,* (1931) 60 M.L.J. 527.

[19] *Ahmed Mahomed* v. *Adjein Dooply,* (1876) 2 Cal. 323.

[20] *The New Beerbhoom Coal Company* v. *Buloram,* (1878) 5 Cal. 175 =2 C.L.R. 268.

[21] *Virasami* v. *Ramasami,* (1880) 3 Mad. 87.

[22] *Ma Shwe Mya* v. *Maung Mo,* (1921) 48 I.A. 214=1922 P.C. 249 =48 Cal. 832 (P.C.).

[23] *Ma Ma Gye* v. *Ma Nyo Po,* 1923 Rang. 44=1 Bur. L. J. 171.

[24] *Kalappa Kamthi* v. *Kachur Sakha Rama Row,* (1915) 29 I.C. 898; *Venkamma* v. *Krishnayya,* (1917) 41 Mad. 18=33 M.L.J. 35 and *Abdul Khadir* v. *Nagasarupu,* (1912) 17 I.C. 399 (Mad.).

held, that where no date has been fixed for the performance of a contract, time does not start running until there has been a demand and refusal. Similarly, the **Lahore High Court** has held that the *terminus a quo*, under Art. 113, in a case where no date for the performance of the contract is fixed is the date when the plaintiff has notice that performance was refused.[25] The first part of third column applies wherever a time is fixed for the specific performance and in other cases the second part.[26] The word "refusal" means an unconditional refusal.[27] The date fixed for the performance must be a date expressly fixed in the contract itself which is to be specifically enforced and not a date which the parties may have fixed by necessary implication without stating expressly what it was. If not expressly stated, the date of notice of refusal of performance is the starting point of limitation.[28] The **Madras High Court** has held that even if a date is fixed for specific performance between the parties to the contract, the second part would apply, if a third person is entitled to the right to enforce specific performance.[29]

**"Refusal".**

**"Date fixed".**

*Illustrations.*

(1) Where the plaintiff was entitled to get a transfer of a decree from the 1st defendant in case the 2nd defendant paid the 1st defendant a certain sum of money within six months from the date of the agreement, and the 2nd defendant so paid the money, it was held that as no specified date was fixed for performance of the contract to transfer, limitation ran, under second clause of the third column, from the date of refusal by 1st defendant to perform the contract.[30]

(2) Where a purchaser of a portion of property has agreed to release it of an existing mortgage but he fails to do so, the cause of action for a suit by the vendor on such covenant arises either on the date when such payment is to be made, or at least, not later than the date when the vendor calls upon the purchaser to do so.[31]

(3) Where a contract is loosely worded, the time for the performance being depended upon the happening of certain contingencies which could not happen simultaneously, it was held that the second part of the third column alone would apply.[32]

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[25] *Mahbub* v. *Munshi,* 32 P.L.R. 761; Relied on 26 All. 497 and *Lal Singh* v. *Hari Singh,* (1932) 139 I.C. 121=33 P.L.R. 562=1932 Lah. 36.

[26] *Lakha Singh* v. *Ghulam Mahomed,* 1930 Lah. 1020=130 I.C. 52.

[27] *Mahbub* v. *Munshi,* 32 P.L.R. 761.

[28] *Kashi Prasad* v. *Chhabilal,* (1933) 145 I.C. 586=1933 A.L.J. 300=1933 All. 410 (2).

[29] *Venkanna* v. *Venkata Krishnayya,* 41 Mad. 18 (22)=33 M.L.J. 35=41 I.C. 807.

[30] *Ibid.,* 41 Mad. 18 (22)=33 M.L.J. 35=41 I.C. 807.

[31] *Chand Bibi* v. *Santosh Kumar Pal,* 60 Cal. 761=146 I.C. 863=1933 Cal. 641 (Art. 116 applied: if suit is for specific performance, Art. 113 applies).

[32] *Waryamsingh* v. *Gopichand,* (1929) 11 Lah. 69=1930 Lah. 34.

(4) A suit for specific performance of contract to sell can be brought within three years from the date of the purchaser's knowledge that the vendor refused to perform the contract, where no specific date is fixed for the performance.[33] In a suit for specific performance of a contract of sale of house the subsequent purchaser of the house with notice of such contract is not the person who was primarily the party to perform the contract and the suit was not barred against him where he was joined as a defendant more than three years from the date fixed for the performance of the contract.[34]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 114. | For the rescission of a contract. | Three years. | When the facts entitling the plaintiff to have the contract rescinded first become known to him. |

## SYNOPSIS.

1698. Corresponding provisions.
1699. Scope and applicability.
1700. Starting point of limitation.

## NOTES.

**1698. CORRESPONDING PROVISIONS.**—This article is the same as Art. 114 of Act XV of 1877. In the corresponding Art. 114 of Act IX of 1871, time would run from the date *"when the contract was executed by the plaintiff"*. Under Act XIV of 1859, the residuary provision in S. 1, cl. 16 applied to such suits.

**Rescission of contracts.**

**1699. SCOPE AND APPLICABILITY.**—Art. 114 applies to the *rescission* of contracts as between the promisors and promisees, and Art. 91 applies to suits by third parties to have an instrument cancelled, or set aside.[35] A suit for dissolution of a partnership is not a suit for rescission of a contract, and is not governed by Art. 114, but by Art. 120.[36] A suit by plaintiff, as reversioner, to recover possession of a plot of land on an occupancy tenure to which the plaintiff claimed to succeed as the nearest collateral heir of the husband of the last occupant, against the defendant claiming under a sale ten years previously from the last occupant who was his mother-in-law, was held governed as to limitation by Art. 141, and not by Art. 114 of the Limitation Act, as the suit was not

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[33] *Ma Shwe* v. *Maung Kywet,* (1916) 32 I.C. 536 (L.B.); *Maung Ne Dun* v. *Ma Le,* (1916) 32 I.C. 573 (L.B.).

[34] *Kessavalu* v. *Rajaram,* 55 I.C. 533 (Mad.).

[35] *Bhawani Prasad Singh* v. *Bisheshar Prasad,* 3 All. 846=1 A.W.N. (1881) 95 (cf. Art. 91).

[36] *Khorasamy* v. *Acha,* (1928) 110 I.C. 349=6 Rang. 198=1928 Rang. 160.

**Rectification of instruments.**

brought with the object of rescinding any contract.[37] There must be a contract between the parties which can be rescinded. An award by a *Tawgaung* is not such a contract.[38] A suit for *rectification* of an instrument is not covered by this article; such a suit would be governed by Art. 95, if rectification is sought on the ground of fraud[39]; otherwise, the residuary Art. 120 would apply.[40]

**Plaintiff's laches.**

**Defence.**

1700. **STARTING POINT.**—Under Act IX of 1871, the language of the third column was as follows: *"When the contract was executed by the plaintiff"*. In the Acts of 1877 and 1908, period of limitation starts from ***date of knowledge*** by plaintiff of the facts entitling him to rescind the contract.[41] For a parallel provision, *see* notes to Arts. 95 and 96, *ante*. The doctrine of laches is wholly inapplicable to suits for rescission of contracts. The Courts have no *discretion*, under S. 35 of the Specific Relief Act, as they have under Ss. 22 and 31 of the same Act, regarding specific performance of a contract, or the rectification of an instrument.[42] This article does not prevent a defendant in possession from defending his position although as a plaintiff he would have been time-barred in asking to avoid a document.[43]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 115. | For compensation for the breach of any contract, express or implied, not in writing registered, and not herein specially provided for. | Three years. | When the contract is broken, or (where there are successive breaches), when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing), when it ceases. |

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37. *Budda* v. *Khan,* 141 P.R. 1882.
38. *Ma Te* v. *Ma Po Nyun,* U.B.R. (1892-1896) 475 at 478.
39. *Gopal Shah* v. *Arura,* 62 P.R. 1901.
40. *Advocate-General* v. *Bai Punjabi,* (1894) 18 Bom. 551 (562).
41. *Bhawani Prasad* v. *Bisheshur,* (1881) 3 All. 846=1 A.W.N. (1881) 95.
42. *Mohunlal* v. *Sri Gungaji,* (1900) 4 C.W.N. 369 at pp. 382-385.
43. *Orr* v. *Sundra,* (1893) 17 Mad. 255 (257); also see *Raja Rajeswara* v. *Arunachellam,* (1913) 38 Mad. 321.

## SYNOPSIS.

1701. Corresponding provisions.
**1702-1703. Scope of article.**
1702. Residuary article.
1703. Other general articles compared.
**1704-1707. Article explained.**
1704. Suit for "compensation".
1705. Wide meaning of compensation.
1706. Compensation not same as "damages".
1707. Registered.
**1708-1711. Applicability of article.**
1708. Express contracts—Illustrative cases.
1709. Implied contracts—meaning of.
1710. Implied contracts—Illustrative cases.
**1711-1713. Suits not within Arts. 115.**
1711. No contractual relation.
1712. Suits not for compensation.
1713. Suits involving damages in tort.
**1714-18. Starting point of limitation.**
1714. Suit for damages of breach of contract to sell goods.
1715. Suit against surety.
1716. Claim for damages for non-delivery of demised premises.
1717. Suit for damages against vendee in default.
1718. When contract is broken.
1719. Continuing breach.
1720. Successive breaches.

## NOTES.

1701. **CORRESPONDING PROVISIONS.**—This article is same as Art. 115, Sch. II, Act XV of 1877, and corresponds with Art. 115, of Sch. II of Act IX of 1871. The words "for compensation", were not in Art. 115, Sch. II of Act IX of 1871. In third column instead of the words *"in respect of which the suit is instituted,"* there were the words "sued for".

Under Act XIV of 1859, S. 1, cls. 9 and 10 made provision for "breach of contract," written or unwritten, with a period of three years prescribed. These provisions applied to express contracts only. The residuary provision in S. 1, cl. 16, applied to breach of implied contracts.[44]

**Residuary article —"Not otherwise provided for".**

1702. **SCOPE OF ART. 115.**—This article is a sweeping article providing for all cases of *breach of contract* not specially provided for in the Act.[45] It is only a residuary article applicable only when no other article of the Limitation Act schedule is appropriate to suits relating to breaches of contract.[46] Art. 115 is a general provision applying to all actions *ex contractu* not specially provided for otherwise.[47]

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[44] *Umedchand Hukumchand* v. *Sha Bulakidas,* 5 Bom.H.C.R.O.C. p. 16.

[45] *Doya Narain Tewary* v. *Secretary of State,* (1886) 14 Cal. 256 (275).; also see *Johuri Mahton* v. *Thakoor Nath,* (1880) 5 Cal. 830.

**Other general articles compared.**

1703. **An agent's contract to account to his principal,** whether express, or implied, **is specially provided for in Art. 89,** and, therefore, it cannot be brought under Art. 115, which is made applicable only where there is no special provision relating to contracts.[48] **Art. 120** is a much more general article than Art. 115, and should be relied on only in the last resort.[49] Art. 115 is extended to all contracts, express or implied.[50] The corresponding **Art. 116,** fixes six years for suits "on a promise or contract in writing registered".[1] Limitation Act does not contain any special article for a **suit by a medical practitioner for recovery of his fees** for attendance on a patient, and the residuary Art. 115, would, therefore, apply to such suits.[2] **A suit for compensation** against a person, under S. 235 of the Contract Act, **for untruly representing himself to be the authorized agent** of another and thereby inducing the plaintiff to deal with him as such agent, is **governed by Art. 115,** and not by Art. 36, or 120 of the Limitation Act.[3] A **suit based on trust created by will** does not fall under Art. 115, and would be **governed by Art. 120,** or Art. 123, Limitation Act,[4] just as Art. 49 is a residuary article relating to torts, this Art. 115 is a residuary article relating to contracts.

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[46] *Nandlal* v. *Partab Singh,* (1922) 69 I.C. 502=3 Lah. 326=1922 Lah. 425; also see *Bhimamal & Sons* v. *Rahmatullah,* 1931 Lah. 309=130 I.C. 574.

[47] *Mahamad Ghasita* v. *Sirajuddin,* 2 Lah. 376=1922 Lah. 198=66 I.C. 490 (F.B.); also see *Saudagarmal-Lachmandas* v. *Bahadurchand Harichand,* (1928) 107 I.C. 493=1928 Lah. 442 and *Mahomed Baksh* v. *Rawalpindi Club, Ltd.,* 1935 Lah. 222.

[48] *Venkatachellam Chetty* v. *Narayanan Chetty,* (1915) 26 I.C. 740=39 Mad. 376=28 M.L.J. 140; also see *Jogindra Narayan* v. *Chinai Muhd. Sircar,* (1925) 89 I.C. 275=4 Pat. 289; *Shib Chandra* v. *Chandra Narain Mukerjee,* 32 Cal. 719=1 C.L.J. 232 (Art. 89 applied to a suit for account, by principal against agent); and *Madhusudan Sen* v. *Rakhal Chandra,* (1915) 30 I.C. 697=43 Cal. 248.

[49] *Surayya* v. *Bapirazu,* (1915) 31 I.C. 335=18 M.L.T. 459=(1916) 1 M.W.N. 121.

[50] *Husain Ali Khan* v. *Hafiz Ali Khan,* (1881) 3 All. 600=1 A.W.N. (1881), 33 (F.B.).

[1] *Ibid.,* 3 All. 600 (F.B.).

[2] *Barodakant Sen* v. *The Court of Wards,* (1931) 133 I.C. 537=1931 A.L.J. 949=1931 All. 752 (2); Relied on *Akhoy Kumar Chatterjee* v. *Queen-Empress,* 5 C.W.N. 249.

[3] *Vairavan Chettiar* v. *Avicha Chettiar,* (1913) 21 I.C. 65=38 Mad. 275=25 M.L.J. 256.

[4] *Mt. Ali Begam* v. *Ismail Hussain,* 1929 Lah. 834=30 P.L.R. 689.

**Suit for compensation.**

**1704. ARTICLE EXPLAINED.**—The suit to fall under this general residuary article must be in respect of a contract, and this article may be applied only when no other article is specially applicable. (*Vide* S. 1703, *ante.*) The other requirements of the article is that the suit must be one for compensation for breach of a contract. The term compensation has been explained in notes under Art. 29.

**Wide meaning of compensation.**

**1705.** "Compensation" is the general term used also in the Indian Contract Act, S. 73, to denote the payment which a party is entitled to claim on account of loss or damage arising from breach of contract.[5] In Arts. 115 and 116, the word "compensation" seems to be used in the sense in which it appears in S. 73 of the Contract Act, IX of 1872.[6] The general remedy for breach of contract is a suit for compensation "for any loss or damage" sustained by the plaintiff (S. 73, Indian Contract Act); and, the suit is nonetheless a suit for compensation, because it is brought for the specific sum due on a bond.[7] In a case under the corresponding provision in Cl. (9), S. 1, Act XIV of 1859, their Lordships in applying the clause to a suit against a *del credere* agent on a balance of accounts in respect of dealings regarding which there was no express written contract, observed that

> "their Lordships do not think it necessary or advisable that they should attempt, on the present occasion, to lay down what is the proper construction of these words as applicable to all cases. It is sufficient to say that it appears impossible to them to put so narrow a construction upon them as not to include the case now before them".[8]

Art. 115 of the Limitation Act is not limited to the case of damages for breach of contract, and it is applicable to a case of liability under a simple debt due.[9] As observed, by the **Patna High Court**, in a recent case,[10]

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[5] *Vaithilinga Pillai* v. *Thetchanamurti,* (1880) 3 Mad. 76=5 Ind. Jur. 76.

[6] *Harendar Kishore* v. *The Administrator-General of Bengal,* (1885) 12 Cal. 357 (363); also see *Mahomed Ghasita* v. *Sirajuddin,* 66 I.C. 490=1922 Lah. 198=2 Lah. 376 (F.B.) and *Saudagarmal-Lachmandas* v. *Bahadurchand Harichand,* (1928) 107 I.C. 493=1928 Lah. 442.

[7] *Ganesh Krishin* v. *Madhavrao Ravji,* (1881) 6 Bom. 75 (76); Relied on *Nobocoomar* v. *Siru Mullick,* 6 Cal. 94 and *Gauri Shanker* v. *Surju,* 3 All. 276; also see *Rameshwar Mandal* v. *Ramchand Roy,* 10 Cal. 1033; Followed in *Ramasami* v. *Muthusami,* (1892) 15 Mad. 380=2 M.L.J. 42 and *Mahomed Ghasita* v. *Sirajuddin,* 66 I.C. 490=1922 Lah. 198=2 Lah. 376 (F.B.).

[8] *Onkur Pershad* v. *Mt. Foolcoomaree,* (1871) 16 W.R. 35=14 M.I.A. 134 (P.C.).

[9] *Sreenath Roy* v. *Peary Mookerjee,* (1917) 39 I.C. 205 (209)=25 C.L.J. 91=21 C.W.N. 479; Relied on *Parbaticharan* v. *Ramnarayan,* 16 W.R. 164 note=5 Beng.L.R. 396 and *Onkar Pershad* v. *Mt. Foolcoomaree,* (1871) 16 W.R. 35=14 M.I.A. 134=10 B.L.R. 15 (P.C.).

> "Article 115, as construed by the Courts applies either to a case of express or implied contract and not a contract in writing registered, that is to say, it may be an express contract or an oral contract or a written contract so long as it is not registered and it also does apply to a case of implied contract."

**Compensation not restricted to damages.**

**1706.** The term "compensation" as used in Arts. 115 and 116 is not sufficiently precise, but the technical distinction between a debt and a damage is too refined for the purpose. Ordinarily, the term compensation is not used as equivalent to damages, although compensation may often have to be measured by the same rule as damages in an action for breach.[11] It was observed, by the **Calcutta High Court,** that

> "the term *compensation* as pointed out in the Oxford Dictionary, *signifies that which is given in recompense, an equivalent rendered.* Damages on the other hand constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another, its **primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent".**[12]

A **Full Bench** of the **Lahore High Court** has held that the term "compensation" in Art. 115, Limitation Act, denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract, and a suit to recover a specified sum of money on a contract, is a suit for compensation within the article.[13] The Judicial Committee[14] have taken the word "compensation" in a very wide sense as used in the Indian Contract Act, S. 73, approving the Bombay decision in *Lal Chand* v. *Narayan,*[15] and, consistently with this view, suits for debts have been held to be also suits for compensation.[16]

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[10] *Gopal Saran* v. *Chhakauri Lall,* 1934 Pat. 7 (9)=12 Pat. 792=148 I.C. 375=15 P.L.T. 197; Relied on *Smith* v. *Kinney,* 1924 Pat. 231 =81 I.C. 298=2 Pat. 749 (Compromise merged in a decree held to be a contract within Art. 115, Limitation Act).

[11] *Mahamad Mazharal Ahad* v. *Mahamad Azimuddin Bhuian,* (1923) 73 I.C. 17 (22)=1923 Cal. 507=37 C.L.J. 108=27 C.W.N. 210.

[12] *Ibid.,* 73 I.C. 17 (22)=1923 Cal. 507 (511).

[13] *Mahomed Ghasita* v. *Sirajuddin,* (1922) 66 I.C. 490=1922 Lah. 198=2 Lah. 376 (F.B.); Relied on 6 Cal. 94 and 3 All. 600 (F.B.).

[14] *Tricumdas* v. *Gopinath,* (1916) 44 I.A. 65=1916 P.C. 182=44 Cal. 759=39 I.C. 156 (P.C.).

[15] (1913) 37 Bom. 656.

[16] *Ram Raghubar* v. *The United Refineries,* 1931 Rang. 139=9 Rang. 56; *Rateh Chand* v. *Nagendra Kishore,* 1931 Cal. 790=53 C.L.J. 522; *Kumar* v. *Chairman,* (1930) 58 Cal. 930; also see *Maneklal Mansukhbhai* v. *The Suryapur Mills,* (1928) 110 I.C. 33=52 Bom. 477=1928 Bom. 252; *Ram Rachayya* v. *Raghunath,* 8 Pat. 860=1930 Pat. 46.

**"Registered."**

1707. The word "registered" in Arts. 115, and 116, means duly registered in British India under the law of registration in force at the time, and place of executing the contract, *vide* S. 3, Cl. (45) of the General Clauses Act X of 1897. These articles do not refer to cases where the document in writing is registered under other enactments, such as the Indian Companies Act, Copyright Act, etc.[17]

## 1708. EXPRESS CONTRACTS — ILLUSTRATIVE CASES.—

**Suit for dower.**

(1) A suit for dower payable under an instrument in writing, is a suit on a contract, and is for compensation for breach of contract.[18]

**Contract of bailment.**

(2) Where the defendant borrowed from the plaintiff his car, and while the car was in the defendant's use, it met with an accident which resulted in considerable damage to the car, and the plaintiff who had to spend a certain sum of money in the repairs of the car instituted a suit for the recovery of the amount, it was held that the case was one of bailment arising out of a contract, and that the defendant was liable for damages in breach of contract by reason of his failure to carry out the obligation imposed on him by S. 151 of the Contract Act.[19]

**Suit for return of purchase-money.**

(3) Where the defendant covenanted that he had a good title to the property sold, and in return for the sale-deed received a certain price, but the plaintiff was obstructed in obtaining possession of property, it was held that a suit for return of the purchase-money was governed by Art. 116, Limitation Act.[20]

**Hire of water.**

(4) Where plaintiffs, who claimed to be the proprietors of a certain canal, sued the defendant for water-rate, alleging that the defendant had his lands watered by the canal, and that he had agreed to pay them water-rate at a specified sum per acre, it was held that the suit being based on contract, the claim came under Art. 115, Limitation Act, as one for compensation for breach of contract.[21]

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[17] *See* Notes under Art. 116; *Dixon* v. *Calcraft,* 12 Bom. 463; *Ramaseshayyar* v. *T. Cotton Press,* (1925) 49 Mad. 468=50 M.L.J. 520 (F.B.); *also see* In the matter of *Union Bank, Allahabad,* (1925) 47 All. 669 and *Karachi Bank* v. *Shewaram,* 143 I.C. 713=1933 Sind 103; compare *Maneklal Mansukhbai* v. *The Suryapur Mills Company,* (1929) 52 Bom. 477=110 I.C. 33=1928 Bom. 252 and *Gobind Narayan* v. *Raghunath,* (1929) 54 Bom. 226=1930 Bom. 572=127 I.C. 305=32 Bom.L.R. 232.

[18] *Asiatullah* v. *Danish Muhammed,* (1922) 50 Cal. 253=1923 Cal. 152=36 C.L.J. 379; also see *Mahammad Mazaharal Ahad* v. *Mahammad Azimuddin,* (1922) 27 C.W.N. 210=37 C.L.J. 108=(1923) 73 I.C. 17 (22)=1923 Cal. 507.

[19] *Halloway* v. *Holland,* (1933) 145 I.C. 1001=1933 Oudh 518=10 O.W.N. 1105.

[20] *Ganappa* v. *Hammad,* (1925) 49 Bom. 596=1925 Bom. 440 (The words "express or implied", also read in Art. 116); also see *Injad Ali* v. *Mohini Chandra,* (1923) 80 I.C. 623=27 C.W.N. 1025.

[21] *Ala* v. *Sadhi,* 171 P.R. 1883.

**Suit for personal relief against mortgagor.**

(5) A suit by a mortgagee to enforce the personal covenant against the mortgagor, is governed by Art. 115, or Art. 116, according as the mortgage-deed is unregistered, or registered, and Art. 132 is confined only to enforce the mortgage against the mortgaged property.[22]

**Money set apart for ornaments.**

(6) A suit to recover money which the defendant had set apart in the books of his firm in the name of plaintiff, his son, for making ornaments for the daughter-in-law, stipulating to pay the same with interest, within a specified time, falls under Art. 115, Limitation Act.[23]

**Adjustment of account.**

(7) Where certain partnership accounts of a dissolved partnership were adjusted between the parties, on the basis of settlement which preceded the adjustment, and the plaintiff claimed the amount due on the basis of that adjustment, it was held that Art. 115, or Art. 120 applied to the case.[24]

(8) Where on an adjustment of account between the plaintiff as landlord, and the defendant as tenant a certain sum was left with the defendant for payment to the superior landlord of the plaintiff on account of the rent payable by the plaintiff to the latter, but was not paid by the tenant, whereupon the superior landlord sued the plaintiff and realised amount from him by obtaining a decree, and the plaintiff sued to recover the amount he had to pay his landlord, it was held that Art. 115, and not Art. 110 applied.[25]

(9) A *Hatchitta* containing an adjustment of accounts arrived at in the presence of both parties and stamped and signed by the debtor, which contains a statement that the amount mentioned therein remains due and owing from the debtor, constitutes a promise to pay and not merely an acknowledgment of liability. A suit on the basis of such a promise is governed by Art. 115, and not by Art. 64 of Sch. I, Limitation Act.[26]

**Suit by a purchasing agent.**

(10) A suit by a purchasing agent to recover certain sums of money due to him for the purchase of stores, etc., for Government, falls under Art. 115.[27]

**Suit for broker's commission.**

(11) A suit for commission due to the plaintiff as broker for the defendant is not a suit for wages within Art. 102, Limitation Act, but falls under Art. 115, as a suit for compensation for services rendered, under a promise to be paid for.[28]

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[22] *Raghubar Dayal* v. *Lachmin Shankar* (1883) 5 All. 461; cf. *Kameswar Prasad* v. *Rajkumari,* (1892) 20 Cal. 79=19 I.A. 234 and *Umapada Trivedi* v. *Haripada,* 1931 Cal. 801 (1) (Art. 116 applied to suit on personal covenant in registered bond).

[23] *Mancherjee Bomanji* v. *Nusserwanj Mancherji,* (1895) 20 Bom. 8 (13).

[24] *Jalim Singh* v. *Choonee Lal,* (1911) 11 I.C. 540=15 C.W.N. 882; also see *Madhowdas Ramdas* v. *Santramdas,* 1933 Sind 324.

[25] *Luchmi Misser* v. *Deoki Kuar,* (1913) 19 C.W.N. 174=19 I.C. 752.

[26] *Sarifun Mandalin* v. *Feradoul Khatoun,* (1923) 76 I.C. 603=1923 Cal. 578.

[27] *Doya Narayan* v. *Secretary of State,* (1886) 14 Cal. 256.

[28] *Sushil Chandra Das* v. *Gauri Shanker,* (1916) 39 All. 81=36 I.C. 371=14 A.L.J. 873.

**Suit for money lent payable within fixed time.**

(12) A suit to recover money lent, with interest upon an agreement that the loan shall be repaid within the time fixed, under the bond, is one falling under Art. 115, and not Art. 57 of the Limitation Act.[29]

**Suit for malikana.**

(13) A suit for damages for wrongfully withholding payment of malikana, falls under this article, and plaintiff can recover annual sums in arrears only for three years prior to suit.[30] Upon failure to pay the principal and interest secured by a bond upon the day appointed, breach of the contract to pay is committed.[31] Interest post diem may be allowed as damages, in the absence of a contract to pay interest after the day fixed for the re-payment of principal and interest.[32] A suit for recovery of arrears of malikana, is governed by Art. 115.[33]

**Suit based on compromise decree.**

(14) An agreement does not cease to be an agreement merely because it is subsequently confirmed by a decree. Where by a compromise defendants agreed to pay to the plaintiff a royalty calculated at a certain rate on all coal extracted from a particular colliery, and the compromise was embodied in a decree; and no payment was, however, made for several years, it was held that the plaintiff's suit to recover the arrears of royalty based on the compromise was governed by Art. 115, and not by Art. 120, Limitation Act.[34] In a **Madras** case, in which there had been a compromise and an action was brought on the decree of Court, Art. 115 was not applied, as it was an action not on a contract. The decision was also in respect of a liquidated sum of money.[35] But this ruling has been distinguished by the **Patna High Court** in *Gopal Saran Narain Singh* v. *Chakkauri Lall*,[36] where following the early Patna case, it has been held that a suit for compensation for breach of a term in a compromise is governed by Art. 115, and not by Art. 36, or Art. 120; and the fact that such compromise is merged in a decree nonetheless makes it a contract within the meaning of Art. 115.

**Suit against a surety.**

(15) A suit by a creditor against a surety, upon a letter of guarantee executed by the latter in respect of a debt payable on demand on a promissory note, is governed by Art. 115, and not by Art. 65 of the Limitation Act.[37] In the case of a debt, as soon as the day of payment

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[29] *Rameshwar* v. *Ramchand*, 10 Cal. 1033; also see *Ramasami* v. *Muthusami*, 15 Mad. 380.

[30] *Mohamya Prosad Singh* v. *Ramkhelawan*, (1911) 15 C.L.J. 684 =15 I.C. 911.

[31] *Mansabali* v. *Gulab Chand*, (1887) 10 All. 85=7 A.W.N. (1887) 292.

[32] *Sri Niwas Ram* v. *Udit Narain*, (1891) 13 All. 330=11 A.W.N. (1891) 66; *Gudri Koer* v. *Bhubaneswari*, (1891) 19 Cal. 19; *Moti Singh* v. *Ramoharisingh*, (1897) 24 Cal. 699.

[33] *Kallar* v. *Ganga*, 33 Cal. 998.

[34] *Smith* v. *Kinney*, (1924) 81 I.C. 298=2 Pat. 749=1924 Pat. 231.

[35] *Arunachellam Chettiar* v. *Raja Rajeswara Sethupati*, 1925 Mad. 1260=22 L.W. 195=91 I.C. 338 (Dist. in 1934 Pat. 7).

[36] 1934 Pat. 7=12 Pat. 792=15 P.L.T. 197=148 I.C. 375; also see *Kusodhaj* v. *Braja Mohan*, (1915) 43 Cal. 217 (A contract of parties is none the less a contract even though it became embodied in a decree).

[37] *Sreenath Roy* v. *Peary Mohan Mookerjee*, (1917) 39 I.C. 205 (Cal.); cf. *Brojendra Kissore* v. *Hindustan Co-operative Insurance*

arises, the default of the principal debtor is complete, and the surety, *apart from special stipulation,* is immediately liable to the full extent of his obligation without being entitled to notice.[38] A suit instituted by creditor, against principal debtor, and his surety, so far as surety was concerned, held governed by Art. 115, Limitation Act.[39]

**Suit to recover share of produce, or certain sum, on default.**

(16) Where defendant, a Government tenant, agreed, for consideration received, to pay to plaintiff half the produce of certain land, and in default to pay a sum of money annually: and, the defendant having made default plaintiff sued to recover the amount payable under the agreement: it was held that the suit was not one for recovery of interest but for compensation for the breach of the agreement to pay a share of produce and fell within Art. 115, and not under Art. 63, Limitation Act.[40]

**Suit to recover unpaid share of cost of shop.**

(17) The parties having jointly acquired a site from Government for the purpose of building a shop entered into a contract by which the plaintiff undertook to build a shop on the site, and the defendant agreed to pay him one-third of the cost of construction thereof. Art. 115 was applied to a suit for recovery of the unpaid part of the share of construction.[41] Similarly, a suit for refund of an amount advanced to defendant for building a well, under an agreement that the defendant should build a well for the plaintiff would be governed by this article.[42]

**Suit for recovery of moneys due from shareholder of company.**

(18) A suit by a company to enforce the liability of a shareholder, whose shares have been forfeited, to pay to the company all moneys which, at the date of the forfeiture, were payable to him to the company in respect of the shares is a suit for "compensation" for the breach of a contract "not in writing registered" within the meaning of Art. 115, Limitation Act.[43]

**Suit to recover value of pledged goods sold by pledgee.**

(19) A suit for damages for breach of contract of pledge, and for recovery of value of goods pledged, but sold by pledgee without authority, would be governed by Art. 115, or Art. 145, if regarded as one for redemption of goods pledged.[44]

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*Society,* (1917) 39 I.C. 705 (710)=44 Cal. 978=25 C.L.J. 238=21 C.W.N. 482 (Art. 65 or Art. 115 applicable).

[38] *Brojendra Kissore* v. *Hindustan Co-operative Insurance Society,* 39 I.C. 705 (710)=44 Cal. 978.

[39] *Diyalumal* v. *Nandu,* (1931) 132 I.C. 590=1931 Lah. 691.

[40] *Wali* v. *Khuda Baksh,* (1913) 72 I.C. 480=5 L.L.J. 366=1924 Lah. 149.

[41] *Saudagarmal Lachmandas* v. *Bahadurchand-Harichand,* (1928) 107 I.C. 493=1928 Lah. 442.

[42] *Naziamdin* v. *Nathuram,* (1911) 9 I.C. 237=66 P.L.R. 1911=202 P.W.R. 1911.

[43] *Maneklal Mansukhbhai* v. *The Suryapur Mills Co., Ltd.,* (1928) 110 I.C. 33=30 Bom.L.R. 549=1928 Bom. 252=52 Bom. 477; also see *Habib Rowji* v. *Standard A and B Works,* 49 Bom. 715; and *Bishambar Nath* v. *Agra E. Stores,* 54 All. 541=1932 A.L.J. 354=140 I.C. 502=1932 All. 342 (343).

[44] *Ramaswamy Chetty* v. *Palaniappa,* (1930) 122 I.C. 37=30 L.W. 898=1930 Mad. 364.

**Suit for value of work done.**

(20) Where a contract is given for the construction of a building to plaintiff, and the progress of the work being unsatisfactory, the plaintiff is asked by the defendant to stop the work, and the rest of the work is carried out through another contractor, the suit for the value of the work done by the plaintiff would be governed by Art. 115, Limitation Act.[45]

**Breach of contract to pay time-barred debt.**

(21) In the event of a breach of contract embodying a promise to pay a time-barred debt due on accounts, a suit for compensation is the only remedy, since the plaintiff cannot fall back upon the original account. A contract to pay money, if not fulfilled causes loss for which the proper compensation is a decree to pay the amount promised.[46]

**Medical practitioner's claim for fees.**

(22) Art. 115 applies to a claim by a medical practitioner for his fees.[47]

**Claim for short delivery against carrier.**

(23) A claim against common carriers for compensation for value of goods short delivered is a suit for damages for breach of contract to deliver, and is governed by Art. 115.[48]

**Suit for account against gomashta.**

(24) A suit for account against a gomashta based upon an unregistered kabuliat is governed by Art. 115.[49]

**Unregistered receipts.**

(25) A suit for compensation for breach of contract contained in an unregistered receipt falls under this article.[50]

**Suit by vendor against vendee.**

(26) Where the vendee having agreed to apply a portion of the consideration money to the payment of a debt due by the vendor to a third person fails to make that payment and then is sued for the recovery of the balance of price by the vendor, against whom a decree has been obtained by the creditor, there is a cause of action for breach of contract even though the amount reserved was not paid by the vendor.[1]

**Suit against *del credere* agent.**

(27) A suit brought against a *del credere* agent on a balance of accounts in respect of dealings regarding which there is an express written contract is governed by this article.[2]

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45. *Sitaram* v. *Mt. Mahmudi Begam,* 1934 Lah. 475=35 P.L.R. 529; Relied on *Mahomed Ghasita* v. *Sirajuddin,* 2 Lah. 376=66 I.C. 490=1922 Lah. 198 (F.B.).

46. *Bharat National Bank* v. *Bishanlal,* 1932 Lah. 212=33 P.L.R. 42=13 Lah. 448=135 I.C. 673; Relied on 6 Bom. 75; 6 Cal. 94; 3 All. 276.

47. *Baroda Kant Sen* v. *Court of Wards,* 1931 All. 752 (2)=133 I.C. 537=1931 A.L.J. 949; also see *Harishchandra* v. *Brojnath,* 13 W.R. 96 (Case of implied contract).

48. *B. I. S. N. Co.* v. *Hajee Mahomed Esack,* (1881) 3 Mad. 107; also see *Mohansingh* v. *Henry Conder,* 7 Bom. 478 (Breach of contract to deliver goods).

49. *Motilal* v. *Aminchand,* 1 C.L.J. 211.

50. *Seshachala* v. *Varadachariar,* 11 M.L.J. 318.

1. *Ram Rachya Singh* v. *Raghunath,* (1930) 8 Pat. 860=122 I.C. 244 =1930 Pat. 46.

2. *Dukar Pershad* v. *Foolcoomarie,* (1871) 16 W.R. 35=14 M.I.A. 34 (P.C.).

### 1709. IMPLIED CONTRACT.—

**Meaning of.**

**1709. IMPLIED CONTRACT.**—Art. 115 deals comprehensively with *"any* contract, express or implied". Contracts are called *'express'*, when they can be proved by oral or written words, directly expressing the parties' agreement. An implied contract on the other hand arises independently of an express contract or agreement, and is proved circumstantially. Contracts may be implied in fact, as defined in S. 9 of the Contract Act: or, they may be implied in law, as a legal fiction, which have no existence in fact. In *Vairavan Chettiar* v. *Avicha Chettiar,*[3] the **Madras High Court** observed that the expression "implied contract" in Art. 115, is used in the sense in which it is understood in **English Law,** and not according to the definition in Contract Act. Baron Parke, B., pointed out in *Marzetti* v. *Williams,*[4] that

> "the only difference between express and implied contract is in the mode of proof. An express contract is proved by direct evidence, and implied contract by circumstantial evidence".

Leake, on Contracts,[5] states that contracts implied in law, or simple contracts arising independently of agreement

> "include transactions affecting the two parties other than an agreement between them, upon which the law operates by imposing a contract, that is, a liability on the one side, and a correlative right on the other."[6]

Promise implied by law, is however, a legal fiction, which has to be distinguished from the implied promise in contracts, implied in fact where the promise is an implication or inference of fact.[7]

### 1710. IMPLIED CONTRACTS—ILLUSTRATIVE CASES.—

**Suit by consignor for compensation.**

(1) A suit by the consignor against a railway for value of goods consigned, which were neither delivered to consignee nor returned to consignor and which the railway company denied having received, and for compensation therefor is governed by Art. 115 and not by Art. 30 or Art. 31 of Sch. I of the Limitation Act.[8] [The breach in this case was of a written contract, *i.e.,* the invoice by the railway which undertook by the contract to deliver the goods to the consignee but had not done so].

**Suit by judgment-debtor for damages.**

(2) Where a decree-holder does not certify a payment made to him out of Court by the judgment-debtor towards the satisfaction of the decree under the provisions of O. XXI, R. 2, Civil Procedure Code, and takes out execution without giving credit for such payment, the judgment-debtor has a right to sue the decree-

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[3] (1913) 38 Mad. 275 (278)=21 I.C. 65.

[4] (1830) 1 B. and Ad. 425.

[5] 7th Edn., Ch. I, p. 43.

[6] *Lewis* v. *Campbell,* (1842) 19 L.J.C.P. 130 (Compensation allowed upon equitable principles, by imposing a debt, and implying a promise to pay the debt).

[7] Dr. Pal's Limitation Act, p. 760.

[8] *Radha Sham Basak* v. *Secretary of State,* (1916) 34 I.C. 130=44 Cal. 16=23 C.L.J. 547.

holder for any damage he may have suffered by the latter's neglect to certify and by the proceedings in execution. Such a suit is one for breach of the implied promise to certify payment to Court and to make it effectual in execution.[9]

**Suit for account of profits.**

(3) A suit by the proprietors of a village against a *lambardar* for an account of the profits of the village management must be brought within the period prescribed by Art. 115 of Sch. I to the Limitation Act: and inasmuch as the *lambardar* is the agent of the proprietors bound by an implied contract to render an account at the end of each agricultural year, the period of limitation commences to run on the date upon which the account should have been rendered under the implied contract.[10]

**Suit for price of ornaments loaned for use.**

(4) Where plaintiff handed over to defendant certain gold ornaments for use on festival, and these ornaments were stolen from the keeping of the defendant owing to the latter's negligence, it was held that when the defendant borrowed the ornaments he must be deemed to have made an implied contract for the return of the goods to the plaintiff, and the article applicable was Art. 115 of the Limitation Act, and not Art. 145 or Art. 49 of the Limitation Act.[11]

**Suit by surface owner for damages.**

(5) A suit by a surface owner against the owner of sub-soil for damages caused by a malfeasance or misfeasance of the latter resulting in subsidence of the soil, is not a suit for compensation for malfeasance or misfeasance independent of contract (Art. 36), but Art. 115 applies, as there is an implied covenant running with the land that the surface owner has an inherent right of support from the owner of the sub-soil.[12]

**Suit for compensation for untrue representation.**

(6) A suit for compensation against a person, under S. 235 of the Contract Act, for untruly representing himself to be the authorized agent of another, and thereby inducing the plaintiff to deal with him as such agent, is governed by Art. 115, and not by Art. 36, or Art. 120 of the Limitation Act.[13]

**Suit for compensation for repairs.**

(7) A suit by a person engaged to repair a bungalow, although there be no express agreement, falls under Art. 115, because there is an implied contract to pay the fair price arising on repairs being done.[14]

**Suit for fees by medical practitioner.**

(8) When a medical practitioner is engaged to treat a patient, without express arrangemeent about fees, there is an implied contract to pay usual reasonable fee, and a suit for recovery of such fee

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[9] *Gopalasami Naik* v. *Nammalwar,* (1918) 48 I.C. 810=1919 M. W. N. 3=36 M.L.J. 175; also see and cf. *Karam Elahi* v. *Hariram,* 1933 Lah. 112=140 I.C. 472=33 P.L.R. 1084 (Payments made by judgment-debtor certified in previous applications, not given credit for in final application, and realizations in excess: suit for recovery of excess payment governed by Art. 115, or Art. 120, but not by Art. 97).

[10] *Anantaram* v. *Ganeshram,* (1919) 51 I.C. 733=4 P.L.J. 304.

[11] *Chaturgun* v. *Shahzady,* (1930) 126 I.C. 682=1930 Oudh 395=7 O. W.N. 769.

[12] *Jagannath Marwari* v. *Kalidas,* (1929) 120 I.C. 626=1929 Pat. 245=8 Pat. 776.

[13] *Vairvan Chettiar* v. *Avicha,* (1913) 21 I.C. 65=38 Mad. 275.

[14] *Naro* v. *Mahomed,* 9 Bom.H.C.R. 280.

would fall under Art. 115.[15]

**Suit for customary compensation on remarriage of a widow.**

(9) A suit for recovery of compensation alleged to be payable according to custom of jats of Ajmere by the defendant in consequence of his re-marrying the widow of plaintiff's deceased brother, is governed by Art. 115, Limitation Act.[16]

**Mortgagor and mortgagee.**

(10) A suit for compensation for breach of an implied contract between a mortgagor and a mortgagee is governed by this article.[17]

1711. **SUITS NOT WITHIN ART. 115.**—(1) If there is no contractual relation between the parties, a suit for compensation cannot be said to be for breach of a contract, within terms of Art. 115 of the Limitation Act. For instance, a **suit by a shareholder** of a limited **company for** recovery of **arrears of dividend,** is not based on a contractual relation, and Arts. 115 or 116 cannot apply.[18] In the absence of a finding of contract to pay at the conclusion of the litigation, a **suit by a co-defendant for contribution** against another co-defendant of his share of money paid into Court by one on behalf of both, would fall not under Art. 115, but under **Art. 61** of the Limitation Act.[19] A timber dealer advanced a certain sum to a person doing sawing business, who sawed a certain quantity of timber worth a certain amount. **A claim for recovery of the balance of money lent, after deducting the value of the work done,** would not fall under Art. 115 as compensation for *breach* of contract, but **Art.** 57 would govern the suit.[20] A **suit for recovery of arrears of rent against co-owner** tenant of part of joint property, who had continued **in possession** of the whole house **after the expiry of the term without the assent** of the plaintiffs and without paying any rent would not be governed by Art. 115 or Art. 110, but Art. 120 would apply. After the expiry of the term, the relationship between the parties was **not** based on an express or implied contract.[21] A **suit by** one **co-sharer** against another **to recover his share in the profits of a ferry** is governed by Art. 120, and not by Art. 36 or 115 of the Limitation

**No contractual relation.**

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[15] *Harish Chunder* v. *Brojanath,* (1870) 13 W.R. 96.

[16] *Madda* v. *Sheo Baksh,* (1881) 3 All. 385.

[17] *Sayad* v. *Nurul,* 8 Oudh Cas. 166.

[18] *Seshayya* v. *T. Cotton Press,* (1925) 49 Mad. 468=1926 Mad. 615 (F.B.); O. R. *Ripon Press* v. *Nama,* (1918) 42 Mad. 33.

[19] (*Shaikh*) *Jamal* v. *Chand,* (1922) 70 I.C. 289=1922 Cal. 79.

[20] *Abdul Aziz Khan* v. *Niazullah,* 1934 All. 126=147 I.C. 295=1934 A.L.R. 103=3 A.W.R. 190; also see and cf. *Annamalai Chetty* v. *Lutchman Chetty,* 36 I.C. 497 (A *thavanai* account is governed by Art. 57, and not by Art. 115, as this involves no breach of any contract, express or implied).

[21] *Madar Sahib* v. *Kader Moideen,* (1916) 33 I.C. 705=39 Mad. 54.

Act.[22] Where there is no question of breach of contract or compensation payable for such breach, but parties were to look into the accounts of each other to equalize the profit, each trading independently of the other, and a suit is brought to take such an account, and ascertain who owes whom, and give a decree for the amount payable, the suit cannot be treated as a suit for compensation and it does not fall under Art. 115. The general Art. 120, would, therefore, apply.[23] The liability of a director of a Bank is of a person whose relations with the company are not independent of contract and who occupies the position of a co-trustee. A **suit,** therefore, **for any misfeasance against a director** would not fall under Art. 36; nor would it fall under Art. 115 or 116, for the suit is **not for a** specific **breach of any** specific **contract** with the person making the claim, *i.e.*, the liquidator, but would fall under the residuary Art. 120.[24] A **suit under S. 235 of the Indian Companies Act** for the misapplication of the company's fund and misfeasance is not governed by Arts. 115 and 116, but by Art. 120.[25]

**Suits not for compensation.**

1712. (2) A **suit for the specific performance of a contract** is not a suit for compensation for breach of contract.[26] Similarly, a **suit for account** is essentially different in nature from a suit for compensation.[27] Where a principal sues his agent for accounts, **Art.** 89 would apply.[28] A **suit for damages against a carrier for non-delivery,** is specifically governed by **Art. 31,** Limitation Act, irrespective of whether the suit is based on a tort or on a breach of contract.[29]

**Suits involving damages in tort.**

1713. (3) Where there is a contract, and there is breach of contract, involving also a breach of duty, the plaintiff may recover either in tort or in contract. This article will only apply if the

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22. *Kishen Dayal* v. *Kishun Deo,* (1916) 35 I.C. 430=1 P.L.J. 69.

23. *Bhavanarayana* v. *Venkayya,* 1927 Mad. 775 (Mad.).

24. *Govind Narayan* v. *Rangnath,* (1930) 127 I.C. 305=32 Bom. L.R. 232=54 Bom. 226=1930 Bom. 572.

25. In the matter of *The Union Bank, Allahabad,* 1925 All. 519=23 A.L.J. 473=88 I.C. 785=47 All. 669; Followed in *Karachi Bank, Ltd.* v. *Shewa Ram,* (1933) 143 I.C. 713=1933 Sind 103.

26. *Srinivasa* v. *Rangasami,* (1908) 31 Mad. 452.

27. *Annu Avathanigal* v. *Somasundara,* 1931 Mad. 185=54 Mad. 654.

28. *Venkatachalam Chetty* v. *Narayana Chetty,* (1914) 26 I.C. 740=39 Mad. 376; *Jogendra Narain* v. *Chinai Mohamed,* (1924) 4 Pat. 289=89 I.C. 275.

29. *Ali Mahomed* v. *G. I. P. Railway,* 11 Nag. L. R. 174=31 I.C. 474; *I. G. N. Ry. Co.* v. *Nanda,* 13 C.W.N. 851; *Mutsaddi* v. *B. B. & C. I. Ry.,* 42 All. 390; *Moti Ram* v. *E. I. Ry.,* 108 P.R. 1906; *G. I. P. Ry. Co.* v. *Ganpat Rai,* 33 All. 544; *Venkatasubba* v. *A. S. N. Co.,* 39 Mad. 1; *E. I. Ry. Co.* v. *Sagar Mull,* 4 Pat. 482=1925 Pat. 611; *B. N. Ry. Co.* v. *Hamir Mull,* 5 Pat. 106=90 I.C. 374=1925 Pat. 727.

suit is based on breach of a contractual relationship. Thus, in *Seshu Gurukkal* v. *Somasundara,*[30] Art. 115 was applied to a suit by master against his servant in respect of a loss caused by the negligence of the defendant: but, in *Jagdish Prasad* v. *Raghubir,*[31] where in breach of contract of tenancy the defendant cut trees, Art. 49 was applied to the suit.

**Suit for damages for breach of contract to sell goods.**

1714. **STARTING POINT OF LIMITATION.**—(1) In a suit for **damages for breach of contract, to sell goods,** the cause of action is the breach by the defendant, which happened on the **date** originally **fixed for the delivery of goods.** The settlement of the amount due from the defendant to the plaintiff did not amount to a novation of the contract, nor did the document showing the amount of damage settled give the plaintiff any fresh cause of action.[32] Where a contract for sale of goods provided that the goods were to be supplied by different shipments in lots, and were to be received by the purchaser on payment of the price as soon as the Railway receipt and the invoice reached his destination, held, that the contract being indivisible one, the limitation for **suit** by buyers **for damages for non-delivery** commenced from the **day of arrival of last shipment,** as the plaintiffs could not sue for damages for breach of contract until that date had expired.[33]

**Suit against surety.**

1715. (2) A **suit against** principal and **surety,** so far as the surety is concerned, is governed by Art. 115, Limitation Act, and if the loan is payable at once, on the **date of the loan,** the cause of action against the surety begins to run from the same date, and the suit may be barred against the surety under the three years' rule in this article, even though the time as against the principal debtor might be six years under the Punjab Loans Limitation Act.[34] A promissory note payable **with interest on demand is a present debt** and becomes due and payable at once without demand so that limitation begins to run **from its date,** as the debtor is considered to be in default from that very date. A surety for a debtor becomes liable to the full extent of his obligation without being entitled to a notice as soon as the **default of the principal debtor** is complete, unless there is a special stipulation qualifying his obligation.[35] In a suit by a creditor against a surety, upon a letter of guarantee executed by the latter in respect of a debt payable on demand on a promissory note, which is governed by Art. 115, Limitation Act, limitation begins to run from the date of execution of the guarantee, notwithstanding a stipulation in the guarantee to the effect that the creditor may look for repayment to the surety if the principal debtor makes default in payment.[36]

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[30] (1909) 7 M.L.T. 93=5 I.C. 764.

[31] (1926) 94 I.C. 336 (All.).

[32] *Nandlal-Lajpatrai* v. *Ramjidas-Dwarkadas,* (1927) 99 I.C. 591=1927 Lah. 122.

[33] *Ganeshdas Ishardas* v. *Ram Nath,* 1928 Lah. 20 (2)=111 I.C. 498=9 Lah. 148=29 P. L. R. 554; also see *Chhotelal Amba Parshad* v. *Basdeomal Hiralal,* (1926) 94 I.C. 2=1926 Lah. 404; Followed *Phulchand-Fatehchand* v. *Chhotelal Ambaparshad,* 90 I.C. 654=1925 Lah. 513=7 Lah. L. J. 360 and *Ambaparshad Gopinath* v. *Jawaladal-Ramkanwar,* 94 I.C. 629=8 Lah. L. J. 101 (Starting point from date when last lot is due to arrive); *Chhotelal-Amba Pershad* v. *Nathumal Mirimal,* (1930) 125 I.C. 189=1930 Lah. 193 (Due date of contract was arrival of last lot).

[34] *Diyalu Mal* v. *Nandushah Devraj,* (1931) 132 I.C. 590=1931 Lah. 691.

**Claim for damages for non-delivery of demised premises.**

**1716.** (3) An action by a lessee for damages caused by the lessor's failure to deliver to him a portion of the demised premises should be brought within the period prescribed by Art. 115 or 116 of the Limitation Act, commencing from the time when the lessee became entitled to possession under the terms of the contract.[37]

**Suit for damages against vendee failing to make payment to other person.**

**1717.** (4) Where a certain portion of the sale consideration in respect of a sale of immoveable property is left in the hands of the vendee for payment to a third person, no time being fixed for the payment, and the vendee fails to make the payment, the breach is committed by the vendee on the date when the sale-deed was executed and limitation for a suit to recover damages from the vendee for the breach commences from that date.[38]

**When contract is broken.**

**1718.** (5) As to when a contract, express or implied is broken, it would depend upon a construction of its terms. In a suit for damages for breach of a betrothal contract, it was held by the **Punjab Chief Court,** that the onus is in the first instance upon the plaintiff to prove that the betrothal contract was broken within three years of his bringing the suit.[39] Where plaintiffs, husband and wife, were promised a gift of money, by the father of first plaintiff, **within a period of three years,** from the date of their marriage, and the purpose for which the money was to be paid was the purchase of ornaments for the wife, it was held that the intention was that the money should not be paid until the plaintiffs required it for the purpose for which it was destined, and demanded it. The contract was not broken until the plaintiffs demanded the money.[40] Where the right of the plaintiff to return of certain goods arose **"on demand"**, *i.e.*, immediately or forthwith, an actual demand was not necessary to establish a starting point of limitation under Art. 115, Limitation Act.[41] Cause of action for a suit under this article arises on the date of the breach if a **date is fixed for the performance** of a contract, but when no date is fixed for the performance, the dates of the breach and the promise coincide.[42] Where the plaintiff made over some money to defendant without specifying any date of repayment, but bearing interest until it is demanded back, the breach of contract did not take place until the demand was made.[43] It was held in *Raghubar Rai* v. *Jaij Rai,*[44] on the authority of an English case, *Battley* v. *Faulkner,*[45] and of *Kumarnath* v. *Nobo Kumar,*[46] that the plaintiff could have brought an **action on the covenant** even before any injury was done or damage took place, in order that the person making the covenant (*i.e.*, defendant) should place him in a position to meet the liability the defendant had undertaken on the plaintiff's behalf. This decision was dissented from in *Sarju Misra* v. *Ghulam Hussain,*[47] and in *Kedarnath* v. *Hargovind,*[48] the view was taken that the English law is not applicable to contracts in India, and that the period of limitation runs from the **date of actual injury.** In an action of assumpsit, the cause of action accrues from the breach of a contract, and not from the time of the refusal to perform contract.[49] Where the defendants undertook to reinstate plaintiff if he was ousted from possession of certain property, the limitation period commenced to run from the time when the defendant neglected to take steps to reinstate plaintiff in the property, *ie.*, the date of the breach of agreement.[50]

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[35] *Brojendra Kissore* v. *The Hindustan Co-operative Insurance Society,* (1917) 39 I.C. 705=44 Cal. 978.

[36] *Sreenath Roy* v. *Peary Mohun Mookerjee,* 39 I.C. 205=25 C.L.J. 91=21 C.W.N. 479.

[37] *Secretary of State* v. *Pemmaraju,* (1916) 35 I.C. 254=40 Mad. 910=30 M.L.J. 575.

[38] *Ram Narain* v. *Nihal Singh,* (1925) 87 I.C. 804=1925 All. 488.

[39] *Mewa Singh* v. *Narain Singh,* (1919) 50 I.C. 735 (Punj.).

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[40] *Mancherji Bomanji* v. *Nusserwanji Mancherji,* (1895) 20 Bom. 8 (13).

[41] *Surayya* v. *Bapirazu,* (1915) 31 I.C. 335 (Mad.); also see *Seetharamayyar* v. *Munisami,* (1918) 37 M.L.J. 613 (Technical meaning of the expression "on demand").

[42] *Raghubar Rai* v. *Jaij Rai,* (1912) 14 I.C. 244 (245)=9 A.L.J. 534=34 All. 429.

[43] *Bibee Heerun* v. *Bebee Marian,* (1870) 14 W.R. 87.

[44] (1912) 14 I.C. 244=34 All. 429=9 A.L.J. 534.

[45] (1820) 3 B. & Ald. 288=22 R.R. 390=160 E.R. 668.

[46] 26 Cal. 241=13 I.D. (N.S.) 759.

[47] 63 I.C. 87.

[48] (1925) 95 I.C. 913=24 A.L.J. 550=1926 All. 605.

[49] *The East Indian Co.* v. *Oditchurn Paul,* (1849) 5 M.I.A. 43.

[50] *Dorab Ally Khan* v. *Abdool Azeez,* (1880) 6 Cal. 356.

**Execution of decrees after satisfaction.**

1718. (6) Where a decree-holder executes a decree notwithstanding a payment made out of Court, and the judgment-debtor brings a suit for damages for breach of contract, Art. 115 applies, even if there is no express contract.[1] In *Jamuna Bai* v. *Beli Ram,*[2] it was held that a suit lies for declaration that a decree has been adjusted out of Court, period commencing from the date of repudiation of payment or adjustment. When an application is made for execution in such cases, there is involved a breach of an implied contract to certify: and the remedy for damages is available even before the decree has been actually executed against the judgment-debtor.[3] But, the difficulty in such a case would be that time would start running although judgment-debtor may be ignorant of filing of the execution application. The view that each successive application for execution gives a fresh cause of action is open to serious objection, as cause of action in this case is assumed to be the breach of an implied contract to certify payment to Court.[4]

**Continuing breach.**

1719. The third column provides that period of limitation shall run (1) when the contract is broken (*see* S. 1718, above), (2) where there are successive breaches, when the breach in respect of which the suit is instituted occurs, or (3) where the breach is continuing when it ceases. As to continuing breaches, *see* S. 23, Notes.

"In case of a continuing breach, a fresh right to sue arises every time the breach continues and as such the suit will be barred only after three years from the time when the breach ceases to exist."[5] In *Mansab Ali* v. *Gulab Chand,*[6] it was observed by the Allahabad High Court, that

> "a covenant for title is an instance of a contract of which, according to English law, there may be continuing breaches. So is a covenant to maintain a building in repair. There is a breach of the covenant for title so long as an adverse title exists, and there is a breach of a covenant to maintain a building in repair so long as the building is out of repair. To take another example from English law, the period of limitation *prima facie* begins to run on a promissory note payable on demand from the date of the note, the debt being payable without any demand, and the non-payment of the note is not according to English law a continuing breach which

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[1] *Gopalasami* v. *Nammalwar,* (1918) 48 I.C. 810=1919 M.W.N. 3 =36 M.L.J. 175; cf. *Marappa* v. *Shunmugappa,* (1911) 21 M.L.J. 518 (Art. 97 applied).

[2] (1913) 21 I.C. 557 (Punj.).

[3] In the matter of *Medai Kaliani Anni,* (1907) 30 Mad. 545; also see *Viraraghava* v. *Subbakka,* (1882) 5 Mad. 397 (F.B.).

[4] Mitra's Limitation Act, Vol. II, p. 1419; see and cf. *Gopalasami* v. *Nammalwar,* (1918) 36 M.L.J. 175=1919 M.W.N. 3=48 I.C. 810.

[5] Shepherd on Limitation, pp. 48 and 49; Mitra's Limitation Act, Vol. II, p. 1415.

[6] (1887) 10 All. 85.

extends the period of limitation." "The Indian Limitation Act specifically provides for the perod of limitation for bringing an **action on a promissory note payable on demand** but this fact does not make the illustration from the English law the less apposite."[7] It has been held in *Raghubar Rai* v. *Jaij Rai,*[8] that **continuing breach applies only to contracts obliging one of the parties to adopt some given course of action** during the continuance of the contractual relation. Thus, upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed, and there is no continuing breach within the meaning of Art. 115 of the Limitation Act.[9] A breach of a covenant "to keep in repair," or "insure or keep insured", is a continuing breach and furnishes from day-to-day a new cause of action so long as the breach lasts.[10] "**Non-repair is a continuing breach** for which an action may be brought and the damages assessed to the commencement of the action; but no damages can be claimed for a possible continuance of the breach."[11] **A covenant for quiet enjoyment** may be a continuing covenant, but the breach of it is not always a continuing breach.[12] An action by a lessee for damages caused by the lessor's failure to deliver to him a portion of the demised premises should be brought within the **period** prescribed by Art. 115, or Art. 116, Limitation Act, **commencing from the time when the lessee became entitled to possession** under the terms of the contract. Such a contract is broken completely as soon as the lessor declines, or is unable to put the lessee in possession, and the **cause of action** for the paintiff's suit **arises on the day of such breach,** whether the suit is construed as one for breach of a covenant to give possession or of one for quiet enjoyment.[13] In the case of a breach of a **covenant for title,** no doubt the period of limitation would begin to run from the time when the deed was executed. But, where the covenant is to provide for what might happen in case of either of the parties to the deed being dispossessed by adverse title, until the event arose which was contemplated by the covenant, the cause of action did not arise.[14] In *Mathura Das* v. *Raja Narindar Baha-*

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[7] *Mansab Ali* v. *Gulab Chand,* (1887) 10 All. 85.

[8] (1912) 34 All. 429 (431)=14 I.C. 244=9 A.L.J. 534.

[9] *Mansab Ali* v. *Gulab Chand,* 10 All. 85.

[10] See Lightwood, p. 203; also see *Doe* v. *Gladwin,* (1845) 6 Q.B. 953.

[11] Leake, 7th Edn., p. 811; also see *Luxmore* v. *Robson,* (1818) 1 B. and Ald. 584; *Jacob* v. *Down,* (1900) 2 Ch. 156, cited in Dr. Pal's Limitation, p. 761.

[12] *Raju Balu* v. *Krishnarav Ramchandra,* 2 Bom. 273 (292, 293).

[13] *Secretary of State* v. *Pemmaraju,* 40 Mad. 910=35 I.C. 254 (*Held,* that it would be mischievous to introduce the technical rules of English Conveyancing or Real Property Law).

[14] *Hari Tiwari* v. *Raghunath,* (1888) 11 All. 27=8 A.W.N. (1888) 254 (F.B.).

*dur,*[15] their Lordships of the **Privy Council** held that in a suit for *post diem* interest on the basis of a mortgage-deed, so long as the principal debt was not time-barred, the creditor might recover six years' arrears of interest by way of damages, notwithstanding limitation. There had been a breach of contract daily while the principal remained unpaid, and unbarred by time. A provision in a sale-deed of the nature of an indemnity clause was construed as a continuing covenant in the **Madras** case of *Parvatanei* v. *Lanka Rambrahman.*[16] It was observed that

> "covenants which provide for a continuous exercise of obligations should be regarded as **continuing covenants** so long as the subject-matter in respect of which the duty is cast subsists. Therefore, though a **cause of action may arise on the date of the covenant** or as soon as there is a breach, the injured person is not bound to sue once and for all for present and prospective damages for the breach of the covenant. He is entitled to wait until he has exhausted all possible means of obtaining reparation before he has recourse to the covenantor. He will then be entitled to sue for consolidated damages caused to him by the act of the intervenor and for the expense he has been put to in attempting to vindicate his title against that party.".

**Successive breaches.** 1720. According to English law,

> "In the case of a bond with a condition the cause of action accrues when the condition is first broken; as in the case of a *post obit* bond, the statute runs from the death upon which the money is payable. Where there are several conditions in a bond or several covenants in the same deed, every distinct breach gives a new cause of action, and the statute can only be pleaded as to those breaches which have occurred within the period of limitation. Upon a **bond conditioned to pay an annuity,** default in each periodical payment is a distinct breach of the condition and gives a new cause of action. So with a **bond or covenant to pay a sum of money by instalment**; but if it is stipulated that upon default in payment of one instalment the whole amount is to become due, then upon the first default a cause of action accrues for all that then remains due, and the statute begins to run forthwith. So under a lease each periodical accrual of rent gives a new cause of action against which the statute begins to run; but as long as the relation of landlord and tenant subsists the right to rent is not barred, except that the arrears payable out of the land are limited to six years."[17]

The **Allahabad High Court,** observed in *Mansab Ali* v. *Gulabchand,*[18] that

> "there are many contracts of which there may be successive breaches, as for instance, contracts by which a party to the contract agrees to do or to forbear doing two or more different things; in such contracts the contracting party may commit several breaches by not doing those things which he has contracted to do, or by doing those things which he has contracted not to do".

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[15] (1896) 19 All. 39 (P.C.).

[16] (1918) 47 I.C. 924=35 M.L.J. 124.

[17] Leake on Contracts, 7th Edn., pp. 731, 732.

[18] (1887) 10 All. 85.

This was relied upon in *Roghubar Rai* v. *Jaij Raj,*[19] for the view that **successive breaches** happen in those cases only in which there is a **promise to perform periodically,** such as payment of rent or annuity. Similarly, it has been held by the **Patna High Court** that where a party has such a recurring or successive causes of action whether under the terms of the contract or by operation of law, each cause of action will give fresh start to the period of limitation, and the mere fact that the party has not availed himself of the earlier cause of action, will not prevent him of availing of a later one.[20] In a suit for breach of a contract to be performed at different times, the period of limitation must be calculated from each breach of contract as it arises. Where there is a contract for performing certain duties in each of several years, each breach of the contract is a complete cause of action, and damages are recoverable for each separately.[21] Where a decree-holder does not certify a payment made to him out of Court by the judgment-debtor towards the satisfaction of the decree under the provisions of O. 21, R. 2, Civil Procedure Code, and takes out execution without giving credit for such payment, in such a case the filing of the execution petition in itself gives a cause of action though no money may have been realised, and successive applications may give rise to successive breaches, and fresh causes of action.[22] If money is subsequently realized, that will give a fresh cause of action as a further breach of the covenant, and the amount recovered will form the main portion of the damage; but where money is not realized, compensation will be allowable for any injury caused to the judgment-debtor, and for any loss he may have been put to by the attempted execution of a satisfied decree.[23]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 116. | For compensation for the breach of a contract in writing registered. | Six years. | When the period of limitation would begin to run against a suit brought on a similar contract not registered. |

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19. (1912) 34 All. 429 (431).

20. *Mukhdeo Singh* v. *Harakh Narain,* (1931) 12 Pat. L. T. 755=1931 Pat. 285=134 I.C. 609=11 Pat. 112.

21. *Mahi Sahu* v. *Forbes,* 6 W.R. Act X, 61.

22. *Gopalasami* v. *Nammalwar,* (1918) 48 I.C. 810=1919 M.W.N. 3=36 M.L.J. 175 (This view is questioned by Mitra, Vol. II, p. 1419).

23. *Ibid.*

## SYNOPSIS.

1721. Corresponding provisions.
1722. **Article explained:** "Compensation".
1723. Suits for compensation, included suits for specific sums.
1724. Suit on a registered bond.
1725. Suit on an instalment bond.
1726. "Registered".
1727-1731. **Contract in writing registered.**
1727. Madras.
1728. Calcutta.
1729. Allahabad.
1730. Oudh.
1731. Bombay.
1732. Quasi-contracts.
1733. Irregular registration.
1734. Void registered contract.
1735. Invalid registration.
1736. **Scope and applicability.**
Distinction between registered and unregistered documents.
1737. Generalised exception of Art. 116.
1738-1756. **Suits within Art. 116.**
1738. Suit to recover arrears of rent.
1739-1747. *Suit on personal covenant in mortgage.*
1740. Allahabad.
1741. Bombay.
1742. Calcutta.
1743. Lahore.
1744. Madras.
1745. Oudh.
1746. Patna.
1747. Rangoon.
1748-1753. *Registered sale-deed—Breach of covenant in.*
1749. Breach of covenant of title.
1750. Breach of covenant of indemnity.
1751. Breach of covenant of quiet possession.
1752. Breach of contract to pay off creditor, or mortgagee.
1753. Modified view—Recent cases.
1754. Suits for compensation for deficient land.
1755. Suits for compensation for sums received by agent.
1756. Partnership agreement by registered instruments.
1757. Suits not within Art. 116.
1758. Starting point of limitation.
1758. (*i*) General.
1759. (*ii*) Sale by co-sharers.
1760. (*iii*) Breach of covenant of title.
1761. (*iv*) Personal relief against mortgagor.
1762. (*v*) Breach of contract to pay off mortgage.

## NOTES.

**1721. CORRESPONDING PROVISIONS.**—Under Act XIV of 1859, the general provision in S. 1, Cl. (16), applied to suits of this description; and S. 51 of the Registration Act XX of 1866, provided that

> "Suits to recover money lent, or interest, or for the breach of any contract, may be brought within six years from the time when the cause of suit arose, in every case in which there is an engagement or contract in writing, provided that such engagement or contract be duly registered under this Act".

This article corresponds with Art. 117, Sch. II of **Act IX of 1871**, which was worded as follows:—

"On a promise or contract in writing registered—Six years—from the time when the period of limitation would begin to run against a suit brought on a similar promise or contract not registered."

The present article is the same as Art. 116, Sch. II of Act XV of 1877.

**Compensation.**

1722. **ARTICLE EXPLAINED.**—*See* S. 1704, *ante*, under Art. 115: as to wide meaning of the word *"compensation"*; which is not restricted to damages,[24] and, it may include a suit brought for a specific sum due on a bond[25]; and, apply to a case of liability under a simple debt due.[26] The technical distinction between a debt and damage is too refined to be drawn in this connection.[27] And, under the wide interpretation of the term "compensation", suits for debts have also been held to be also suits for compensation.[28]

**Suit for compensation includes suits for specific sums.**

1723. A suit to recover the amount of principal and interest due upon a registered bond has been held to be a suit for compensation for breach of contract in writing registered within the meaning of this article, in a large number of cases.[29]

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[24] *Vaithilinga Pillai* v. *Thetchanamurti,* (1880) 3 Mad. 76 (Loss or damage arising from breach of contract); *Harendra Kishore* v. *The Administrator-General of Bengal,* (1885) 12 Cal. 357 (363); *Mahomed Ghasita* v. *Sirajuddin,* 66 I.C. 490=1922 Lah. 198=2 Lah. 376 (F.B.); *Saudagarmal Lachhmandas* v. *Bahadurchand-Harichand,* (1928) 107 I.C. 493=1928 Lah. 442 (Sense in which it appears in S. 73, Indian Contract Act); *Shib Dayal* v. *Meherban,* (1922) 45 All. 27 (Expression is wide enough to include a claim for a payment of a sum certain).

[25] *Ganesh Krishin* v. *Madhavrao,* (1881) 6 Bom. 75 (76); *Nobocoomar* v. *Siru Mullick,* 6 Cal. 94; *Gauri Shanker* v. *Surju,* 3 All. 276; *Rameshwar Mundul* v. *Ramchander Roy,* 10 Cal. 1033; also see *Ramasami* v. *Muthusami,* (1892) 15 Mad. 38=2 M.L.J. 42; and *Mahomed Ghasita* v. *Sirajuddin,* 66 I.C. 490=1922 Lah. 198=2 Lah. 376 (F.B.).

[26] *Parbati Charan* v. *Ramnarayan,* 16 W.R. 164 note=5 Beng. L. R. 396; and *Onkar Pershad* v. *Mt. Foolcoomaree,* (1871) 16 W.R. 35=14 M.I.A. 134=10 Beng. L. R. 15 (P.C.); *Sreenath Roy* v. *Peary Mookerjee,* (1917) 39 I.C. 205 (209).

[27] *Mahomed Mazharal* v. *Mahomed Azimuddin,* (1923) 73 I.C. 17 (22)=1923 Cal. 507=27 C.W.N. 210.

[28] *Lal Chand* v. *Narayan,* (1913) 37 Bom. 656; approved in *Tricandas* v. *Gopinath,* (1916) 44 I.A. 65=1916 P.C. 182=44 Cal. 759=39 I.C. 156 (P.C.); also see *Ganapa Putta* v. *Hammad Saiba,* (1925) 49 Bom. 596; *Ram Rachhayya* v. *Raghunath,* (1929) 8 Pat. 860; *Seshayya* v. *Annamma,* (1886) 10 Mad. 100; *Ruthnasami* v. *Subramanya,* (1887) 11 Mad. 56; also see *Shib Dayal* v. *Meherban,* 69 I.C. 981=1923 All. 1=45 All. 27 (F.B.) and *Ganappa* v. *Hammad,* 49 Bom. 596=1925 Bom. 440=89 I.C. 59 and *Seshayya* v. *T. C. Press,* 49 Mad. 468 (F.B.); *Viswanatha* v. *S. I. Bank,* (1917) 42 I.C. 609=6 L.W. 712 (Suit to recover amount of debt after default).

On the same grounds, Art. 116 applies to **suits for the recovery of dower-debt** where there is a registered dower-deed.[30]

**Suit on a registered bond.**

1724. As noticed in **S. 1723** above, a suit to recover a specific sum of money due upon a registered bond, or other written contract is a suit for compensation for breach of a contract in writing registered within the meaning of Art. 116 of the Limitation Act, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract which is not registered.[31] To a bond covered by Art. 66, Limitation Act, Art. 116 may be applied for failure to pay the bond-debt where the instrument is registered.[32]

**Starting point.**

A suit to recover money due on a registered bond must be instituted within six years from the date when the contract is broken, or where there are successive breaches, from the date of the breach in respect of which the suit is instituted, or where the breach is continuing from the date when it ceases.[33]

**Suit on an instalment-bond.**

1725. Article 116 is applicable to a suit on a registered instalment bond, notwithstanding the express provision of **Art. 74, Limitation Act:** (*See* S. 1432): This article is intended to apply to all contracts in writing registered, whether there is or there is not an express provision in the Limitation Act for similar contracts not registered.[34] Where a registered bond is payable in instalments the limitation prescribed is under Art. 116,[35] as a suit based upon the covenant to recover mortgage-money upon failure of the mortgagor to pay instalments is in substance a suit governed by this article.[36] In case of a provision for demand of full amount secured by the bond with interest on default of any one of the instalments, the mortgagee has his option to bring a suit for the realization of the entire amount as soon as any one of the instalments falls due, or to wait until the expiry of the time for payment of all the instalments, and in the latter case his claim would not be barred in so far as the instalments which are within the period of limitation from the date of suit are concerned.[37] This article applies to a suit against a minor for necessaries supplied on basis of a registered bond, if consideration of the bond is proved.[38]

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[29] *Gauri Shanker* v. *Sarju,* (1880) 3 All. 276; *Hussain Ali* v. *Hafiz Ali,* (1881) 3 All. 600 (F.B.); *Khuni* v. *Nasiruddin,* (1881) 4 All. 255; *Collector* v. *Beti Maharani,* (1892) 14 All. 162; *Susil* v. *Gauri,* (1916) 39 All. 81; *Ganesh Krishn* v. *Madhavrav Ravji,* (1881) 6 Bom. 75; *Parbutty Nath* v. *Mudho,* 3 Cal. 276=1 C.L.R. 592; *Nobocoomar* v. *Siru,* (1880) 6 Cal. 94; *Kalut Ram* v. *Dhanukhdhari,* (1882) 11 C.L.R. 361; *Girijanand* v. *Shailaja,* (1896) 23 Cal. 645; *Ethel G. Kerr* v. *Clara B. Ruxton,* (1906) 4 C.L.J. 510; *Nastarini* v. *Chandi,* (1910) 12 C.L.J. 423=8 I.C. 788; *Ram Narain* v. *Odindra,* (1911) 17 C.W.N. 369=13 I.C. 440=15 C.L.J. 17; *Chellaphroo* v. *Banja,* (1915) 20 C.W.N. 408=22 C.L.J. 311.

[30] *Muhammad Mazaharal* v. *Muhammad Azimuddin,* 1923 Cal. 507 =73 I.C. 17=37 C.L.J. 108=27 C.W.N. 210; cf. *Kubra Begam* v. *Fazal Husain,* (1927) 99 I.C. 553=1927 All. 268 (Art. 103 applied to suit for dower payable on demand).

[31] *See* cases noticed in S. 1723 above. 6 Bom. 75; 3 Cal. 276; 6 Cal. 94; 8 I.C. 788; 13 I.C. 440, etc.

[32] See *Ibid.,* S. 1723 above; 3 All. 600; 14 All. 162; 39 All. 81, etc.

[33] *Ram Narayan Singh* v. *Odindranath,* 15 C.L.J. 17=13 I.C. 440.

[34] *Din Doyal* v. *Gopal Sarn,* (1891) 18 Cal. 506; also see *Rup Narayan* v. *Gopi,* (1906) 11 C.W.N. 903.

[35] *Magaluri Garudiah* v. *Narayana,* (1881) 3 Mad. 359.

**"Registered."**

1726. *See* Note, in S. 1707, under Art. 115, *ante*. The word "registered", in both the Arts. 115, and 116, means duly registered in British India, under the law of registration in force at the time, and place of executing the contract.[39] Registered does not mean registered under the Indian Companies Act, Copyright Act, etc.[40] Attestation before a Kazi is not registration.[41]

**Contract in writing registered.**

**Madras cases.**

1727. (1) The **Madras High Court,** has held that the contract comprised in a registered document, is a "contract in writing registered" within the meaning of Art. 116, although it is **signed only by one of the parties.** There is no statutory provision requiring the signatures of both parties, and registration is sufficient to bring the case within the provisions of Art. 116.[42] In a receipt of consideration for a registered document is registered, Art. 116, would be applicable, notwithstanding that it was not signed by the defendant.[43] An undertaking in a

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36. *Collector of Mirzapur* v. *Dawan Singh,* (1908) 30 All. 400; Relied on *Hussain Ali Khan* v. *Hafiz Ali Khan,* (1881) 3 All. 600; also see *Kamta Prasad* v. *Mt. Muni Bibi,* (1909) 1 I.C. 570 (Art. 116 applied to registered bond payable by instalments. Limitation runs from date of default).

37. *Ram Sakhar Prasad* v. *Mathuralal,* (1925) 90 I.C. 249=1925 Pat. 557=4 Pat. 820.

38. *Sham Charan* v. *Chowdhry Debia Singh,* 21 Cal. 872.

39. *See* S. 3, cl. 45, General Clauses Act, X of 1897.

40. In the matter of *Union Bank, Allahabad,* (1925) 47 All. 669; cf. *Maneklal* v. *Suryapur Mills,* (1929) 52 Bom. 477=110 I.C. 33=1928 Bom. 252; also see *Govind Narayan* v. *Raghunath,* (1929) 54 Bom. 226=1930 Bom. 572=127 I.C. 305=32 Bom. L. R. 232; *Ramaseshayyar* v. *T. C. Press,* (1925) 49 Mad. 468=50 M.L.J. 520 (F.B.); *Karachi Bank* v. *Shewaram,* 143 I.C. 713=1933 Sind 103 and *Ripon Press* v. *Venkataram Chetty,* (1918) 42 Mad. 33=33 M.L.J. 555 (F.B.).

41. *Doyamoyee* v. *Nobonee Debee,* (1864) 1 W.R. 89.

42. *Ambalavana Pandaram* v. *Vaguran,* (1895) 19 Mad. 52=5 M.L.J. 228.

43. *Seshachala Naicker* v. *Varadachariar,* (1901) 25 Mad. 55; Relied on 19 Mad. 52 *supra* and *Kotappa* v. *Vallur Zamindar,* 25 Mad. 50.

registered mortgage-deed, to withdraw an appeal which was pending at the time, was held to be "an agreement in writing registered", within the meaning of Art. 116 of the Limitation Act.[44] But, an agreement signed by one of the parties, and *not accepted* by the other party, is not a contract in writing registered.[45]

**Calcutta.**

1728. (2) Similarly, it has been held by the **Calcutta High Court** that a contract, which has, in fact, been registered is no less a "contract in writing registered" within the meaning of Art. 116 of the Limitation Act, because it bears **the signature of only one of the parties,** in the absence of any statutory provision regarding the signatures of both parties.[46] A contract signed by only one party may be acted on by both, for example, a ***patta,*** the terms of which were accepted by the tenant and acted upon by him, although he did not sign the *patta,* nor did he execute any *kabuliat,* was held to be a "contract in writing registered," within Art. 116.[47] A contract in writing does not necessarily imply that the document must be signed by both the parties thereo.[48] Therefore, a **bond** executed by a party and delivered to the other party and accepted by him completes the agreement between the parties, and in law this amounts to a contract in writing.[49] Ar.t 116 applies to cases of bonds not signed by both the parties.[50]

**Allahabad.**

1729. (3) The view is accepted by the **Allahabad High Court,** that Art. 116, is not confined in its operation to contracts in writing executed by both parties, or by defendants. If there is a valid contract evidenced by a registered document which, though signed by only one party, is complete because it has been accepted by the other, Art. 116, would apply.[1]

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[44] *Kotappa* v. *Vallur Zamindar,* 25 Mad. 50.

[45] *Ramakrishna* v. *Appa Row,* (1903) 13 M.L.J. 485.

[46] *Girish Chandra Das* v. *Kunja Behari Malo,* (1908) 35 Cal. 683 =12 C.W.N. 628=9 C.L.J. 1; Followed 19 Mad. 52; 25 Mad. 50 and 25 Mad. 587; Not followed *Apaji Bapuji* v. *Nilkantha Annaji,* (1901) 3 Bom. L. R. 667.

[47] *Ibid.,* (1908) 35 Cal. 683=12 C.W.N. 628=9 C.L.J. 1.

[48] *Chhallaphroo* v. *Banga Behary Sen,* (1915) 31 I.C. 394=22 C.L.J. 311=20 C.W.N. 408.

[49] *Ibid.,* 31 I.C. 394 (395).

[50] *Ibid.*

[1] *Parbati* v. *Sarup Singh,* (1928) 109 I.C. 409=1928 All. 313= 26 A.L.J. 426=50 All. 661 (Not followed, 3 Bom.L.R. 667; Followed 19 Mad. 52=5 M.L.J. 228; 25 Mad. 50=11 M.L.J. 125; 25 Cal. 683= 1 I.C. 438; 31 I.C. 394=20 C.W.N. 408=22 C.L.J. 311).

**Oudh.**

1730. (4) The **Oudh Chief Court,** has held following the Madras, Calcutta cases that in a suit by the plaintiff for recovery of arrears of revenue and rent there was a contract in writing though the document was signed by the transferor alone and that the suit was governed by Art. 116 and not by Art. 110 of the Limitation Act.[2] Having regard to the system of conveyancing prevailing in India a contract which has in fact been registered is no less a contract in writing registered within the meaning of Art. 116 of the Limitation Act because it bears the signature of only one of the parties, in the absence of any statutory provision requiring the signature of both parties.[3]

**Bombay.**

1731. (5) The contrary view taken by Sir L. Jenkins, C.J., in a Bombay case, rests on the authority of an English decision, and this ruling has not been followed by Allahabad, Calcutta, Madras High Courts, and by the Oudh Chief Court as noticed above.[4]

**Quasi-contracts.**

1732. Quasi-contracts are distinguished from ordinary contracts, under the Indian Contract Act. But, such contracts create obligations or relations resembling those created by contract; and, it has been held that a suit for the breach of a "contract" for supply of necessaries to the minor, is a suit governed by the provisions of Art. 116, Sch. I of the Limitation Act.[5]

**Irregular registration.**

1733. It was held in *Sham Charan* v. *Debya Singh,*[6] that where there was nothing to show that the minor executant of a registered document *appeared* to be such to the Registrar at the the time of registration so as to enable the Registrar to refuse registration under S. 35 of the Registration Act, and the concealment of the fact of the executant's minority both by himself and by the plaintiff from the Registrar not amounting to fraud so as to invalidate the registration proceedings as against the minor, the Registrar had in no way violated the law relating to registration of documents, and the bond must be taken to have been duly registered within Art. 116.[7]

**Void registered contract of a minor.**

1734. Their Lordships of the Privy Council have held on the true construction of the Contract Act (IX of 1872), that a person, who by reason of infancy is incompetent to contract, cannot

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2. *Narsing Partab Bahadur Singh* v. *Mt. Mammanjan,* (1929) 118 I.C. 417=1929 Oudh 311=6 O.W.N. 431.

3. *Ibid.,* (1929) 118 I.C. 417=1929 Oudh 311.

4. *Apaji Bapuji* v. *Nilkantha Annaji,* 3 Bom.L.R. 667; cf. *Ganappa* v. *Hammad,* 89 I.C. 59=49 Bom. 596=1925 Bom. 440.

5. *Sham Charan* v. *Debya Singh,* (1894) 21 Cal. 872.

6. *Ibid.*

7. *Ibid.*; cf. 10 Oudh Cas. 38 (Art. 120, applied).

make a contract within the meaning of the Act.[8] A mortgage, therefore, made by a minor is void, and advances made by the money-lender, cannot be recovered under Ss. 64 and 65 of the Contract Act on the mortgage being declared invalid.[9] Any claim based upon the document, other than a claim under S. 68 of the Contract Act, would not be maintainable, even though the document might have been registered.[10]

**Invalid registration.**

**1735.** Where a document required to be registered by law, has not been duly registered, the defect of registration may make the document inoperative as a deed of transfer in respect of immoveable property dealt with therein,[11] but this **will not affect the personal covenant** on the part of the mortgagor, and for the purposes of the mortgagor's personal liability the instrument may be considered as being duly registered.[12] In *Joginee Mohun Chatterjee* v. *Bhoot Nath Ghoshal*,[13] it was held that where registration of a deed has been effected by a Registrar having no jurisdiction in that behalf under S. 28 of the Registration Act (III of 1877), the document is not effective as a mortgage-bond, but it being registered, the plaintiff had six years under Art. 116, Limitation Act, within which to claim a money-decree for the whole amount secured by the deed with interest at the contract rate. A document not held valid in creating a mortgage security, is not invalid so far as a registered covenant is concerned; and a suit on such a covenant for return of the amount as a mere debt would be governed by Art. 116.[14] However, a different view was taken by **Oudh Judicial Commissioner's Court** in *Kalka* v. *Mathuradas*,[15] where it was held that an act which constitutes a fraud upon the registration authority cannot be treated as a valid act for any purpose whatsoever. If the registration is a nullity, the document must be treated as unregistered for all purposes. This view appears to be unsound.[16]

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[8] *Mohori Bibee* v. *Dharmodas Ghose*, (1902) 30 Cal. 539=30 I.A. 114 (P.C.).

[9] *Ibid.*

[10] *Ibid.*

[11] *Harendra Lal* v. *Haridasi Debi*, (1914) 41 Cal. 972=41 I.A. 110 (P.C.) and *Biswanath* v. *Chandranarayan*, (1921) 48 Cal. 509=48 I.A. 127=40 M.L.J. 489 (P.C.).

[12] *Biswanath Prasad* v. *Chandra Narayana*, (1921) 48 Cal. 509 (517)=48 I.A. 127=40 M.L.J. 489 (P.C.); also see and cf. *Dronamaraju Rama Row* v. *Vissapragrada Vedayya*, (1922) 46 Mad. 435=44 M.L.J. 373.

[13] (1902) 29 Cal. 654.

[14] *Ibid.*

[15] (1919) 50 I.C. 220 (Oudh).

[16] Mitra's Limitation Act, Vol. II, p. 1427; also see *Ramnarayan* v. *Adhindranath*, (1916) 44 Cal. 388=44 I.A. 87=32 M.L.J. 39; on review, s.c. as (1916) 34 I.C. 900=31 M.L.J. 251 (P.C.).

**Distinction between registered and unregistered documents.**

1736. **SCOPE AND APPLICABILITY.**—Their Lordships of the Privy Council have given the history of Art. 116, Limitation Act, in the case of *Tricomdas Cooverji* v. *G. J. Thakur,*[17] and it observed as follows:—"Both these Acts (Act IX of 1871 and XV of 1877) draw, as the Act of 1859 had drawn **a broad distinction** between unregistered and registered instruments much to the advantage of the latter." . . . .

> "It has been pointed out that 'compensation' is used in the Indian Contract Act in a very wide sense, and that the omission from Art. 116 of the words, which occur in Art. 115, *'and not herein specially provided for'*, is critical."

Their Lordships then observe that

> "there is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds", (in which distinction is drawn in favour of registered instruments). "They begin in 1880, and are to be found in all the Indian High Courts". . . . "Then in 1908, and in this state of the decisions, Act IX of 1908 replaced the Limitation Act of 1877, without altering the language or arrangement of the articles, and in 1913, in *Lal Chand* v. *Narayan,*[18] the **High Court of Bombay** held that, especially in view of this re-enactment, the current of decisions must be followed, and *Ram Narain's case,*[19] must be disapproved."

In this leading case, their Lordships accepted the interpretation so often and so long put upon the statute by the Courts in India, and thought that the decisions could not now be disturbed.

**Generalised exception of Art. 116.**

**1737.** The Calcutta High Court, in *Mahammad Mazaharal Ahad* v. *Mahammad Azimuddin,*[20] has observed that judicial decisions have repeatedly interpreted Art. 116

> "as if it were **a generalised exception engrafted upon all articles which** might, by stretch of language, be regarded as applicable to suits comprehended within the description of a suit for compensation for the breach of a contract".

Accordingly, where a suit for recovery of dower-debt was brought on a registered dower-deed, it was held that Art. 116 governed the suit, although Arts. 103 and 104 of the Schedule would apply when there was no such registered instrument. The learned Judges (Sir Asutosh Mookerjee and Rankin, JJ.), notice the conflict between two opposite views in discussing the case-law:

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[17] 1916 P.C. 182=44 Cal. 759=44 I.A. 65=39 I.C. 156=21 C.W.N. 577=25 C.L.J. 279 (P.C.).

[18] (1913) 37 Bom. 656=21 I.C. 315=15 Bom.L.R. 836.

[19] (1903) 26 All. 138=1903 A.W.N. 210.

[20] (1923) 73 I.C. 17=7 C.L.J. 108=27 C.W.N. 210=1923 Cal. 507; also see *Ranga Reddi* v. *Chinna Reddi,* (1891) 14 Mad. 465=1 M.L.J. 482 (Partnership agreement registered: suit between partners for share of loss, held governed by Art. 116); *Venkatachellam Pillai* v. *Krishnaswami,* (1919) 50 I.C. 673 (Mad.) (Claim based on registered indemnity bond governed by Art. 116, not Art. 83) and *Abdul Aziz* v. *Muhd. Baksh,* (1921) 64 I.C. 431=2 Lah. 316 (Arts. 83 and 116—claim on indemnity bond).

> "one maintains that Art. 116, like Art. 115, applies where there is no special provision; the other maintains that Art. 116, supersedes all provisions, including those covered by special articles unaffected by Art. 115". . . .

The judgments in *Nobo Coomar* v. *Siru Mullick*[21] and the **Full Bench** case in *Hussain Ali* v. *Hafiz Ali*,[22] were noticed as based upon a historical review of the previous legislation on the subject. The construction then placed upon Art. 116 of the Limitation Act, 1877, must be taken to have found favour with the Legislature, as it has been reproduced without alteration in the Limitation Act, 1908. The Judicial Committee, in *Tricomdas* v. *Gopinathji*,[23] felt impressed with this consideration, and their Lordships' decision, though concerned directly with the applicability of Arts. 110 and 116, to a suit for arrears of rent, instituted upon a registered lease, has been regarded as of **"far-reaching application"**. The **Rangoon High Court** has held that Art. 116 applies not merely to a suit for compensation for breach of contract in the narrow sense of the word compensation but also to a suit for money payable under the terms of the contract, and it is applicable in all cases in which the contract is in writing and registered notwithstanding that there may be an article directly applicable to the class of contract in question.[24] Similarly, Kumaraswami Sastriar, J., has observed in a **Madras** case, that

> "we cannot on any principle distinguish the decision in *Tricomdas* v. *Gopinath*,[25] dealing with claims on registered rent-deeds from those on registered mortgages".[26]

A **Full Bench** of the **Allahabad High Court**,[27] notices that the applicability of Art. 116 to claims under registered bonds was accepted by all the High Courts with the exception of one solitary case of Allahabad, *Ram Narain* v. *Kalka Singh*[28]: and it is observed that

> "the new Limitation Act was passed in 1908, and the legislature reproduced the language of Art. 116, and of the other relevant articles. It is, therefore, a fair presumption that the correctness of the old view was accepted".

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[21] 6 Cal. 94=6 C.L.R. 579.

[22] 3 All. 600=A.W.N. (1881) 33 (F.B.).

[23] 44 C. 759 (P.C.).

[24] *Ram Raghubir Lal* v. *The United Refineries, Ltd.*, 9 Rang. 56=134 I.C. 737=1931 Rang. 139.

[25] 44 Cal. 759 (P.C.).

[26] *Thiruvendipuram* v. *Veeraraghava*, 114 I.C. 340=55 M.L.J. 506=1928 Mad. 1124.

[27] *Radhakrishna* v. *Tej Sarup*, 1930 All. 69=123 I.C. 321=52 All. 363=1929 A.L.J. 1294 (F.B.).

[28] (1904) 26 All. 138.

It is added that

> "the weighty pronouncement of their Lordships of the Privy Council in *Tricomdas* v. *Gopinath*,[29] in which *Ram Narain's* case, was expressly disapproved, removed any doubt that might have existed".

The opinion of Mookerji, J., in 49 Cal. 250, that to make out Art. 116 applicable, it must be shown that the suit is not specifically provided for in schedule, is unsound and at variance with Privy Council view.[30]

**(i) Suit to recover arrears of rent.**

1738. **SUITS WITHIN ART. 116.**—*See* Notes to Art. 110, S. 1669, *ante*. All the High Courts are now agreed, that in a suit for rent based on a registered lease, Art. 116, and not Art. 110, Limitation Act, is applicable. The **Privy Council** decision in *Tricomdas* v. *Gopinath*,[31] (S. 1736, *ante*), approved of a course of decisions in the High Courts of **Bombay**,[32] **Calcutta**,[33] **Lahore**,[34] **Madras**,[35] and **Patna**,[36] and the contrary view taken in the **Allahabad** case of *Ram Narain* v. *Kamta Singh*,[37] was disapproved. The **Full Bench** of the **Allahabad High Court**, in *Radhakrishna* v. *Tej Saroop*,[38] has recently taken a view in uniformity with all the other High Courts, in view of the pronouncement of the Judicial Committee. Thus, when a suit is to recover the arrears of rent payable under a registered lease, the correct article to apply is Art. 116, and not Art. 110,[39] and Art. 116, and not Art. 131 has been applied to a suit by landlord under an irredeemable *anubhavam* tenure, and the award of arrears of rent can be limited to a period of six years.[40] Where a registered *kabuliat,* not in conformity with **S. 37, Bengal Municipal Act,** was executed, Art. 115, and not Art. 116 was applied, but Art. 116 would apply if the foundation of the claim was a valid registered document.[41] However, a suit for recovery of rent, by a landlord, under the **Madras Estates Land Act,** is governed by three years' period prescribed by Art. 8, Sch. A of the Act, even, if the suit is on a registered deed.[42] The period of limitation applicable to a suit to recover arrears of rent from the assignee of a person holding under a registered *kanom* deed is contained under Art. 116, Limitation Act.[43] A suit for rent payable under a registered *zarpeshgi* lease will be goverened by Art. 116, and the period is not three years as provided in Bengal Tenancy Act.[44]

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[29] 44 C. 759 (P.C.).

[30] *Pranram Mookerji* v. *Jagadishnath Ray*, 49 Cal. 250=68 I.C. 562=1922 Cal. 355 commented on in 73 I.C. 17 (20).

[31] 1916 P.C. 182=44 Cal. 759=44 I.A. 65=39 I.C. 156=21 C.W.N. 577=25 C.L.J. 279 (P.C.).

[32] *Lalchand* v. *Narayan*, (1913) 37 Bom. 656=21 I.C. 315=15 Bom. L.R. 836 (Approved by Privy Council).

[33] *Umesh Chunder* v. *Adarmoni Dasi*, 15 Cal. 221; *Raniganj Coal Assocn.* v. *Jadoonath*, 19 Cal. 489; *Bholanath Das* v. *Raja Durga Prosad*, 27 Cal. 205=4 C.W.N. 76.

[34] *Abdul Samad* v. *The Municipal Committee*, (1922) 67 I.C. 939 (Lah.); *Jesaram* v. *Daulat Shah*, 4 P.R. 1902 (Rev.).

[35] *Vythilinga Pillai* v. *Thetchanamurthi*, (1800) 3 Mad. 76; *Ambalavana* v. *Paguran*, (1895) 19 Mad. 52=5 M.L.J. 228; also see *Ramakrishna* v. *Subbarayya*, (1913) 18 I.C. 64=24 M.L.J. 54 and *Chengiah* v. *Thimma*, 6 I.C. 766=7 M.L.T. 419.

[36] *Mackenzie* v. *Rameshwar*, (1916) 34 I.C. 754=1 P.L.J. 37.

[37] (1903) 26 All. 138=1903 A.W.N. 210; Followed in *Jaggilal* v. *Sriram*, (1912) 34 All. 464=10 A.L.J. 1=16 I.C. 146.

[38] 1930 All. 69=1929 A.L.J. 1294=123 I.C. 321=52 All. 363 (F.B.).

[39] *Fateh Chand* v. *Kumar*, 133 I.C. 102 (1)=53 C.L.J. 522=1931 Cal. 790.

**(*ii*) Suit on personal covenant in mortgage.**

**1739.** There is a consensus of opinion that a suit on a personal covenant in a mortgage will be governed under this article if the mortgage-deed is registered, and Art. 132 of the Limitation Act will have no application to such suits.

**1740.** The **Allahabad** High Court has held in the recent **Full Bench** case of *Radhakrishna* v. *Tej Saroop,*[45] that since the Privy Council decision in *Tricomdas* v. *Gopinath,*[46] the view has uniformly prevailed in the Indian Courts that the **personal remedy** can be **enforced on the basis of a registered deed,** within six years under Art. 116.[47] In an earlier case of *Raghubar Dayal* v. *Lachmin Shanker,*[48] it was held that in a **suit by a mortgagee for money payable under a registered mortgage-bond,** the claim as regards the personal relief against the mortgagor, is governed by the six years' limitation provided by Art. 116, and not the twelve years' limitation provided by Art. 132 of the Limitation Act. Where a suit is instituted more than six years after the making of the mortgage, and the mortgage-money is payable on demand, a personal decree is barred.[49]

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[40] *Chathanni* v. *Narayana Ayyar,* 158 I.C. 228=1925 M. 682=1935 M. W.N. 866.

[41] *Ajitkumar Basu* v. *Chairman,* 133 I.C. 179=58 Cal. 930.

[42] *Kaliba* v. *Periathambia,* (1927) 100 I.C. 241=1927 Mad. 439; Relied on 18 I.C. 64=38 Mad. 101; 14 I.C. 184 and 30 I.C. 94=39 Mad. 645.

[43] *Kannan Narayanan* v. *Mudalpuredath Ramunni Menon,* (1920) 56 I.C. 241=11 L.W. 328.

[44] *Mohammad Hanif* v. *Morat Mahton,* (1918) 44 I.C. 153=4 Pat. L.W. 146.

[45] 1930 All. 69=52 All. 363=123 I.C. 321=1929 A.L.J. 1294 (F.B.).

[46] 1916 P.C. 182=44 Cal. 759=44 I.A. 65 (P.C.).

[47] *Shib Doyal* v. *Mehrban,* 1923 All. 1=69 I.C. 981=45 All. 27 (F.B.).

[48] (1883) 5 All. 461=3 A.W.N. (1883) 114.

[49] *Kishen Sahai* v. *Raghunath Singh,* 1929 All. 139=51 All. 473=116 I.C. 488.

**1741.** A suit in form, a **suit for money due on a bond,** is in substance a suit for compensation for breach of contract within the meaning of Art. 116, Limitation Act, and the period of six years provided in that article applies if the bond is registered.[50] A **suit by a mortgagee against the mortgagor on a personal covenant,** contained in a registered deed of mortgage, to recover the amount remaining due after the mortgaged property has been sold, is governed by Art. 116 of the Limitation Act.[1]

**Bombay.**

**1742.** It has been held in a number of cases that a suit in form a **suit for money due on a bond,** is in substance a suit for compensation for breach of a contract within the meaning of Art. 116 of the Limitation Act, and the period of six years provided in that article would apply, if the bond is registered.[2] Similarly, the appropriate article of the Limitation Act, in the case of a **suit based on a personal covenant in a registered mortgage bond** is Art. 116, and not Art. 66, as held by the Calcutta High Court in *Umapada Trivedi* v. *Haripada Saha.*[3] This view receives further support from the observations of the Judicial Committee in the case of *Kameswar Pershad* v. *Rajkhumari Ruttan Koer,*[4] where in a **suit based on a registered instrument,** it was observed that the period of six years, and not a period of twelve years, would apply to the case. An **application for a personal decree,** under O. 34, R. 6, Civil Procedure Code is governed by the six years' rule of limitation prescribed by Art. 116.[5] In *Miller* v. *Runganath Moulick,*[6] approved by the **Privy Council** in *Ganeshilal* v. *Khetramohan,*[7] it was held that a suit upon a registered mortgage to recover the amount due by the sale of the mortgaged property is governed by Art. 132, Limitation Act, but that a **suit to recover the balance,** if any, **from the person of the mortgagor,** is governed by Art. 116, Limitation Act: When a registered mortgage contains a covenant to pay the mortgage-money, the mortgagee would have, under Art. 116, six years to bring his suit

**Calcutta.**

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[50] *Dinkar* v. *Chhaganlal,* (1918) 23 I.C. 353=38 Bom. 177; Relied on *Ganesh Krishna* v. *Madhavrav,* 6 Bom. 76; *Amritrav* v. *Vasudev,* (1882) B.P.J. 291, etc.; also see *Ramchandra* v. *Jairam,* 22 Bom. 686 (690).

[1] *Vasanji Kallianji* v. *Eruchshaw Dossabhai,* 1935 Bom. 203=37 Bom. L.R. 170=156 I.C. 286=59 Bom. 634; also see *Vithoba Mahipati* v. *Balkrishna Sakharam,* 1921 Bom. 437=45 Bom. 1206=63 I.C. 234.

[2] *Umesh Chunder* v. *Adarmonidasi,* 15 Cal. 221; *Dindoyal Singh* v. *Gopal Sarun,* 18 Cal. 506; *Ram Narain* v. *Odindra,* 13 I.C. 440=17 C.W.N. 369=15 C.L.J. 17.

[3] 1931 Cal. 801 (1)=35 C.W.N. 1030=53 C.L.J. 520.

[4] 19 I.A. 234=20 Cal. 79 (P.C.).

[5] *Dharmdhar Ghosh* v. *Indar Narayana,* 36 C.W.N. 117.

[6] (1885) 12 Cal. 389 (390).

[7] 1926 P.C. 56=95 I.C. 839=5 Pat. 585=53 I.A. 131 (P.C.).

on the covenant; and, the question of limitation on an application for a supplemental decree under S. 90 of the Transfer of Property Act is whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application.[8] Where a mortgage-deed executed by the *karta* of a joint Hindu family, is not binding on the family, and cannot be enforced against the security, the mortgagee's suit for recovery of money against the sons of the mortgagor, would fall under this article.[9] Even if the mortgage-deed is registered by a Registrar within whose jurisdiction the property is not situate, the deed will be treated as a simple registered money-bond and the suit for money due under the bond would be governed by Art. 116, Limitation Act.[10]

**1743.** **Lahore.** The claim to realization of the debt from the property can be brought within twelve years under Art. 132, but the **claim to relief against the mortgagor personally,** would have to be brought within six years, under Art. 116, Limitation Act.[11] The period starts from date when default is made under the mortgage-deed.[12] The *terminus a quo* being the date of the mortgage,[13] except when the mortgage-deed provides that the mortgage-money would be paid after some years, in which case the limitation for the personal relief against the mortgagor would be six years from the date when the mortgage money became payable.[14] Where a deed of charge is registered, Art. 116, applies to a **claim for a personal decree** in the event of the sale proceeds of the charged property being found insufficient to discharge the amount due: and the period is six years from the date when the amount becomes payable.[15]

**1744.** **Madras.** A **suit on a personal covenant** contained in a registered mortgage, is governed by Art. 116, Limitation Act:[16] and this article also applies to a **suit to recover the deficiency** arising out of such sale.[17] This article has been applied to a **suit to recover mortgage-debt** due on a registered bond.[18] And it applies also to a **suit to recover money lent on a kanom** which they treated as usufructuary mortgage owing to the mortgagor's failure to put the mortgagee in possession.[19] Similarly, a suit by a usufructuary mortgagee for refund of the mortgage-money on account of the mortgagor's failure to put the mortgagee in possession, is a suit for breach of the mortgagor's liability to give possession by S. 68 of Transfer of Property Act, and is governed by Art. 116, Limitation Act.[20] A registration invalid for the purpose of a mortgage is not necessarily invalid for the purpose of the covenant to pay contained in the registered instrument.[21]

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[8] *Rahmat Karim* v. *Abdul Karim,* (1907) 34 Cal. 672=6 C.L.J. 119 =11 C.W.N. 674.

[9] *Surju Prasad* v. *Gulabchand,* 27 Cal. 762 (767).

[10] *Joginnee* v. *Bhoop,* 29 Cal. 654 (663).

[11] *Sahib Singh* v. *Gurdial Singh,* (1931) 129 I.C. 201=1930 Lah. 993; Relied on *Ramdin* v. *Kalka Pershad,* 7 All. 502=12 I.A. 12 (P.C.); Followed in *Lalji Narain* v. *Turab Unnissa,* 14 I.C. 505=34 All. 246=9 A.L.J. 297.

[12] *Ibid.*

[13] *Karamsingh* v. *Mt. Mayawanti,* 140 I.C. 387=1932 Lah. 592.

[14] *Ishardas* v. *Mayamal,* 144 I.C. 738=34 P.L.R. 171=1933 Lah. 329.

[15] *Kesrimal Umraosingh* v. *Tansukhrai Kidarnath,* 1934 Lah. 765=16 Lah. 137=153 I.C. 1064.

[16] *Thiruvendipuram* v. *Vernasani Veeraraghava,* (1929) 114 I.C. 340 =1928 Mad. 1124=55 M.L.J. 506; Followed 12 Cal. 389.

**1745.** **Oudh.** Where a mortgage-deed is found to be inoperative or cannot be enforced as a mortgage, the mortgagee can enforce the personal covenant against the mortgagor within six years from the date of the mortgage under Art. 116, Limitation Act.[22] This is supported by the pronouncement in *Tricomdas* v. *Gopinath,*[23] and, the dicta in *Ramdin* v. *Kalka Prasad,*[24] and *Ganeshlal* v. *Khetramohan,*[25] cannot be understood as opposed by the view taken in *Millar* v. *Rungnath,*[26] which was approved by their Lordships of the Privy Council.[27] Where property mortgaged, by manager of a joint Hindu family, without necessity or antecedent debt, cannot be proceeded against by reason of the mortgage being absolutely void, a **suit for personal decree** against the assets of the deceased, must be brought within the period of limitation prescribed by Art. 116, Limitation Act.[28] In a **suit for money decree,** where property mortgaged is not subject to sale, Art. 97 has no application, but the suit is governed by Art. 116, Limitation Act.[29] A **suit under the provisions of S. 68 (*c*), Transfer of Property Act,** must be governed either by Art. 116, or by Art. 120, Limitation Act.[30] The limitation for such a suit begins to run from the date on which the mortgagee is refused or is ousted from the possession of the mortgaged property, *i.e.*, from the time when the cause of action arises.[31] The period commences when the mortgagor loses the property, and not when the mortgagee comes to know of such loss.[32]

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[17] *Ratnasabhapathy* v. *Devasigamany,* (1929) 116 I.C. 817 (821)=52 Mad. 105=1929 Mad. 53=56 M.L.J. 10.

[18] *Ratnasami* v. *Subramanya,* 11 Mad. 56.

[19] *Unichaman* v. *Ahmad Kutti,* 21 Mad. 242=8 M.L.J. 81.

[20] *Ibid.*

[21] *Dronamraju* v. *Kissapragada,* (1923) 73 I.C. 188=1923 Mad. 447 =46 Mad. 435; Followed *Joginee* v. *Bhoot,* 29 Cal. 654=6 C.W.N. 856 and *Biswanath* v. *Chandra,* 63 I.C. 770=48 Cal. 509=48 I.A. 127 (P.C.).

[22] *Jatindra Bahadursingh* v. *Khairati Lal,* (1928) 113 I.C. 489=4 Luck. 107=1928 Oudh 465.

[23] 39 I.C. 156=44 I.A. 65=44 Cal. 759=1916 P.C. 182 (P.C.).

[24] 12 I.A. 12=7 All. 502 (P.C.).

[25] 53 I.A. 134=1926 P.C. 56=95 I.C. 839=5 Pat. 585 (P.C.).

[26] 12 Cal. 389.

[27] *Ganesh Lal* v. *Khetramohan,* 53 I.A. 134=1926 P.C. 56=95 I.C. 839=5 Pat. 585 (P.C.).

[28] *Gajadhar Baksh* v. *Gauri Shanker,* (1921) 61 I.C. 205=1921 Oudh 47; Relied on *Surju Prasad* v. *Gulab Chand,* 27 Cal. 762; also see *Ram Narain* v. *Nandkumar,* (1922) 69 I.C. 786=1922 Oudh 257=25 O.C. 64; Relied on 5 O.W.N. 1128=114 I.C. 813 and 6 O.W.N. 974.

**1746.** A mortgagor's suit to enforce the charge upon immoveable property is clearly governed by Art. 132 of the Limitation Act; but Art. 116, applies where the plaintiff's **claim** is with respect **to a personal covenant in the bond** or under S. 68 (*c*) of the Transfer of Property Act by reason of the mortgagor's failure to deliver or secure possession of the property.[33] In *Ganeshilal* v. *Khetramohan*,[34] their Lordships of the **Privy Council**, referred to earlier decisions in *Ramdin* v. *Kalka Prasad*,[35] and *Miller* v. *Runga Nath*,[36] in support of the view that when a mortgagee sues on a **personal covenant to make the mortgagor responsible for any deficiency** in the realisation of the mortgage-debt out of the mortgaged properties, the claim would be barred after three years. It has been pointed out that in this case it was unnecessary for the Judicial Committee to decide whether the three years' rule (Art. 66), or six years' rule (Art. 116) applied, as the suit was barred in either case. Such a claim lies under Art. 116 and is governed by six years' limitation.[37]

**Patna.**

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[29] *Thamman Singh* v. *Dal Chand*, (1922) 67 I.C. 595=1922 Oudh 13.

[30] *Laltasingh* v. *Mathur Upadhia*, 1931 Oudh 5=6 Luck. 374=129 I.C. 168.

[31] *Ibid.*, 6 Luck. 374; also see *Udairaj Singh* v. *Ramdut Tewari*, (1923) 77 I.C. 340=1924 Oudh 147.

[32] *Shambhudat* v. *Shiam Narain*, (1934) 151 I.C. 448=11 O.W.N. 1198=1934 Oudh 415.

[33] *Jainandan Prashad* v. *Baijnath Saran*, (1921) 63 I.C. 297=1921 Pat. 403.

[34] (1926) 95 I.C. 839=1926 P.C. 56=5 Pat. 585=53 I.A. 134 (P.C.); Explained in *Jatindra* v. *Khairati*, (1928) 113 I.C. 489=4 Luck. 107=1928 Oudh 465.

[35] 12 I.A. 12=7 All. 502 (P.C.) (The ruling inadvertently mentions that a suit for recovery of money personally from the mortgagor, must be brought within the same period of limitation as a suit on a bond for money, *i.e.*, three years. The current of decisions in India as to six years under Art. 116, is not noticed).

[36] 12 Cal. 389 (P.C.).

[37] *Bala Bux* v. *Nath*, 1934 Pat. 578=13 Pat. 228.

**Rangoon.**

1747. The **Rangoon High Court,** has held in *Maung Yan Kwin* v. *Maung Po Ka,*[38] that where a mortgagee is deprived of his security owing to the default of the mortgagor, he is entitled to a **personal decree against mortgagor for the money advanced,** and time would begin to run under Art. 116, or Art. 120 from the date on which this security was lost to plaintiff by his eviction from possession of mortgaged property.

**Registered sale-deed — Breach of covenant.**

1748. In *Ram Raghubir Lal* v. *United Refineries, Ltd.,*[39] their Lordships of the Privy Council held that where the liability of the vendee arises in virtue of the conveyance, *i.e.,* upon a contract in writing registered, within the meaning of Art. 116, the six years' period allowed by that article applies. The High Court had held in this case that a conveyance is not properly speaking a contract. It is the completion by the seller of a previously made contract to sell. It is not as a rule signed by the purchaser. . . . . . But if the vendee's promise to pay the purchase-money is set out in a registered conveyance which is accepted by him, Art. 116 is applicable in case of its breach.

**Breach of covenant of title.**

1749. An action for damages for breach of covenant based on a sale-deed which is registered should be brought within a period of six years.[40] A claim by vendee for damages on the ground that his vendor's title is defective is governed by Art. 116.[41] Every conveyance imports a covenant of title under S. 55 (2), Transfer of Property Act, and this is so whether the buyer has or has not notice of the infirmity of the title of the seller.[42] Where there is a covenant of title, express or implied in a document duly registered, a suit for refund of purchase-money based upon covenant of title is governed by Art. 116, Limitation Act.[43] In *Multanmal* v. *Budhu-*

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[38] (1925) 89 I.C. 56=1925 Rang. 223=3 Rang. 60; also see *Ram Raghubir* v. *The United Refineries,* 9 Rang. 56=134 I.C. 737=1931 Rang. 139 s.c. on appeal 1933 P.C. 143=142 I.C. 786=11 Rang. 186 (Suit for personal remedy, on breach of contract expressed in registered sale-deed).

[39] 1933 P.C. 143=142 I.C. 786=11 Rang. 186=60 I.A. 183=64 M.L.J. 655 (P.C.); on appeal from 1931 Rang. 139=134 I.C. 737=9 Rang. 56; Relied on *Tricomdas* v. *Gopinath,* 1916 P.C. 82=44 I.A. 6 =39 I.C. 156=44 Cal. 759 (P.C.).

[40] *Krishna Bhatta* v. *Govinda Bhatta,* 1929 Mad. 775.

[41] *Sorabji Muncherji* v. *Tarachand Ghanshamdas,* 1930 Sind 66=126 I.C. 737.

[42] *Krishna Bhatta* v. *Govinda Bhatta,* 1929 Mad. 775; also see 1930 All. 771=124 I.C. 185.

[43] *Chandrawati Bai* v. *Valabdas,* 1931 Sind 141=25 S.L.R. 173= 133 I.C. 76; also see and cf. *Bageshwar* v. *Bikramajit Singh,* 1930 All. 785 =128 I.C. 767 and *Kanok Dasi* v. *Srihari,* (1919) 52 I.C. 269 (Cal.).

*mal,*[44] the **Bombay High Court** held that "the contract of sale having been registered, the suit was governed by Art. 116, Limitation Act"; similarly, the **Patna High Court** has observed in *Mt. Lakhpat Kuer* v. *Durga Prasad,*[45] that every conveyance imports a covenant of title, and consequently,

> "a suit **for refund of the purchase-money** paid under a registered instrument on the ground that the consideration for the sale had failed, is governed by Art. 116, Limitation Act, and time begins to run only when it is found that there is no good title in the vendor".[46]

The result of authorities reviewed in *Abdul Rahim* v. *Kadu,*[47]

> "seems to be that where there is covenant of title (express or implied) in a document duly registered, suit for refund of purchase price based upon covenant of title would be governed by Art. 116 . . . whether the sale-deed was void *ab initio* or voidable. Cases of the nature of the suit in question fall under **Art. 62,** if the transaction is void *ab initio,* and **Art. 97,** if the consideration has failed wholly or partially. Both these classes of cases are again covered by Art. 116, which has the effect of extending three years to six years in cases falling under Art. 62, to run from the date of the payment of purchase-price and cases covered by Art. 97 from the time the consideration has failed."

Article 116 is applicable, to a suit for compensation if any sort of defect is found in respect of title of property sold.[48] The plaintiff's cause of action is complete when it has been found that the vendors had no power to sell, and the vendees were dispossessed.[49]

**Breach of covenant of indemnity.**

1750. (3) Where a sale-deed recites that the **property is sold free from all debts and liabilities** and contains a covenant that in the event of vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor would be liable to make it good together with damages and costs. Such a covenant may be relied upon as a covenant of indemnity, and the limitation for a suit brought upon it would begin to run from the date on which the plaintiffs have suffered actual loss by reason of their being compelled to pay off any prior mortgage charge, in order to save the property from sale under the mortgage-decree.[50] A suit to recover compensation for the breach of a contract to indemnify falls within the purview of Art. 83, Limitation Act, and when such a contract is in writing registered, Art. 116 of the Limitation Act becomes applicable, and by virtue of it the period of limitation for the suit is extended to six years.[1] Where a registered sale-deed contains a contract by which the vendor is to be indemnified in case the vendee fails to complete the sale, limitation for a suit by the vendor against the vendee is six years from the time when the vendor is damnified.[2] A suit for compensation for breach of covenant of indemnity contained in a mortgage-deed is governed by Art. 116.[3]

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[44] 1921 Bom. 252=61 I.C. 70=45 Bom. 955.

[45] 1929 Pat. 388=117 I.C. 654=8 Pat. 432; also see *Jhingur Ojha* v. *Meghnath Pandey,* 1924 Pat. 321=72 I.C. 653.

[46] *Ibid.,* 1929 Pat. 388=117 I.C. 654=8 Pat. 432.

[47] 1930 Sind 12=118 I.C. 203=24 S.L.R. 172; also see *Krishnan* v. *Kannan,* (1897) 21 Mad. 8; *Ganapa Patta* v. *Hammad Saiba,* (1925) 49 Bom. 596=89 I.C. 59=1925 Bom. 440; *Hanwant Rai* v. *Chandi Prasad,* (1929) 51 All. 651; *Jujad Ali* v. *Mohini Chandra,* (1923) 27 C.W.N. 1025 =1924 Cal. 148=80 I.C. 623; *Arunachala* v. *Ramasami,* (1914) 38 Mad. 1171; *Kasturi* v. *Venkata,* (1890) 1 M.L.J. 162; *Mahomed Ali* v. *Venkatapathi,* (1920) 39 M.L.J. 449; *Ramdhan* v. *Parshottam,* 1926 Nag. 109 and *Sigamoni* v. *Munibadra,* (1925) 49 M.L.J. 668=1926 Mad. 255 (A suit for compensation for breach of implied covenant of title and quiet possession, where the sale-deed is registered, will be governed by Art. 116, and not by Art. 97); *Bhawani Singh* v. *Girdhari,* 1932 Nag. 3=137 I.C. 61 (Art. 116: Cause of action from date, sale found voidable).

[48] *Jawahur Ram* v. *Jhinguri Lal,* 1935 All. 786=156 I.C. 177.

[49] *Ibid.,* 1935 All. 786=156 I.C. 177; also see *Kashirao* v. *Zabu,* 12 N.L.J. 125 (F.B.) and *Mangladharam* v. *Gandamal,* 1929 Lah. 388= 120 I.C. 424 (The clause in a registered sale-deed that "if upon an objection of any one any damage or loss accrues to the vendee, the vendor will be liable," amounts to a contract of indemnity and is not a mere covenant for title, and quiet possession).

**Breach of covenant of quiet possession.**

**1751.** (4) There are several classes of cases in which a vendee may sue to recover damages from his vendor upon breach of covenant. In *Subbaraya* v. *Rajagopala,*[4] Seshagiri Aiyar, J., classified cases of this nature as follows:—

> "(*a*) Where from the inception the vendor has no title to convey and the vendee has not been put in possession of the property.
>
> "(*b*) Where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale.
>
> "(*c*) Where though the title is known to be imperfect the contract is in part carried out by giving possession of the properties."

**Where the vendor was really selling some one else's property,** the sale was not merely voidable but void, and because he gave no possession, **there was a breach of covenant for title** implied under S. 55 (2) of the Transfer of Property Act, **and a breach of the covenant for quiet enjoyment** in the failure to give possession.[5] If the vendor does not at first refuse to give possession, a breach of this covenant for quiet enjoyment occurs later when the vendor refuses to give possession, or denies the right of the vendee to present possession.[6] In the first class of cases **where the sale is *ab initio* void the starting point of limitation will be the date of the sale,** assuming of course that the purchase-money was paid not later than that date.[7] **If the vendor had no title** to convey, and the vendee had not been given any possession, the **cause of action** would commence from the **date of the sale. In case of voidable contracts** where a decree has had the effect of invalidating a title believed good, **the starting point would be the date of the decree.**[8] Where possession, and an ostensibly good title has been given, and the possession is lost under decree, the date of decree will be the starting point.[9] Where the vendee has any doubt of his vendor's ability or willingness to give him a good title and possession, it is open to him to ask in the alternative either for possession or for the refund of his purchase-money.[10] Suit by lessee under registered lease for compensation for breach of an implied term for quiet possession is governed by Art. 116, Limitation Act.[11] Where a **lessor** has received a certain sum in advance as a part of the rent of the property leased, but **fails to deliver possession** of the property to the lessee, and where the lessee sues for the refund of the advance, **time begins to run from the date of the lease.**[12] In *Secretary of State* v. *Venkayya,*[13] it was held that the breach of a covenant to give possession, *viz.,* a failure on the part of the lessor to give possession to his lessee upon the due date, is **not a continuing breach,** as for instance would be the breach of a covenant for quiet enjoyment, but that it occurs once and for all at the inception of the term as soon as failure to comply with the terms of the lease in this respect takes place. A claim for damages would not differ in this respect from a claim for the return of an advance in the circumstances above stated.[14] A suit for possession under a contract of lease and for mesne profits being substantially one for damages for breach of contract, is governed by Art. 116.[15] Similarly, claim for profits owing to non-delivery of possession under a usufructuary mortgage is governed by Art. 116, and not by Art. 109, Limitation Act.[16]

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[50] *Ram Dulari* v. *Hardwarilal,* (1918) 48 I.C. 18=40 All. 605=16 A.L.J. 706.

[1] *Abdul Aziz Khan* v. *Muhammad Baksh,* (1921) 64 I.C. 431=2 Lah. 316=3 L.L.J. 542.

[2] *Abdul Qadir* v. *Mt. Bilas Kaur,* 1933 Lah. 793=144 I.C. 362=14 Lah. 646=34 P.L.R. 734.

[3] *Ziauddin Ahmed* v. *Akbar Ali,* 1932 All. 358=136 I.C. 829=1932 A.L.J. 317.

[4] (1914) 38 Mad. 887=23 I.C. 570=1914 M.W.N. 376.

[5] *Pattrachariar* v. *Alamelumangai,* 1927 Mad. 273=25 L.W. 11=100 I.C. 40.

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[6] *Pattrachariar* v. *Alamelumangai,* 1927 Mad. 273=25 L.W. 11.

[7] *Subbaroya* v. *Rajagopala,* (1914) 38 Mad. 887=23 I.C. 570=1914 M.W.N. 376; Relied in 1927 Mad. 273=100 I.C. 40; also see *Kovvuri Basivi Reddi* v. *Tallapragada Nagamma,* (1912) 35 Mad. 39=8 I.C. 1087 =1910 M.W.N. 827; cf. *Arunachala* v. *Ramasami,* (1914) 38 Mad. 1171= 26 I.C. 618.

[8] *Pattrachariar* v. *Alamelumangai,* 1927 Mad. 273=100 I.C. 40=25 L.W. 11; Relied on *Hanuman Kamat* v. *Hanuman Mandur,* (1892) 19 Cal. 123=18 I.A. 158 (P.C.) (Sale by a coparcener, objected to by another).

[9] *Ibid.,* 1927 Mad. 273=100 I.C. 40; Relied on *Multanmal* v. *Budhumal,* 45 Bom. 955.

[10] *Pattrachariar* v. *Alamelumangai,* 1927 Mad. 273=100 I.C. 40=25 L.W. 11.

[11] *Obedur Rahman* v. *Darbari Lal,* (1928) 98 I.C. 584=7 Lah. 423 =1927 Lah. 1=27 P.L.R. 663.

[12] *Appasami Ayyangar* v. *Krishnaswami Padayachi,* 1932 Mad. 225 =138 I.C. 119.

[13] (1917) 40 Mad. 910=35 I.C. 254.

[14] 1932 Mad. 225=138 I.C. 119, *supra.*

**Breach of contract to pay off creditor or mortgagee.**

**1752.** In *Raghubar Rai* v. *Jaij Raj,*[17] it was laid down by the **Allahabad High Court,** that upon failure to pay money due by a vendor to a third party which the vendee agreed to pay, but within no fixed time, the breach was committed on the date when the sale deed was executed, and there was no continuing breach within the meaning of S. 23 of the Limitation Act, nor successive breaches within the meaning of Art. 115. It was further held in this case that it is not necessary that the vendors should have suffered any loss before they could bring the suit, and if no time is specified in the sale-deed for payment of the amount, limitation runs from the date of the execution of the deed.[18] This leading case was followed by **Nagpur Judicial Commissioner's Court,** in *Vinayakrao* v. *Shripatrao,*[19] where it was held that when the vendor has to satisfy a mortgage, and the vendee undertakes by writing registered to pay the mortgage amount to the mortgagee, and to procure an indemnity or freedom of the mortgaged property from all liability, and the vendee does not fulfil his undertaking, and the vendor has to discharge the mortgage-debt which the vendee promised to pay, the vendor may sue the vendee for compensation for breach of the contract, such a suit woud be governed by Art. 116, and not by Art. 111, or Art. 62 of the Limitation Act. The **Lahore High Court** accepted this view in *Mehar Chand* v. *Shanti Sarup,*[20] where the vendor by stipulation in the registered sale-deed kept portion of purchase-money with vendee to be paid to his creditor, and on failur of vendee to discharge the debt due from vendor, the creditor sued vendor, and purchased this debt due from vendee to vendor in execution, it was held that the suit by creditor-purchaser of the debt to recover same from vendee was governed by Art. 116 and not by Art. 111 although he based his cause of action on the debt purchased by him. The view has been followed in the **Allahabad** case of *Ram Narain* v. *Nihal Singh,*[21] where a suit brought more than six years after the sale-deed for recovery of damages for failure to pay the amount left in the hands of the vendee for clearing a prior mortgage was held barred by time, where the vendee agreed to pay off a usufructuary mortgage on the property, but no time was fixed for the payment of the money. A similar view was taken in *Babu Makund Lal* v. *Bhola Rai,*[22] where Art. 116 and not Art. 111 was applied to suit by vendor for refund of unpaid purchase-money, though not compelled to pay.

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[15] *Kodiyalbail Rymond* v. *Kodiyalbail Devu Shetti,* 32 I.C. 245 (Mad.).

[16] *Nirbbai Sinha* v. *Tulsiram,* 31 I.C. 804; Relied on *Balgobind Das* v. *Barkat Ali,* A.W.N. (1888) 15 and *Collector* v. *Dawan Singh,* 30 All. 400=A.W.N. (1908) 160.

[17] (1912) 34 All. 429=14 I.C. 244=9 A.L.J. 535; Followed in *Vinayakrao* v. *Shripatrao,* 1926 Nag. 429=97 I.C. 185=9 N.L.R. 107; *Ram Narain* v. *Nihal Singh,* 1925 All. 488=87 I.C. 804; *Babu Makund Lal* v. *Bhola Ram,* 1931 All. 419=131 I.C. 686=1931 A.L.J. 985; *Mehr Chand* v. *Shanti Sarup,* 1929 Lah. 395=118 I.C. 445 and *Ram Rachhya Singh* v. *Raghunath Prasad,* 1930 Pat. 46=8 Pat. 860=122 I.C. 244.

[18] *Raghubar Rai* v. *Jaij Raj,* (1912) 34 All. 429=14 I.C. 244.

[19] 1926 Nag. 429=9 N.L.J. 107=97 I.C. 185.

[20] 1929 Lah. 395=118 I.C. 445; cf. *Gulzarimal* v. *Maghilal,* 1933 Lah. 109=14 Lah. 380=141 I.C. 435 (Where the modified view is accepted, not following 34 All. 429).

**Modified view—Recent cases.**

**1753.** But, the view taken in *Raghubar Rai* v. *Jaij Raj,*[23] has been considerably modified in later decisions of the **Allahabad High Court,** and the current of authority in recent years shows that the statute runs from the time when the loss was incurred, or in other words, when the payment was made, and not always when the sale-deed was executed. In this connection, it is also necessary to distinguish claims of two kinds which may arise in this connection, out of a promise to pay to a previous creditor, of the vendor, or to pay off a previous charge in favour of mortgagee. The authority of *Raghubar Rai* v. *Jaij Raj,*[24] is, therefore, considerably shaken, and the view held therein is to be accepted with caution.

The **Patna High Court,**[25] while relying on *Raghubar Rai* v. *Jaij Raj,*[26] that Art. 116 applies not only to a suit for specified sum of money due on a registered bond but also to a suit where the vendee having agreed to apply a portion of the purchase-money to the payment of a previous debt due by the vendor fails to apply it in that way, and a suit is brought to recover that amount from him, has held that the period of limitation in such a case does not run from the date of the execution of the sale-deed but from the **date on which the contract is deemed to have been broken,** *viz.*, the date when either there was a repudiation of liability under it or when the contract has become impossible of performance on account of vendor's debt having been satisfied.[27] In *Ishri Prasad* v. *Muhammad Sami*,[28] where money was left with the mortgagee to pay whenever he pleased so long as he did pay it, he being solely responsible for any interest which might accrue, it was held that the period of limitation began to run not from the date of the execution of the sale-deed but **from the time when the mortgagor had to pay the decretal money to satisfy** the decree. In *Daswant Singh* v. *Shah Ramjan Ali*,[29] Mookerji, J., explains why in such a case the period of limitation does not run from the date of the execution of the deed.

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[21] 1925 All. 488=87 I.C. 804.

[22] 1931 All. 419=131 I.C. 686=1931 A.L.J. 985; cf. *Abdul Wahid* v. *Sher Muhammad Khan,* 1935 All. 463 (Art. 83 applied to suit by vendor where *mortgage* not paid off by vendee).

[23] (1912) 34 All. 429=14 I.C. 244=8 A.L.J. 534; see and cf. *Abdul Wahid* v. *Sher Muhammad Khan,* 1935 All. 463; also see and cf. *Kedar Nath* v. *Hargovind,* 1926 All. 605=95 I.C. 913 (Art. 83 applied on ground of implied agreement to indemnify); cf. *Ram Ratanlal* v. *Abdul Wahid,* 1927 All. 435=101 I.C. 691=49 All. 603; also see and cf. *Abdul Aziz* v. *Muhammad Baksh,* 1921 Lah. 260=64 I.C. 431=2 Lah. 316 (Time runs under Arts. 116 and 83 from the date when the plaintiffs were actually damnified) and *Bhanji Undraji* v. *Govind Atmaram,* 149 I.C. 1200=1933 Nag. 379=29 N.L.R. 298.

[24] *Ibid.*

[25] *Ram Rachhya Singh* v. *Raghunath Prasad,* 1930 Pat. 46=8 Pat. 860=122 I.C. 244.

[26] (1912) 34 All. 429=14 I.C. 244=8 A.L.J. 534; also see *Daswant Singh* v. *Shah Ramjan Ali,* (1907) 6 C.L.J. 398 and *Ishri Prasad* v. *Muhammad Sami,* 1921 All. 133.

> "There was an express covenant that the purchaser would satisfy the debt due to the creditor, but there was no time specified for the performance of the contract . . . . the contract, might be performed at any time before performance became impossible on account of the satisfaction of the debt by payment or novation. A contract may be broken quite as much by repudiation of liability under it, as by making it impossible to fulfil the terms of the contract."

Similarly, it has been held by the **Bombay High Court,**[30] that a **suit to recover unpaid purchase-money from vendee,** which he agreed to pay to third person under sale-deed is governed by Art. 116, and time begins to run from **date of loss, or when vendor himself pays.** The **Nagpur Court** has taken a similar view, in *Bhanji Undraji* v. *Govind Atmaram*,[31] that where no time is mentioned, it means the undertaking is an undertaking to pay upon demand, and when demand is made and ignored the cause of action is not the breach, but the loss itself, and therefore the period runs from the time when the money was paid by vendor. The **Calcutta High Court** in *Chand Bibi* v. *Santosh Kumar Pal*,[32] has, likewise, held that where a purchaser of a portion of property has agreed to release it of an existing mortgage but he fails to do so, the cause of action for a suit by the vendor on such covenant arises either on the date when such payment is to be made or at least not later than the date when the vendor calls upon purchaser to do so. Such a suit is governed by Art. 116, and if it is for specific performance, it is governed by Art. 113 of the Limitation Act. The **Madras High Court** has recently reviewed the entire case-law in *Navamani Nadar* v. *Vedamanicka,*[33] where a mortgagor sold a portion of the mortgaged property, and as part of the consideration, the vendee undertook the payment of mortgage debt but failed to carry out his promise, and in execution of the mortgage-decree, the whole property including that in the mortgagor's possession was sold. It was held that a suit by the mortgagor against his defaulting vendee for the mortgage-debt which he had undertaken to pay off under the sale-deed, and also interest thereon was governed not by Art. 111, but by Art. 116, and that limitation ran, not from the date of the sale, but from the date when the vendor actually incurred loss, *i.e.,* when property in his possession was sold in this case. It was held further, that it was not possible for the vendor to sue the purchaser for the whole amount reserved but that he could only sue for the portion of the amount, the non-payment of which is likely to affect him, and this can only be properly determined when he had either made the payment himself, or he had suffered some other damage by the purchaser's default. It was observed, in the Madras case,

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[27] *Ram Rachhya Singh* v. *Raghunath Prasad*, 1930 Pat. 46=8 Pat. 860=122 I.C. 244; Relied on *Husain Ali Khan* v. *Hafiz Ali Khan*, (1881) 3 All. 600 (F.B.) and *Tricomdas* v. *Gopinath*, (1916) 44 Cal. 759=44 I.A. 65=1916 P.C. 182 (P.C.).

[28] 1921 All. 133.

[29] (1907) 6 C.L.J. 398.

[30] *Ammani Bai* v. *Anantnarayan*, 1931 Bom. 365.

[31] 149 I.C. 1200=1933 Nag. 379=29 N.L.R. 298.

[32] 1933 Cal. 641=60 Cal. 761=146 I.C. 863.

> "that it is necessary to distinguish claims of two kinds which may arise in this connection. A vendor may reserve part of the purchase-money with the purchaser entirely for the payment of the vendor's debts in the payment of which the purchaser has himself no primary interest . . . . or, it may be to pay off a previous mortgage covering only the property sold. In this case except by way of the vendor's personal liability for any deficiency that may arise on the mortgage, the purchaser subject to the mortgage becomes the only person interested in the payment".[34]

The latest **Allahabad** case on the subject is *Abdul Wahid Khan* v. *Sher Muhammad Khan,*[35] where Bennet, J., has distinguished 34 All. 429 and relied on 1926 All. 605 and 1933 All. 386, for the view that where the vendee of a property who has agreed to pay a mortgagee fails to do so, and the vendor from whom the mortgage amount is recovered files a suit against the vendee, the suit is governed by Art. 83, and limitation runs not from date of sale-deed but from date when vendor has actually been damnified.[36] The **Lahore High Court** has held recently that where a vendee required to pay off vendor's incumbrances defaults in paying, and the vendor sustains loss thereby, a suit by the vendor for a relief against the vendee is governed by Art. 116, read with Art. 83 or 61, and the starting point for limitation is the date when the vendor is actually damnified.[37]

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[33] 1933 Mad. 424=144 I.C. 550=56 Mad. 724.

[34] *Ibid.,* 1933 Mad. 424 (426)=144 I.C. 550=56 Mad. 724.

[35] 1935 All. 463; Relied on *Kedarnath* v. *Hargovind,* 1926 All. 605 =95 I.C. 913; *Suraj Misra* v. *Ghulam Hussain,* (1920) 63 I.C. 87 and *Unkar Singh* v. *Kashi Prashad,* 1933 All. 386=143 I.C. 821=55 All. 490; cf. *Raghubar Rai* v. *Jaij Raj,* (1912) 34 All. 429=14 I.C. 244 (Where plaintiffs had not actually paid any sum which the defendants should have paid: no authority for the question whether Art. 83 does not apply where the plaintiff has been actually damnified).

[36] *Ibid.*

**Suit for compensation for deficient land.**

1754. A suit for refund of purchase-money stipulated to be refunded on the happening of certain contingencies set forth in a registered deed of sale, is a suit for compensation for breach of a contract, in writing registered, and is governed by Art. 116 of the Limitation Act.[38] Thus, where the sale to the purchaser is maintained, but there is a deficiency in rental or quantity of land sold, he is entitled to satisfaction and an equivalent for the deficiency.[39] Where a person sells his share in certain lands and agrees to pay compensation if the land sold does not come to his share at the time of partition, the agreement must be interpreted as meaning that the compensation would be payable if by the order of the Revenue Officer, subject to any modification on appeal, the vendors were allotted a less area than that sold by them.[40]

**Suit for compensation of sums received by deceased agent.**

1755. A suit to recover from the representatives of a deceased agent certain sums of money which had been received by such agent in the course of his duties and misappropriated by him will be governed by limitation prescribed by Art. 116, Limitation Act, when the contract under which the agent was employed, is contained in a duly registered instrument. In a suit for compensation for breach of a contract in writing and registered, whether such compensation be for a liquidated or unliquidated sum, the limitation applicable is six years under this article.[41]

**Partnership agreement by registered instrument.**

1756. Art. 116, Limitation Act, is intended to extend the period of limitation in favour of **suit to enforce an obligation based on registered instruments.**[42] Where the contract of partnership contained an express stipulation that the parties should, according to their shares, pay the loss, and thus the origin of the obligation was a registered contract, Art. 116, and not Art. 64 was applicable, as the account stated had reference to the registered contract and did not constitute in itself an independent contract.[43] However, Art. 116 cannot be stretched to cover every case in which the plaintiff's claim may in its origin be referred to a contractual relation which is expressed in a registered agreement.[44] For instance, where, after the dissolution of the partnership, one partner brought a **suit for an account of a dissolved partnership** against another, this was held to be beyond the scope of the article.[45] **Art. 116 applies only where the right of action rests upon the registered contract,** or derives its vital force therefrom.[46] A suit by a partner against his co-partner alleging that an account of the partnership has not been furnished according to an express stipulation in the agreement of partnership and asking for rendition of accounts for a specified period is maintainable.[47] When a suit relates to matters incidental to the partnership and seeks to compel the partners to discharge the obligations undertaken by them under the agreement of partnership, it would not be necessary to sue for a dissolution of partnership.[48] If the plaintiffs base their suit on an express agreement to distribute the profits every year in a particular month, Art. 89 does not apply; neither is the case governed by Art. 116, since a **suit for accounts can hardly be treated as one for compensation** for breach of an agreement.[49] Where dissolution of partnership is not prayed for, Art. 106 is not apposite, and the suit not being specifically provided for, in any of the articles of the Limitation Act, will be governed by the residuary Art. 120.[50]

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[37] *Gulzarimal* v. *Maghilal,* 1933 Lah. 109=14 Lah. 380=141 I.C. 435 =34 P.L.R. 156.

[38] *Kishenlal* v. *Kinlock,* (1881) 3 All. 712=1 A.W.N. (1881) 67.

[39] *Ibid.*

[40] *Rukan Din* v. *Hassan Din,* (1923) 72 I.C. 897=1923 Lah. 23.

[41] *Harendar Kishore Singh* v. *Administrator-General,* (1885) 12 Cal. 357.

[42] *Ranga Reddi* v. *Chinna Reddi,* (1891) 14 Mad. 465=1 M.L.J. 482.

**1757. SUITS NOT WITHIN ART. 116.**—A **suit for recovery of money on failure of consideration,** and not one based on any express or implied covenant is governed by Art. 62, or Art. 97 of the Limitation Act, and not by Art. 116.[1] Where there is an implied covenant arising out of a deed which is in writing and registered, the period of limitation would be governed by Art. 116 of the Limitation Act. But the **provisions contained in S. 55, Sub-S. 1**

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[43] *Ranga Reddi* v. *Chinna Reddi,* (1891) 14 Mad. 465.

[44] *Vairavan Asari* v. *Ponnayya,* (1898) 22 Mad. 14.

[45] *Ibid.,* 22 Mad. 14; also see *Kothandapani Chetty* v. *Sreemanavedan,* 57 Mad. 378=151 I.C. 81=1934 M.W.N. 22=1934 Mad. 162=39 L.W. 164=66 M.L.J. 625.

[46] Rustomji's Limitation Act, p. 566. See *Suraj Prasad Dwarkadas* v. *Karam Ali Abdul Miya,* (1920) 57 I.C. 532=44 Bom. 591.

[47] *Raghubar Dayal* v. *Sheoram Das,* 1 A.L.J. 94; also see *Harjimal Melaram* v. *Kirparam Brijlal,* 66 I.C. 478=2 Lah. 381=1922 Lah. 495.

[48] *Binjraj* v. *Kisanlal,* (1933) 141 I.C. 277=1933 Nag. 127=16 N.L.J. 10=29 N.L.R. 34.

[49] *Ibid.,* 141 I.C. 277 (280)=1933 Nag. 127; also see *Annu Avathanigal* v. *Somasundara,* 54 Mad. 654=131 I.C. 165=1931 Mad. 185 (2).

[50] *Ibid.*

[1] *Bageshwar Tewari* v. *Bikramajit Singh,* (1930) 128 I.C. 767=1930 All. 785.

(*g*) of the Transfer of Property Act **are not implied covenants** for the breach of which a purchaser after the completion of the purchase can claim damages, or ask for rescission of the contract, and Art. 116 of Limitation Act has no application to a **suit for compensation** based on the said provisions.[2] A suit to recover a sum of money, beeing the contribution claimable from the defendant in respect of repairs to a well jointly owned by the parties, is a claim in contribution and must be brought within the period of limitation prescribed by Art. 61, Limitation Act.[3] A **suit by a principal against his agent** for moveable property received by the latter and not accounted for is not a suit for compensation for the breach of a contract, but is a **suit for account** and is governed by Art. 89 and not by Art. 116, Limitation Act.[4] A **suit for reimbursement** is different in its nature from a suit for damages and Art. 116 can only apply to the latter.[5] Accordingly, where a mortgagee who is bound to pay off a prior incumbrance fails to do so and the mortgagor is compelled to pay it off and then sues the mortgagee for re-imbursement the suit is governed by Art. 62, and not by Art. 116 of the Limitation Act.[6] A **suit to recover arrears of maintenance due** to plaintiff's mother to the date of her death, but **without reference to the security bond registered** by which the annuity had been charged on certain properties, was held not governed by Art. 116, and the claim being simply one for money due on account of arrears of maintenance, with interest was governed by three years' period.[7] A **suit for taking the accounts of a dissolved partnership** cannot be deemed to be a suit "*for compensation for breach of contract*", and is not, therefore, governed by Art. 116, Limitation Act.[8] A **suit by one partner for partnership accounts** (without a prayer for dissolution of partnership) based on an expressed agreement between the partners to render accounts and to distribute the profits annually is **governed by Art. 120,** and not Art. 89, or Art. 100, or Art. 116, Limitation Act.[9] **Where a plaintiff who has advanced money on a mortgage, repudiates it himself and files**

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[2] *Bidhu Bhushan* v. *Umesh Chandra,* (1930) 128 I.C. 183=51 C.L.J. 538=57 Cal. 683=1930 Cal. 568.

[3] *Suraj Prasad Dwarkadas* v. *Kamali,* (1920) 57 I.C. 532=44 Bom. 591=22 Bom. L. R. 777.

[4] *Annu Avathanigal* v. *Somasundara,* 1931 Mad. 185=1930 M.W.N. 1199=33 L.W. 1.

[5] *Prag* v. *Mohanlal,* (1918) 47 I.C. 161=5 Oudh L. J. 263.

[6] *Ibid.,* (1918) 47 I.C. 161=5 O.L.J. 263; cf. *Chananlal* v. *Maharaj,* 1931 Lah. 448=32 P.L.R. 457 (Suit to recover compensation based on stipulation for reimbursement, held governed by Art. 116).

[7] *Rajmani Bibi* v. *Baldeodas,* 146 I.C. 1033=1934 Pat. 244.

[8] *Kothandapani Chetty* v. *Sreemanavedan,* 57 Mad. 378=151 I.C. 81 =1934 M.W.N. 22=1934 Mad. 215.

[9] *Binjraj* v. *Kisanlal,* 141 I.C. 277 (2)=29 N.L.R. 34=16 N.L.J. 10=1933 Nag. 127.

**a suit for the money paid,** such a suit is not a suit for compensation for breach of contract, and is governed either by Art. 62, or by Art. 97, according as to whether the contract is void or voidable, and not Art. 116.[10] A suit for recovery of consideration or part of it from a vendee would not come under Art. 116, unless the **liability of the defendant** arose directly under the agreement contained in the registered deed.[11] A recital in a registered sale-deed about the payment of price, will not help to bring a suit for its recovery come under this article.[12] This article will not apply to suits for enforcement of a liability, **which does not arise under** the express or implied covenant in a **registered contract.**[13] Where a registered sale-deed provided that the purchaser should pay the revenue on the land sold, but the vendor paid the revenue, on behalf of the purchaser, and sued him for revenue paid, it was held that Art. 61 should apply, and not Art. 116.[14]

**1758. STARTING POINT OF LIMITATION.**—(1) The starting point, speaking generally, would depend on the nature of the breach of contract, and upon the article applicable to the suit if the contract had not been in writing registered within the meaning of Art. 116 of the Limitation Act. In a suit on a bond, where a mode of payment was provided but it was laid down that the debtor would be responsible for any deficiency, the time within which the suit must be instituted under Art. 116 is six years from the date when the contract is broken, or where there are **successive breaches,** from the date of the breach in respect of which the suit is instituted, or **when the breach is continuing,** from the date when it ceases.[15] The notion of continuing or successive causes of action is not entirely foreign to the Limitation Act, and where, therefore, a party has recurring or successive causes of action whether under the terms of contract or by operation of law, each cause of action will give a fresh start to the period of limitation and the mere fact that a party has not availed himself of the earlier cause of action,

**General.**

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[10] *Milkha Singh* v. *Fazal Din,* 145 I.C. 186=34 P.L.R. 96=1933 Lah. 581.

[11] *Seshachala* v. *Varadachariar,* (1901) 25 Mad. 55 (59, 60).

[12] *Avuthala* v. *Dayumma,* (1900) 24 Mad. 233; cf. *Vaithinatha* v. *Bheemachariar,* 8 I.C. 804 (Mad.).

[13] *Bidubhushan* v. *Maneshchandra,* 1930 Cal. 568=57 Cal. 683; *Mammi Kutti* v. *Pusakkal,* (1926) 100 I.C. 241; also see *Deb Narain* v. *Ram Sadhan,* (1911) 9 I.C. 988 (Cal.) (A person not entitled to sue on conveyance cannot get benefit of Art. 116).

[14] *Thondiyil Puthalatha* v. *Thondiyil Ponnigari,* 1926 Mad. 633=94 I.C. 1046=51 M.L.J. 159=1926 M.W.N. 291.

[15] *Ramnarain Singh* v. *Odindra Nath,* (1912) 13 I.C. 440=15 C.L.J. 17.

will not prevent him from availing himself of a later one.[16] In a case to which Art. 97 would have been applicable, if the lease deed had not been registered, the limitation in a **suit by a lessee under a registered lease** for damages for dispossession would run from the date of dispossession before the expiry of the period of lease.[17] In a suit on a bond payable by instalments, limitation would begin to run from date of default, as under Art. 75, read with Art. 116.[18] Similarly, in cases falling under Art. 83, if the suit to recover compensation for the breach of a contract to indemnify is based on a registered document, the period starts from the date when the plaintiff was damnified.[19]

**Sale of portions of joint property by co-sharers.**

**1759.** (2) In a sale of portions of joint property by a co-sharer, where the agreement is to pay compensation if land sold is not allotted to vendor on partition, or the vendor is allotted lesser land than the area sold, limitation for a suit claiming compensation is to be reckoned from the date of such an order and not from the date when the different co-sharers take possession of the shares allotted to them.[20]

**Suit for breach of covenant of title.**

**1760.** (3) In a **suit for damages for breach of covenant of title** contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor, and the sale is void *ab initio* as against the rightful owner, the starting point of limitation under Art. 116, is the **date of dispossession** of the vendee, and not the date of sale.[21]

**Suit by vendee for refund of price and damages.**

In a suit for refund of purchase-money on breach of covenant of title under a registered sale-deed, the starting point is the **date when the defect is found out.**[22] Where the sons in a joint Hindu family impugned the sale-deed executed by their father, and succeeded in obtaining a decree declaring its invalidity, followed by delivery of possession, which decree was affirmed on appeal, it was held that a suit by the vendee for refund of price and damages based on the covenant of title in the sale-deed was governed by Art. 116, and the plaintiff's **cause of action** was complete **when** the trial Court **found that the vendor**

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[16] *Mukhdeo Singh* v. *Harakh Narain Singh,* (1931) 134 I.C. 609=1931 Pat. 285=11 Pat. 112=12 P.L.T. 755.

[17] *Laxmichand* v. *Bajirao,* (1924) 78 I.C. 248 (Nag.).

[18] *Kamta Pershad* v. *Munni Bibi,* (1909) 1 I.C. 570 (All.).

[19] *Abdul Aziz Khan* v. *Muhd. Baksh,* (1921) 64 I.C. 431=2 Lah. 316.

[20] *Rukandin* v. *Hasandin,* (1923) 72 I.C. 897=1923 Lah. 23.

[21] *Kashi Rao* v. *Zabu,* 12 N.L.R. 125 (F.B.).

[22] *Mt. Lakhpat Kuer* v. *Durga Prasad,* 1929 Pat. 388=117 I.C. 654=8 Pat. 432.

**had no power to sell,** and the vendee was dispossessed.[23] In *Chuni Lal* v. *Hari Chand,*[24] where a sale was declared void by trial Court, and the vendee sued to recover the purchase price, relying on an express covenant in the sale-deed, the suit was held governed by Art. 116, and time commenced to run from the date of the trial Court's decree, and not from the date when such decision was affirmed in appeal. Where plaintiff having entered into possession and remained in possession as vendee is subsequently dispossessed, time would begin to run either from that date or from the **date on which** it was **held by the Court that property had not passed by the sale.**[25] In *Multanmal Jayaram* v. *Budhumal Kevalchand,*[26] the **Bombay High Court** held that where a purchaser of property under a registered sale-deed is put in possession of it, but is subsequently dispossessed by a third person who establishes that the sale is voidable as against him, limitation for a suit by the purchaser against his vendor to recover damages runs from the date **on which the third person first obtains a decree in his favour.** A breach of a covenant of title caused by the absence of right contracted for it, is, however, entire and complete at the time of the execution of the conveyance.[27] But in a suit for compensation by a vendee of immoveable property for breach of a covenant for title, the cause of action arises on the **date of disturbance of possession** by a person having prior title, and the limitation would not commence to run from the date of the conveyance.[28] Where the contract of sale being made respecting some lands in possession of a stranger, the vendee was unable to get possession of some lands, and his suit against the party in possession was dismissed, the cause of action for a suit for damages, against the vendor for breach of an implied covenant of title arose when its breach occurred by the vendor being found to have no title, as the result of the dismissal of the vendee's suit against the stranger.[29] Where breach occurs of a covenant of title, a suit for refund of purchase-money and expenses lies within six years of the **date when** it is found that the sale is voidable[30]: or when the vendor suffers loss, or when the agreement of the vendee becomes impossible of performance by reason of payment made by vendor.[31] Where a plaintiff got a sale-deed of property from defendants who were the auction-purchasers in an execution sale on a decree in a different suit but had not got the lawful delivery of the property sold, and relying upon a covenant in their sale-deed, the plaintiffs sued the defendants for the recovery of the property or return of the consideration paid by him to defendants, it was held that, under Art. 116, Limitation Act, no time being fixed within which delivery was to be given, the **cause of action** arose only when **the vendors became incapable of carrying out their undertaking.** Before that occasion arose the vendees could not have sued alleging a breach of the contract of title for the return of the purchase-money.[32]

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[23] *Jawahar Ram* v. *Jhingurilal,* 1935 All. 786=1935 A.L.J. 929=156 I.C. 177=1935 A.W.R. 768; also see *Chandrawatibai* v. *Valabhdas,* 1931 Sind 141=133 I.C. 76.

[24] 1934 Lah. 305 (2)=35 P.L.R. 179=148 I.C. 825.

[25] *Basu Kuer* v. *Dhumsingh,* 11 All. 47=15 I.A. 211 (P.C.); Relied in *Jhingur Ojha* v. *Megnath Pandey,* (1927) 72 I.C. 653=1924 Pat. 321.

[26] 61 I.C. 70=45 Bom. 955=23 Bom.L.R. 325.

[27] *Pirbhu* v. *Wazirbi,* 31 I.C. 877=11 N.L.R. 186.

[28] *Alagarappa Reddi* v. *Aligirisami Naik,* 156 I.C. 843 (2)=1935 Mad. 636=68 M.L.J. 588=41 L.W. 728=1935 M.W.N. 375.

[29] *Thillai Kannu Achi* v. *Abdul Kadir,* 140 I.C. 805=1933 Mad. 126=64 M.L.J. 336=1933 M.W.N. 649=37 L.W. 497.

[30] *Bhawani Singh* v. *Girdhari,* (1932) 137 I.C. 61=1932 Nag. 3.

**Personal decree in mortgage suit.**

**1761.** (4) *See* S. 1739, *ante*. The starting point of limitation in suits to enforce personal liability of mortgagor, under a registered mortgage deed is the **date of the mortgage,**[33] or, **when the default is made** under the mortgage **which gives rise to** a claim to **relief** against the mortgagor personally.[34] When the mortgage deed provides that the mortgage-money would be paid after some years, the limitation for personal relief against the mortgagor would start from the date when the mortgage-money became payable.[35] A suit under the provisions of S. 68 (*c*), Transfer of Property Act, must be brought, under Art. 116, Limitation Act, within six years from the time when the cause of acion arises, *i.e.*, when the mortgagor loses the property, or is refused or ousted from the possession of the mortgaged property.[36]

**Suit for breach of contract to pay off mortgage.**

**1762.** (5) *See* notes under Ss. 1752 and 1753, *ante*. The **Allahabad High Court,** held in *Raghubar Rai* v. *Jaijraj*,[37] that where no time is fixed for payment, the starting point dates from the deed itself. This view has been followed by the **Nagpur**[38] and **Lahore High Court,**[39] and has the support of some decisions from **Allahabad.**[40] But, a modified view has been taken in later rulings of the Allahabad High Court,[41] and the trend of recent rulings in other High Courts, is to hold that the period of limitation starts from the date when the contract is broken, which is taken to be the date when the plaintiff pays the money, or suffers loss, and is actually damnified, and not on the date of the mortgage.[42] The starting point under Art. 116, for a suit by vendee against vendor for breach of contract to pay off a mortgage is the date when the vendee was compelled to pay off the mortgage,[43] or when the vendor is actually damnified.[44] Where the parties to a mortgage agree that the mortgagee is to pay off a previous mortgage when he pleases, he being solely responsible for any interest which might accrue under the prior mortgage, the cause of action for a suit by the mortgagor against the mortgagee for damages accrues when he is damnified and not on the date of the mortgage.[45]

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[31] *Ammanibai* v. *Anant Narayan*, 1931 Bom. 365=33 Bom.L.R. 136=133 I.C. 267.

[32] *Satyanarain Row* v. *Venkatasami*, 143 I.C. 504=1933 Mad. 153.

[33] *Karamsingh* v. *Mt. Mayawanti*, (1932) 140 I.C. 387=1932 Lah. 592; *Kishen Sahai* v. *Raghunath*, 1929 All. 139=51 All. 473=116 I.C. 488; and *Jatindra Bahadur* v. *Khairatilal*, (1928) 113 I.C. 489=4 Luck. 107=1928 Oudh 465; also see and cf. *Mohanlal* v. *Lekhraj*, (1916) 33 I.C. 111.

[34] *Sahib Singh* v. *Gurdial Singh*, (1931) 129 I.C. 201=1930 Lah. 993.

[35] *Karamsingh* v. *Mt. Mayawanti*, 140 I.C. 387=1932 Lah. 592; cf. *Ishardas* v. *Mayamal*, 144 I.C. 738=34 P.L.R. 171=1933 Lah. 329.

[36] *Laltasingh* v. *Mathur Upadhia*, 1931 Oudh 5=6 Luck. 374=129 I.C. 168; also see *Udairaj Singh* v. *Ramdutt Tewari*, (1923) 77 I.C. 340=1924 Oudh 147.

[37] (1912) 34 All. 429=14 I.C. 244.

Where out of sale-consideration a certain sum is left with the vendee for payment to the vendor's mortgagee in satisfaction of his mortgage with a stipulation that if any surplus be left in the hands of the vendee after the redemption of the property, the same be returned to vendors, the **seller's right to refund** would arise only when it would be found that **after satisfying the prior charge** some money still remained in the hands of the vendee. Before that point is decided the vendor has no right of suit against the vendee, and the period under **Art. 116,** Limitation Act, would commence from the date of the breach, *i.e.*, where for the first time in the suit instituted by the vendee for redemption the Court of first instance would find that a smaller sum than the amount left with the vendee was due.[46]

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[38] *Vinayakrao* v. *Shripatrao,* 1926 Nag. 429=97 I.C. 185=9 N.L.J. 107.

[39] *Mehar Chand* v. *Shanti Sarup,* (1929) 118 I.C. 445=1929 Lah. 395.

[40] *Ram Narain* v. *Nihal Singh,* 1925 All. 488=87 I.C. 804; *Babu Makundlal* v. *Bholarai,* 1931 All. 419=131 I.C. 686=1931 A.L.J. 985; *Ramsaran* v. *Bhagwan Singh,* 1929 All. 775.

[41] *Kedarnath* v. *Hargobind,* 1926 All. 605=95 I.C. 913; *Ram Ratan* v. *Abdul Wahid,* 1927 All. 435; *Abdul Wahid* v. *Sher Muhd.,* 1935 All. 463.

[42] *Ram Rachaya Singh* v. *Raghunath,* 1930 Pat. 46=8 Pat. 860=122 I.C. 244; *Ammani Bai* v. *Anant Narayan,* 1931 Bom. 365; *Chand Bibi* v. *Santosh,* 1933 Cal. 641=60 Cal. 761=146 I.C. 863; *Navamani* v. *Vedamanicka,* 1933 Mad. 424=144 I.C. 550=56 Mad. 724.

[43] *Abdul Aziz* v. *Muhd. Baksh,* (1921) 2 Lah. 316=3 L.L.J. 542=64 I.C. 431.

[44] *Gulzarimal* v. *Maghilal,* 141 I.C. 435=34 P.L.R. 156=1933 Lah. 109.

[45] *Ishri Pershad* v. *Muhd. Sami,* (1921) 60 I.C. 829=1921 All. 133 =19 A.L.J. 81; also see *Ramdulari* v. *Hardwarilal,* 40 All. 605=16 A.L.J. 706=48 I.C. 18 (Date when the vendor is compelled to pay off the prior mortgage).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 117. | Upon a Foreign judgment as defined in the Code of Civil Procedure, 1908. | Six years. | The date of the judgment. |

### SYNOPSIS.

1763. Corresponding provisions.
1764. "Foreign judgment."
1765. Starting point.

### NOTES.

1763. **CORRESPONDING PROVISIONS.**—This article is same as Art. 117, Sch. II, Act XV of 1877, and corresponds with Art. 116, Sch. II, Act IX of 1871, where the first column read *"upon a judgment obtained in a foreign country"*. There was no specific provision for such cases under Act XIV of 1859, and the residuary cl. 16, S. 1, was applicable to suits on foreign judgment[47]: limitation period being "six years from the time the cause of action (the judgment) arose". Under **English law,** the limitation for such an action is six years, on the basis of an **implied contract** on the part of the defendant to pay the amount decreed by the foreign judgment.[48]

**Definition.**

1764. **"FOREIGN JUDGMENT."**—(1) The definition of "foreign judgment", as given by S. 2 (6), explains it to mean the "judgment of a foreign Court". **Foreign Court** [*see* **S. 2 (5), Civil Procedure Code, 1908**].

"means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council".

**Foreign Courts.**

(2) An *ex parte* judgment in England of the **Queen's Bench Division,** against the defendants who were, at the time of the judgment subjects of the sovereign, both of England and of British India, although at the date of the judgment, they were not within the territorial jurisdiction of England, but were resident in British India, was not a nullity. It was the judgment of **a foreign Court** within the meaning of Civil Procedure Code, and the judgment was a foreign

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[46] *Baijnath* v. *Parmeshwari Dayal,* 149 I.C. 529=11 O.W.N. 691=1934 Oudh 240.

[47] *Boloram Gooy* v. *Kameenee Dossee,* (1865) 4 W.R. 107.

[48] Dr. Pal's Limitation Act, citing *Dupleix* v. *De Rowen,* (1705) 2 Vern. 540.

judgment.[49] The **Supreme Court of Mauritius** is a "foreign Court" within the meaning of Civil Procedure Code, and the judgments are foreign judgments.[50] **French Courts** are foreign Courts,[1] as also Courts situate in a **Native State.**[2] A judgment in the **Court of** Kandy **(Ceylon)**[3] or of a **Court in Ceylon** is a "foreign judgment", though Ceylon and British India owe allegiance to the same sovereign.[4] The judgment of an independent **Native State** in India is also a foreign judgment.[5] But the **Privy Council** has *authority within* British India, and is **not a "foreign Court".**[6] However, the **English Courts** of Admiralty, Probate and Divorce **are,** with regard to Courts in India, as much **foreign Courts** as the Courts of France or of any other country.[7]

An **Act of State** passed **by a Native State** (Oodeypore Darbar) in its sovereign capacity, in removing a High Priest, held **not** to be a **"foreign judgment,"** within the meaning of Civil Procedure Code.[8] But, an **order** of Baroda Court, **calling upon the contributories** of a public company to pay a quota per share, and authorizing the liquidators to file suits against contributories residing outside jurisdiction of the State, **is** not a **"foreign judgment",** a suit on which will be governed by Art. 117, Limitation Act.[9] **An award** made against the defendant in England, **and an order** under the English Arbitration Act **enforcing the award** is not such a judgment.[10]

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[49] *Moazzim Hossein Khan* v. *Raphael Robinson,* (1901) 28 Cal. 641 (645)=5 C.W.N. 741; also see *The London, Bombay and Mediterranean Bank Ltd.* v. *Hormazji Pestanji Framji,* (1871) 8 B.H.C. (O.C.) 200 (A call by the chancery Court in England upon a contributory of an English company is a foreign judgment).

[50] *Kassim Mamooji* v. *Isuf Mahomed Sulliwan,* (1902) 29 Cal. 509 (516)=6 C.W.N. 829; *Shaikh Atham* v. *Davud,* (1909) 32 Mad. 469.

[1] *Boloram* v. *Kameenee Dossee,* 4 W.R. 107; also see *Kandhasami* v. *Moidin,* (1880) 2 Mad. 337; *Nallatambi* v. *Ponnusami,* (1879) 2 Mad. 400 (405).

[2] *Bhavanishanker Shevakram* v. *Pursadri Kalidas,* (1882) 6 Bom. 292.

[3] *Nalla Karuppa* v. *Md. Ibrahim,* (1897) 20 Mad. 112 (114)=7 M.L.J. 76.

[4] *Shaik Atham Sahib* v. *Davood Sahib,* (1909) 3 I.C. 190=32 Mad. 469.

[5] *Gurdyal Singh* v. *Raja of Faridkot,* 22 Cal. 222=21 I.A. 171; also see *Mayaram* v. *Rawji,* (1900) 24 Bom. 86=1 Bom.L.R. 539; *Bikrama Singh* v. *Bir Singh,* 191 P.R. 1888; also see and cf. *Sujan Singh* v. *Hardyal Singh,* 36 P.R. 1877 and *Veeraraghava* v. *Muga Sait,* (1915) 26 I.C. 287 (Mad.) (F.B.) (Cochin State).

[6] *Bowles* v. *Bowles,* 8 Bom. 571 (574).

[7] *Ibid.*

[8] *Sriman Goswami* v. *Goswami Shri Gusharlalji,* 17 Bom. 620 (624).

[9] *Modern Chemical Works, Ltd.* v. *Manmohan Nath Dar,* 1935 Lah. 975 (Reversed 1935 Lah. 553).

[10] *Deep Narain Singh* v. *Dietert,* (1903) 31 I.C. 274 (Cal.).

1765. **STARTING POINT.**—A **suit on a foreign judgment** is maintainable in Indian Courts. *See* S. 14, Civil Procedure Code, 1882, to which a clause was added by S. 5 of Act VII of 1888. This settled the conflict of view between the decision of **Madras High Court** in *Sama Rayar* v. *Annamalai*,[11] which held that a suit on the judgment was maintainable, and the **Bombay** case of *Himmat Lall* v. *Shivjirav*,[12] in which an opposite view was taken. *Also see* the **Privy Council** judgment in the leading case of *Gurdyal Singh* v. *Raja of Faridkot*.[13]

In *Baijnath Karnani* v. *Vallabhdas Damani*,[14] it has been observed that the "judgment" in the expression "foreign judgment," as used in S. 2 (6) of the Civil Procedure Code has the English meaning, and not the meaning (as regards the word judgment) given by S. 2 (9) of the Civil Procedure Code. That is, the term "foreign judgment" means the decree or order of a foreign Court as defined in S. 2 (5) of the Civil Procedure Code. The essence of cause of action is the implied contract raised by the fact that the parties have litigated the matter and the implication that by so doing each has impliedly agreed with the other to abide by the order or obey the decree of the *forum* before whom the action is tried. A "judgment" as defined by the Civil Procedure Code need not be given at all.[15] A foreign judgment may be final and conclusive though it is subject to appeal, and though an appeal against it is actually pending in the foreign country where it was given.[16] The **pendency of an appeal in a foreign Court** might afford ground for the equitable interposition of a British Court to prevent the possible abuse of its process and on proper terms to stay execution in the action, but it **would not be a bar to the action itself.** Even a stay of execution does not affect the finality of a foreign judgment which nevertheless can be sued on.[17] For the purposes of Art. 117 as for those of Art. 181 the existence of **a decree** is essential as the basis of the action and that decree has to be one that is **final and conclusive** between the

**Finality of judgment.**

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[11] (1883) 7 Mad. 164.

[12] (1884) 8 Bom. 593.

[13] (1895) 21 I.A. 171=22 Cal. 222.

[14] (1932) 138 I.C. 648=62 M.L.J. 566=35 L.W. 763=1932 Mad. 661 (s.c. on appeal, 1933 Mad. 511=56 Mad. 951=144 I.C. 853=65 M.L.J. 572). (*Held*, that the judgment of the appellate Court alone is the final and the only decree for purposes of execution).

[15] *Baijnath Karnani* v. *Vallabdas Damani*, 138 I.C. 648 (649)=1932 Mad. 661.

[16] *Hari Singh* v. *Muhammad Said*, (1927) 102 I.C. 523=8 Lah. 54=1927 Lah. 200.

[17] *Ibid.*, 102 I.C. 523.

parties so as to operate as *res judicata.*[18] The period of limitation for a suit in British India to enforce the foreign judgment begins to run not from the date of the judgment in the trial Court but from the date of judgment of the appellate Court.[19]

**Limitation: Foreign judgments.**

The right to sue on a foreign judgment, as on a new cause of action, accrues on the day when the foreign decree is made, and is barred in all Courts, at the expiration of six years from that date.[20] Time spent in executing the decree in the foreign Court cannot, therefore, be excluded.[21] Nor can the time taken to set aside an *ex parte* decree be deducted, as the finality of the judgment is not affected by an unsuccessful attempt of that nature.[22]

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 118. | To obtain a declaration that an alleged adoption is invalid, or never, in fact took place. | Six years. | When the alleged adoption becomes known to the plaintiff. |

### SYNOPSIS.

1766-71. Corresponding provisions.
1766. Under Act XIV of 1859.
1767. Under Act IX of 1871.
1768. "Suit to set aside an adoption." —13 I.A. 84 (P.C.).
1769. Under Act XV of 1877.
1770. 20 I.A. 30 (P.C.).
1771. 52 I.A. 322 (P.C.).
1772. Acts XV of 1877 and IX of 1908—Change in the law.
1773-80. **Scope of Art. 118.**
1773. 33 I.A. 156 (P.C.).
1774. 39 I.A. 19 (P.C.).
1775. 51 I.A. 220 (P.C.).
1776. Conflict of views.
1777. Suits for possession not barred under Art. 118.
1778. *"Invalid."*
1779. Adoption by a Hindu widow, a matter of status.
1780. Effect of bar on immediate reversioners.
1781-83. **Starting point of limitation.**

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[18] *Baijnath* v. *Vallabdas,* 1933 Mad. 511=1933 M.W.N. 453=56 Mad. 951=144 I.C. 853=65 M.L.J. 572=38 L.W. 85 (s.c. 1932 Mad. 661, *supra*). (*Held,* that the judgment of the appellate Court alone is the final and the only decree for purposes of execution.)

[19] *Ibid., Baijnath* v. *Vallabhdas, supra.*

[20] *Heeramonee Dossia* v. *Promothonath Ghose,* (1867) 8 W.R. 32.

[21] *Ibid.*

[22] *Hari Singh* v. *Muhd. Said,* (1907) 102 I.C. 523=8 Lah. 54; cf. *Venugopal Mudali* v. *Venkata Subbiah,* (1915) 28 I.C. 367=39 Mad. 24. (Art. 11—"order" refers to a subsisting order, *i.e.,* date of order of the appellate Court).

1782. Actual knowledge of plaintiff—Onus.
1783. Subsequent alienation does not give fresh cause of action.

## NOTES.

1766. **CORRESPONDING PROVISIONS.**—(1) Under **Act XIV of 1859,** there was no corresponding specific provision for suits of this nature, to which the general provision in S. 1, Cl. (16) was made applicable. Act XIV of 1859, S. 1, Cl. (16) applied to a declaratory suit; and where the suit was to have an adoption declared invalid, the only exception to limitation beginning to run from the date of the adoption which was the cause of action was that provided in S. 9, namely, the right of action being concealed by means of fraud.[23] A suit not to recover property but to set aside the adoption was governed by S. 1, Cl. (16), under Act XIV of 1859.[24] But, a suit to recover possession of immoveable property after setting aside an adoption was governed by 12 years' limitation.[25] In a suit by a reversioner upon the death of a Hindu widow, in possession of a life estate, the reversioner had 12 years from the death of the widow to sue for possession, even when the widow in her lifetime professed to adopt a son, and put him in possession of the property, if the reversioner denied the validity of the adoption.[26] A suit for possession contesting adoption by widow, had period of limitation running, against the reversioners, from the date of the widow's death.[27]

1767. (2) In Court-Fees Act, VII of 1870, Sch. II, Art. 17, Cl. (*v*), a special stamp fee was fixed for a suit for setting aside an adoption, and in **Limitation Act, IX of 1871, Art. 129,** provided a period of 12 years within which such a suit was to be brought.

> "The legislature seems distinctly to have recognized the right of a person to bring a suit to set aside an adoption as a substantive proceeding, independent of any claim to property."[28]

Act IX of 1871, gave a period of 12 years from the date of the adoption, or at the option of the plaintiff the date of the death of the adoptive father. This came into force on and from the 1st April, 1873. It was held by their Lordships of the Privy Council, in *Raj Bahadur Singh* v. *Achumbit Lall,*[29] that the provision in Act IX of 1871, Sch. II, whereby it was enacted that, with respect

**6 C. L. R. 12 (P.C.).**

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23. *Mrino Moyee* v. *Bhoobun,* (1875) 23 W.R. 42.

24. *Kalova* v. *Padapa,* (1876) 1 Bom. 248.

25. *Radha Kissen* v. *Sree Kishen,* (1864) 1 W.R. 62.

26. *Sreenath Gangooly* v. *Mohesh Chunder,* (1869) 12 W.R. 14 (F.B.); also see *Sitaramayya* v. *Varadhanamma,* (1874) 7 M.H.C.R. 351.

27. *Rajendro Nath Holdar* v. *Jogendro Nath Banerji,* 14 I.A. 67=15 W.R. 41 (P.C.).

28. *Kalova* v. *Padapa,* (1876) 1 Bom. 248—Per Westropp, C.J.

29. (1879) 6 I.A. 110=6 C.L.R. 12.

to suits to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption, or (at the option of the plaintiff), the date of the death of the adoptive father," *does not interfere with the right, which but for it a plaintiff had, of bringing a suit to recover possession of real property within twelve years from the time when the right accrued.* Where plaintiff sued in 1877 to set aside an adoption which was alleged to have taken place twenty years before, and, as heir of the husband of the last Adhikar, to obtain possession of a certain temple and properties attached thereto, which the defendant claimed under the said adoption, it was held on the authority of the Privy Council decision, that the suit was not barred by Art. 129, Sch. II of Act IX of 1871.[30] The view above taken that the suit for possession will not be barred, though the suit to contest the adoption be barred, seems to have been modified in the leading case of *Jagadamba* v. *Dakhina.*[31] Their Lordships explained that in the earlier case, the decision was not to be taken as detached from its content and from the facts of the case, where an instrument called a deed of adoption was thus described:

> "This document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons or heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death."[32]

**A distinction** was thus drawn between the case of a plaintiff who was not embarrassed by the widow's adoption of the defendant, and who could recover the estate of the deceased male propositus without in any way disturbing the adoption, and the case in which the heir cannot possibly get at the ancestor's property, without disturbance of a title and of possession founded on adoption to that ancestor.

**13 I. A. 84=13 Cal. 308 (P.C.). "Suit to set aside an adoption."**

**1768.** (3) Their Lordships of the **Privy Council** have observed in the case of *Jagadamba* v. *Dakhina,*[33] that

> "The expression '**suit to set aside an adoption**' is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all. In the ordinary language of Indian Lawyers the expression 'set aside an adoption' is applied to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land, and to suits of a declaratory nature."

**Act XV of 1877.**

**1769.** (4) As remarked by their Lordships of the Privy Council, in *Jagadamba* v. *Dakhina.*[34]

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[30] *Purna Narain* v. *Hemakant,* (1880) 6 C.L.R. 46.
[31] (1886) 13 I.A. 84 at 93; 13 Cal. 30 (P.C.).
[32] *Ibid.*
[33] (1886) 13 I.A. 84 at 93=13 Cal. 30 (P.C.).
[34] (1886) 13 I.A. 84 (95).

"It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the **language is changed**. Art. 118 of the Act of 1877, which corresponds to Art. 129 of the Act of 1871 so far as regards setting aside adoption, speaks of a suit 'to obtain a **declaration that** an alleged adoption is invalid or never in fact took place', and assigns a different starting point to the time that is to run against it."[35]

**20 I.A. 30 (P.C.).**

**1770.** Where the plaintiff's suit was barred by limitation under the Act of 1871, the Act XV of 1877 could not revive the plaintiff's right so barred: As the statute of 1877, in its second section provided as follows:—

"All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed."[36]

**52 I.A. 322 (P.C.).**

**1771.** (5) In *Vaithilinga* v. *Sriranga-thanni,*[37] their Lordships of the **Privy Council** observed as follows:—

"It was held by the Board, in *Jagdamba* v. *Dakhina,*[38] that Art. 129 of the Second Schedule of Act IX of 1871, related to all suits in which the plaintiff could not succeed without displacing an apparent adoption by virtue of which the defendant is in possession. That article prescribes twelve years as the period of time within which a suit 'to establish or set aside an adoption' might be brought, and that such period of twelve years should begin to run from 'the date of adoption, or (at the option of the plaintiff) from date of the adoptive father's death'. Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of a Hindu widow any further time than the twelve years given by Art. 129 to any plaintiff. That Act was in force until the 19th July, 1877, when Act XV of 1877, the Indian Limitation Act, 1877, came into force, and by **Art. 141** of the Second Schedule of Act XV of 1877, a Hindu entitled to the possession of immoveable property on the death of a Hindu female might bring his suit for possession within twelve years from the time when the female dies."

**Change in the law.**

**1772. ACTS XV OF 1877 AND IX OF 1908.**—(6) Under Act IX of 1871, as noticed above, it was imperative that a suit for recovery of immoveable property which involved the displacement of an alleged adoption should be filed within 12 years from the date provided under that Act.[39] The validity of the adoption

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35. *Jagadamba* v. *Dakhina,* (1886) 13 I.A. 84 (95)=13 Cal. 30 (P.C.).

36. *Mohesh Narain* v. *Taruck Nath,* (1892) 20 Cal. 487=20 I.A. 30 (P.C.); also see *Appasami Odayar* v. *Subramanya,* 12 Mad. 26=15 I.A. 167 P.C., in which was decided a similar point in regard to the Limitation Acts of 1859 and 1871.

37. (1925) 52 I.A. 322=42 C.L.J. 563=30 C.W.N. 313=48 Mad. 883=1925 P.C. 249=92 I.C. 85 (P.C.); also see *Kalyandappa* v. *Chanbasappa,* (1924) 51 I.A. 220=48 Bom. 411=46 M.L.J. 598 (P.C.).

38. (1886) 13 I.A. 84=13 Cal. 30 (P.C.).

39. *Jagadamba* v. *Dakhina,* (1886) 13 I.A. 84 (93)=13 Cal. 30 (P.C.); also see *Kalyandappa* v. *Chanbasappa,* (1924) 51 I.A. 220=48 Bom. 411 (418)=46 M.L.J. 598 (P.C.).

could not be questioned after the expiry of this period.[40]

But under Act XV of 1877, the old Art. 129 of Act IX of 1871 has been broken up into two Arts. 118, and 119. Article 118 provides a period of six years for suits to obtain a *declaration* that an alleged adoption is invalid or never in fact took place from the time when the alleged adoption becomes known to the plaintiff; and Art. 119 provides the same period for 'suit to obtain a declaration that an adoption is valid' from the time when the rights of the adopted son as such are interfered with. The words 'establish' and 'set aside' are dropped, and the period of limitation as well as the starting point are altered, both articles now providing a six years' period for suits confined to a declaration, and excluding a suit for possession or other relief.[41]

**33 I.A. 156 (P.C.).**

**1773. SCOPE OF ARTICLE 118.**—(1) The case-law under Act XV of 1877, was noticed by the Subordinate Judge in *Tirbhuvan Bahadur* v. *Rameshar Baksh.*[42] In *Parvathi Ammal* v. *Saminatha Gurukul,*[43] and *Sirinivash* v. *Hanmant,*[44] it was held that the principle laid down by their Lordships of the Judicial Committee in *Jagadamba's* case was applicable to Art. 118 of the present Act, and that a plaintiff could only succeed in his suit for possession if he could prove that his suit was not barred under Art. 118. As against the above cases there has been a strong current of decisions the other way. It was held in the following cases that Art. 118 of Act XV of 1877 did not apply to a suit for possession of immoveable property though it might be necessary for the plaintiff to prove the invalidity of an adoption.[45] Their Lordships in upholding this view observed that

> "giving full effect to the *Jagadamba's* case and the other cases which followed it, they do not think the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of S. 2 of the Act of 1877."[46]

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[40] *Mohesh* v. *Taruck,* (1892) 20 Cal. 487=20 I.A. 30 (P.C.); also see *Venkoba* v. *Thunia,* (1914) 27 I.C. 109 (M.).

[41] *Tribhuvan* v. *Rameshar,* (1906) 33 I.A. 156=28 All. 727=10 C.W.N. 1065=4 C.L.J. 405 (P.C.).

[42] (1906) 33 I.A. 156=28 All. 727=10 C.W.N. 1065=4 C.L.J. 405 (P.C.).

[43] (1896) 20 Mad. 40.

[44] (1899) 24 Bom. 260.

[45] *Basdeo* v. *Gopal,* (1886) 8 All. 644; *Parbhulal* v. *Mylne,* (1887) 14 Cal. 401; *Ghandarap* v. *Lachman Singh,* (1888) 10 All. 485; *Padajirav* v. *Ramrav,* (1888) 13 Bom. 160; *Nathu Singh* v. *Gulab Singh,* (1895) 17 All. 167; *Fanyamma* v. *Manjaya,* (1895) 21 Bom. 159; *Harilal* v. *Bai Rewa,* (1895) 21 Bom. 376; *Jagannath* v. *Ranjit,* (1897) 25 Cal. 354; *Ram Chandra* v. *Ranjit Singh,* (1899) 27 Cal. 242; *Mt. Bhagana* v. *Barjore Singh,* 1898 O.C. Vol. I, p. 30.

[46] (1906) 33 I.A. 156=28 All. 727=10 C.W.N. 1065=4 C.L.J. 405 (P.C.).

1774. (2) It has been held in a later case, following the above view, that the language of Art. 118 **applies only to suits of a declaratory nature,** and the omission to bring such a suit under Art. 118, is no bar to a suit for any other relief when the plaintiff becomes entitled to such relief afterwards on the termination of widow's life estate.[47]

**39 I.A. 19 (P.C.).**

1775. (3) An elaborate review of the decisions on the point was made by the Judicial Committee in *Kalyandappa* v. *Chanbasappa,*[48] and it was observed that

**51 I. A. 220 (P.C.).**

> "the words a **suit to obtain a declaration** are terms of Art. They relate back to the Specific Relief Act passed in the same year, 1877, being Act No. I of that year, whereas the Limitation Act is Act XV of 1877. Section 42 of the Specific Relief Act deals with declaratory decrees, and the illustration (letter f) is much in point:—"A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration, that the adoption was invalid." "It is **to this class of suits that this particular limitation applies.** The date from which the time begins to run is a subjective or personal date; and the condition of obtaining particular relief which is sought in a declaratory suit is that **the plaintiff shall not be guilty of laches,** the measure of laches being fixed by the statute as six years. **But if a claimant chooses to run the risk** that an adoption which he has not attacked will have every presumption made in its favour by reason of its longstanding, **he can wait till his reversionary right has accrued,** and even till the limit (no doubt a very wide limit) of twelve years from that accruer has passed."

1776. (4) The **Privy Council** decision above noticed sets at rest the **conflict of view** on this matter in the High Courts in India. The early Privy Council decisions, in 20 I.A. 30 (P.C.); 22 I.A. 51 (P.C.); also 13 I.A. 84 (P.C.) were followed by the **Madras,** and **Bombay** High Courts as authority for the proposition that Arts. 118, and 119 were applicable to a suit for possession also, if the displacement of an apparent adoption was necessary for plaintiff's success in the possessory suit.[49] Bhashyam Ayyangar, J., had recorded a dissenting Judgment in *Ratnamasari* v. *Akilandammal,*[50] tracing the history of the articles, and observing that

**Conflict of views.**

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[47] *Muhammad Umar Khan* v. *Muhammad Niazuddin,* (1911) 39 Cal. 418=39 I.A. 19=22 M.L.J. 240 (P.C.).

[48] (1924) 48 Bom. 411 (425, 426)=51 I.A. 220=46 M.L.J. 598 (P.C.).

[49] *Parvathi* v. *Saminatha,* (1896) 20 Mad. 40=6 M.L.J. 272; *Ratnamasari* v. *Akilandammal,* (1902) 26 Mad. 291=13 M.L.J. 27 (Bhashyam Ayyangar, Diss.); *Shrinivas* v. *Hanmant,* (1899) 24 Bom. 260 (F.B.); O.R. *Fanuyamma* v. *Manjaya,* (1895) 21 Bom. 159; also see *Barot Narain* v. *Barot Jesang,* (1900) 25 Bom. 26.

[50] (1902) 26 Mad. 291 (309-314) (F.B.) (per Bhashyam Ayyangar, J.).

"it is impossible to resist the conclusion that the Legislature deliberately departed from the policy of Art. 129 of the Act of 1871 and confirmed the operation of Arts. 118 and 119 of the new Act to mere declaratory suits as defined in S. 42 of the Specific Relief Act".

Their Lordships overruled the Bombay decisions in *Shrinivas* v. *Balwant,*[1] and *Shrinivas* v. *Hanmant,*[2] and, the principle of the decision in *Bijoy Gopal* v. *Srimati Krishna,*[3] was approved of, and applied to suits of the present character.

The decision in *Jagmohansaran* v. *Sahu Deoki,*[4] lays down that a suit in substance for declaring an adoption invalid is covered by Art. 118. The claim was *not for recovery of possession* on the ground that the defendant's adoption was invalid, and the decision in this case does not take away anything from the pronouncement of their Lordships in cases above noticed.

**Suits for possession not barred under Art. 118.**

1777. The **Calcutta** and **Allahabad** High Courts have held in several cases that Arts. 118, and 119 were **restricted in their application to declaratary suits alone.**

**Allahabad.**

In *Basdeo* v. *Gopal,*[5] it was observed that there is no ambiguity about Art. 118 of Limitation Act (1877), as there was in the case of Art. 129 of Act IX of 1871, and it refers only to suits purely for a declaration that an alleged adoption is invalid or never, in fact, took place; and when the suit has been brought for possession of property, a suit governed by Art. 141, it will be governed by that article, although the question of validity of an adoption may arise therein. It is discretionary in a Court to grant relief of a purely, declaratory nature, and a suit for a declaration is to be regarded as distinct from a suit for possession of property, which cannot be held to be barred as a suit of the former description brought under Art. 118, merely by reason of its raising a question of the validity of a certain adoption.[6] If nothing had intervened to disturb the widow's possession of her life estate, the reversioner's suit for possession after her death would be governed by Art. 141, Limitation Act.[7] In *Lali* v. *Murlidhar,*[8] it was held that Art. 119, Sch. II, Limitation Act, did not apply to a suit for possession of immoveable property in which the plaintiff claimed as the adopted son of the last male owner of the property, and in which the plaintiff's adoption was denied by the defendant, and the plaintiff himself alleged that his right as adopted son had been interfered with more than six years before the institution of his suit. Article 144, and not Art. 119, applied to a suit for possession on title, and not merely for a declaration as to the validity of an adoption.[9] In the case of *Nathu Singh* v. *Gulab Singh*,[10] it was held by Edge, C.J., and Banerji, J., that Art. 118 of Sch. II, applies only to suits for a declaration that an adoption is invalid, or in fact never took place, and does not apply to a suit for possession of property merely because it may be necessary in order to give effect to the relief claimed in such suit to find that an adoption is invalid. Where on the death of a Hindu, his widow takes possession of his estate, it is not incumbent upon his reversioners to bring a suit for declaration that a certain person who claims to be the adopted son of the deceased was not in fact adopted by him. The reversioners are entitled to wait till the death of a widow, and then bring a suit for recovery of possession, and if such a suit is brought within twelve years of the death of the widow it cannot be held to be barred by time.[11] If plaintiff sues for *possession*, alleging that the adoption of the defendant was invalid, Art. 118 would not apply.[12]

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[1] (1913) 37 Bom. 513.

[2] (1899) 24 Bom. 260; also see *Chanbasappa* v. *Kaliyandappa,* (1917) 41 Bom. 728; *Fakirappa* v. *Lumanna,* (1919) 44 Bom. 742 (*Held,* that Art. 118 would apply to suits for possession also).

[3] (1907) 34 I.A. 87=11 C.W.N. 424.

[4] (1927) 46 C.L.J. 280=32 C.W.N. 153=1927 P.C. 229 (P.C.).

[5] (1886) 8 All. 644=6 A.W.N. (1886) 232.

[6] *Basdeo* v. *Gopal,* 8 All. 644=6 A.W.N. (1886) 232; Followed in *Radha Dulaiya* v. *Rashiklal,* 45 All. 1=1923 All. 25=20 A.L.J. 814=75 I.C. 14 (Suit for possession against the alleged adoptee within twelve years of the widow's death held within time, and not barred under Art. 118).

[7] *Gandharp Singh* v. *Lachman Singh,* 10 All. 485=8 A.W.N. (1888) 192.

[8] (1901) 24 All. 195; Followed 8 All. 644; 9 All. 253; 10 All. 485; 17 All. 167.

**Calcutta.**

The **Calcutta High Court** has similarly held that, although under Art. 118, Limitation Act, a suit for a declaration that an adoption was invalid should be brought within six years from the date when the adoption becomes known to the plaintiff, still having regard to the provisions of Arts. 140 and 141 the next reversioner is not thereby prevented from suing to obtain possession within twelve years from the date of the widow's death or when the estate falls into possession.[13] A suit for possession of immoveable property is not barred under Art. 119, notwithstanding that the plaintiff has to establish the validity of adoption as the basis of his title.[14] Likewise, Art. 118 does not apply to a suit for possession of immoveable property, though it might be necessary for the plaintiff to prove the invalidity of an adoption.[15]

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[9] *Chandania* v. *Salig Ram*, (1903) 26 All. 40.

[10] (1895) 17 All. 167; Relied on 8 All. 644; 10 All. 485; 13 Bom. 160 and 14 Cal. 401.

[11] *Shib Deo* v. *Ram Prasad*, (1925) 87 I.C. 938=1925 All. 79=46 All. 637=22 A.L.J. 690; also see *Radha Dulaiya* v. *Rashik Lal*, (1923) 75 I.C. 14=1923 All. 25=45 All. 1=20 A.L.J. 814; Dist. *Chunilal* v. *Sitaram*, 34 All. 8=11 I.C. 476=8 A.L.J. 1101 (Where the plaintiffs sought a relief as to declaration that the alleged adoption is invalid).

[12] *Ramlal Rai* v. *Mt. Murta Kuer*, (1923) 75 I.C. 676 (Starting point under Art. 118, is date of knowledge of the plaintiff).

[13] *Parbhulal* v. *Mylne*, (1887) 14 Cal. 401; also see *Baikanta* v. *Kali Charan*, 9 C.W.N. 222 (224).

[14] *Jagannath Prasad* v. *Ranjit Singh*, (1897) 25 Cal. 354.

**Lahore.**

The **Punjab Chief Court,**[16] and the **Lahore High Court,**[17] have consistently taken the view in a number of cases that plaintiff's collaterals of a deceased sonless proprietor, or the reversioners of a widow holding a life-estate, are not bound in a suit for possession of the property, to seek any distinct relief by way of cancellation of the adoption set up by the defendant, and the limitation applicable to such suits is not that provided by Art. 118. The **Privy Council** ruling in **28 All. 727 P.C.** is interpreted that Art. 118 is not applicable to suits for possession where an adoption is challenged, and that it applies to declaratory suits only. The article applicable to a suit for possession of immoveable property on the death of a Hindu female is Art. 141, even if it is necessary to decide in the suit whether an adoption was or was not valid.

**Patna.**

This is also the view taken by the **Patna High Court** in *Shah Deo Narain* v. *Kusum Kumari,*[18] as to non-applicability of Art. 118 to suits for possession.

**Madras.**

The **Madras** cases, in *Valaga Mangamma* v. *Bandlamudi,*[19] *Maharaja of Kolhapur* v. *Sundaram,*[20] and *Rama Rao* v. *Venkoba,*[21] take the same view that Art. 118 applies only to declaratory suits in respect of adoption, and not to suits for possession of immoveable property, the period of limitation applicable to which is that prescribed by Art. 141, Limitation Act. Thus, a suit for partition and possession of the plaintiff's share in the family properties is not barred simply because the plaintiff failed to sue to obtain a declaration that an alleged adoption of one of the family members was invalid, or never took place. In such a suit, plaintiff is entitled to show that the adoption never took place, or was invalid.[22]

**Bombay.**

In view of the decisions of the Privy Council in *Tirbhuvan* v. *Rameshar,*[23] the **Bombay High Court** even has held in a Full Bench case[24] that suits for possession of immoveable property where the plaintiff cannot succeed except by displacing an adoption are not governed by Art. 118, Limitation Act: and the Bombay High Court has thus fallen in line with all other High Courts in India, and ceases to give effect to *Shrinivas* v. *Hanmant.*[25] The **Privy Council** view stands re-affirmed in *Padmalav Achariya* v. *Fakira Debya,*[26] where a suit by a Hindu widow to recover possession of the estate of her deceased husband from the defendant who claimed to be the adopted son of the deceased was held not to be governed by Art. 118. It was declared by their Lordships that the law is finally settled in this respect.

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[15] *Ram Chandra Mukerjee* v. *Ranjit Singh,* (1899) 27 Cal. 242 (254).

[16] *Wazia* v. *Tattu,* 96 P.R. 1883; *Dheru* v. *Sidhu,* 56 P.R. 1903=93 P.L.R. 1903 (F.B.); *Rangan* v. *Mahbubchand,* 55 P.R. 1897; *Surjan Singh* v. *Kharak Singh,* 96 P.R. 1908; *Nathu* v. *Rahman,* 44 P.R. 1911; cf. *Gujar Singh* v. *Puran,* 71 P.R. 1901; *Ganesha* v. *Nathu,* 20 P.R. 1902; *Bhupa* v. *Nigaliva,* 68 P.R. 1903; *Ishar* v. *Partap Singh,* 38 P.R. 1907 (No longer good law in view of later Punjab and Privy Council cases);

[17] *Jholi* v. *Khazana,* 8 Lah. 48=1926 Lah. 654; *Hirde Ram* v. *Jhandu,* 1935 Lah. 213 (2).

[18] 5 P.L.J. 164; *Bhoop Singh* v. *Ramji Lal,* 1930 Lah. 438=31 P.L.R. 222 (Art. 118 applies only to declaratory suits).

[19] 30 Mad. 308.

[20] 48 Mad. 1.

[21] 17 M.L.J. 282.

[22] *Kolandavelu* v. *Arumugatha,* (1913) 18 I.C. 493 (Mad.).

[23] 33 I.A. 156=28 All. 727 (P.C.).

**"Invalid".**

**1778. SUIT TO DECLARE THAT THE ADOPTION IS INVALID.**—The **Punjab Chief Court** took the view, in some early cases, that Art. 118 of the Limitation Act, cannot be construed as necessarily applicable to a case where a person whom neither law nor custom permits to make an adoption, chooses to go through the form of appointing an heir.[27] It was held

> "that the alleged adoption mentioned in Art. 118 must be a transaction by a person with some inherent right to adopt, and which is either denied as a fact by the plaintiffs or challenged as invalid upon some ground of law or custom which does not go to the length of asserting that the adoption, as an adoption is wholly impossible".[28]

In *Karmdad* v. *Nathu,*[29] it was held by a Full Bench, that the word *"invalid"* in Art. 118 must be understood in the sense of acts done with authority, but being an improper exercise of that authority. Consequently, that an adoption unknown to the personal law of the adopter, or by a person unauthorised by him, which has no legal inception and does not displace or threaten to displace the right of succession of heirs need not be avoided within the limitation provided by Art. 118, which applies to *"invalid"* adoptions only. But, in *Muhammad Niazuddin Khan* v. *Muhammad Umar Khan,*[30] the *dictum* that Art. 118 applies only when validity of an adoption is in question and not when the adopter has no inherent power to adopt was doubted: and, in *Nathu* v. *Rahman,*[31] it was held that the Privy Council ruling in 28 All.

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[24] *Doddawa Purshya* v. *Yellawa Mallappa,* (1922) 67 I.C. 134=46 Bom. 776 (F.B.).

[25] 14 Bom. 260=1 Bom.L.R. 799 (F.B.).

[26] 1931 P.C. 84=131 I.C. 758=35 C.W.N. 465=12 P.L.T. 563.

[27] *Bhagat Ram* v. *Tulsi Ram,* 144 P.R. 1892; Followed in *Muhd. Din* v. *Sardar Din,* 67 P.R. 1901.

[28] *Ibid.,* 144 P.R. 1892 (Benton and Rivaz, JJ.); Relied on (1879) 6 I.A. 110=6 C.L.R. 12.

[29] 86 P.R. 1905 (F.B.) (Followed in *Nizam* v. *Bhana,* 71 P.R. 1908—*Held,* that where adoption is unknown to personal law of the adopter, the heirs are under no obligation to sue for a declaration of its invalidity).

[30] 1 P.R. 1907.

[31] 44 P.R. 1911=11 I.C. 11.

727 (P.C.), overrules the expression of opinion in 56 P.R. 1903 (F.B.), as to the effect of 13 Cal. 308 (P.C.), in cases of adoption, as also the dictum in 86 P.R. 1905 (F.B.), as to the application of Art. 118 in cases of adoption done with authority but by way of improper exercise of that authority.

**A suit by a minor natural son** born subsequent to an adoption by his father, **to declare that the adoption is invalid,** and for an injunction restraining the defendants from interfering with the enjoyment of his property is not barred by limitation though the suit is instituted more than six years after the date of the adoption. A minor cannot be fixed with knowledge of an adoption from the date of his birth, and a suit by him to set aside the adoption is not governed by Art. 118, Limitation Act.[32]

**Adoption by a Hindu widow a matter of status.**

**1779.** An adoption of a son by a Hindu widow to her husband is of course the introduction of an heir, and concerns a matter of status, and such an introduction cannot be treated to be in effect nothing more than a mere transfer of property.[33] But, where the widow adopted a son as heir to herself, and not to her husband, the reversionary heirs can recover the property without seeking to set aside the adoption.[34] If the suit be for the estate of the last male owner, and adoption is only by the widow to herself, Art. 118 will have no application,[35] but it may apply if the suit be for the woman's estate against a person adopted by the widow.[36] An adoption by a Jain woman, of a son to her husband in respect of his separate property would be covered by Arts. 118 and 119 of the Limitation Act,[37] though these articles do not apply to affiliation of females under Malabar law, or the customary adoption of dancing girls in some parts of the country.[38]

**Effect of bar on immediate reversioner.**

**1780.** There is a *distinction between a suit to set aside an alienation, and a suit to set aside an adoption.* Although in suits relating to alienations by a qualified owner, the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought on principle to represent the remote reversioner, provided the matter is decided after a fair trial; and this principle will apply equally when a remote reversioner is allowed to sue under special circumstances to set aside an adoption.[39] Suits involving questions as to adoptions stand on quite different grounds from those impeaching the validity of alienations.[40] A **suit for declaration that an adoption is invalid is a representative suit,** which the nearest reversioner is entitled to bring on behalf of the whole body of reversioners, born or unborn, within the period prescribed in Art. 118, Limitation Act.[41] Time begins to run against the whole body of reversioners from the time that the adoption comes to the knowledge of the next reversioner, and the fact that there was fraud or inaction on the part of the next reversioner does not prevent the next remote reversioner from suing himself if so minded, or prevent the whole body of reversioners being barred if no suit was brought within the prescribed period.[42] Accordingly, the fact that the plaintiff was born after the alleged adoption, and before the suit had become barred under Art. 118, did not give him any fresh cause of action or stop time running which had begun to run against the whole body of reversioners from the date of the adoption.[43] The word

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[32] *Siddareddi* v. *Deva Jarama,* (1926) 98 I.C. 435=1926 Mad. 1123 =51 M.L.J. 557.

[33] *Ayyadorai Pillai* v. *Solai Ammal,* (1901) 24 Mad. 405.

[34] *Raj Bahadur* v. *Achumbit,* (1880) 6 I.A. 110=6 C.L.R. 12 (P.C.); as explained in *Jagadamba* v. *Dakhina,* (1886) 13 Cal. 308 (321); also see *Shamlal* v. *Amarendra,* (1895) 23 Cal. 400.

[35] *Luchmun* v. *Kanhya,* (1894) 22 I.A. 51=22 Cal. 609 (614) (P.C.).

[36] *Tribhuwan Singh* v. *Rameshar,* (1906) 28 All. 727=10 C.W.N. 1065 (P.C.).

[37] *Harnath* v. *Mandil,* (1899) 27 Cal. 379.

[38] *Valiyappu* v. *Paru Nethiar,* (1885) 9 M.L.J. 196 (198).

**"Plaintiff".**

**"plaintiff"** in column 3 of Art. 118, includes a person from or through whom the plaintiff derives his right to sue, and is taken as meaning also his predecessor-in-title (*vide* definition in S. 2).[44] Their Lordships of the **Privy Council** have also laid down in *Venkatanarayana Pillai* v. *Subbammal,*[45] that a suit brought by a presumptive reversioner for a declaration that an alleged adoption is invalid is brought by him in a representative capacity, and on behalf of all the reversioners, and on the death, therefore, of the presumptive reversioner, the next presumptive reversioner is entitled to continue the action begun by the deceased plaintiff. **Art. 118 relates to status and involves the adjudication of rights *in rem*,** and it differs from Art. 125, which raises the question of mere justifiable necessity.[46] It is explained that

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[39] *Chirnoolu Punnamma* v. *Chirnoolu Perrazu,* (1905) 29 Mad. 390=1 M.L.T. 183=16 M.L.J. 307 (F.B.).

[40] *Ibid.,* 29 Mad. 390 (F.B.) (Approved 24 Mad. 405).

[41] *Venkattasivayya* v. *Ademma,* (1921) 60 I.C. 98=1921 Mad. 380=44 Mad. 218=39 M.L.J. 621.

[42] *Ibid.,* 44 Mad. 218=60 I.C. 98=1921 M. 380 (F.B.).

[43] *Ibid.*

[44] *Ayyadorai* v. *Solai Ammal,* 24 Mad. 405; *Manik Chand* v. *Jagat Settiani,* 17 Cal. 518 (532).

[45] (1915) 29 I.C. 298=1915 P.C. 124=38 Mad. 406=28 M.L.J. 535=42 I.A. 125 (P.C.).

[46] *Venkatanarayana Pillai* v. *Subbammal,* 29 I.C. 298=42 I.A. 125 (P.C.); also see *Rajendro Nath Holdar* v. *Jogendra Nath Banerjee,* (1871) 14 M.I.A. 67 (77) (Where the case of adoption was held analogous to one in which the legitimacy of a person in possession is questioned).

"there is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. **It is the common injury to the reversionary rights which entitles the reversioners to sue".**[47]

The right is given to the person although he may never succeed to the estate, and a result of suits by one reversioner binds the remotest reversioner, in the absence of collusion, fraud or laches.[48] If the suit for a declaration that the adoption is invalid is barred by time, the plaintiff cannot elude the operation of Art. 118 by suing for a declaration that a gift made by the adoptive female in favour of the adopted son should not bind the plaintiff.[49]

**1781. STARTING POINT.**—(1) Under this article, the period of limitation for a suit for declaration in favour of all the reversioners arises from the date when the alleged adoption becomes *known* to the plaintiff, *i.e.*, the next reversioner, and this knowledge is attributable to the next remote reversioner also.[50] A suit by a presumptive reversioner, under this article, is a representative suit on behalf of all the reversioners, and the right to relief arises the moment the act is done and becomes known to the plaintiff; and if a suit by the next reversioner is barred, the right of the remoter or subsequently born reversioner is also barred.[1] As held by the Madras High Court, even the fraud or laches of the nearest reversioner does not extend the right of suit of the next remote reversioner to any date beyond six years from the date of the knowledge of the plaintiff, *i.e.*, the nearest reversioner.[2] The cause of action arises from the date on which the adoption becomes known to the plaintiff, and the fact that the adoptive father died within six years of the date of the suit could not prevent the bar of limitation.[3]

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[47] *Venkatanarayana Pillai* v. *Subbammal*, 29 I.C. 298 (301) (P.C.); also see *Kesho Prasad* v. *Sheq Pragash*, (1921) 44 All. 19 (F.B.) (There is no restriction as to the person entitled to sue).

[48] *Mata Prasad* v. *Nageshar Sahai*, (1925) 47 All. 883=52 I.A. 398 =50 M.L.J. 18 (P.C.).

[49] *Bhoop Singh* v. *Khem Ram*, (1930) 121 I.C. 296=31 P.L.R. 222= 1930 Lah. 438.

[50] *Venkatasivayya* v. *Ademma*, (1920) 44 Mad. 218=1921 Mad. 380 =60 I.C. 98=39 M.L.J. 621; *Doddana* v. *Yellawa*, (1921) 46 Bom. 776= 67 I.C. 134 (F.B.); *Chit Reddi* v. *Chit Reddi*, (1915) 28 I.C. 632 (Mad.).

[1] *Varamma* v. *Gopala Dasayya*, (1918) 41 Mad. 659=35 M.L.J. 57 (F.B.).

[2] *Venkatasivayya* v. *Ademma*, (1920) 44 Mad. 218=1921 Mad. 380= 60 I.C. 98=39 M.L.J. 621; cf. *Sidda Reddi* v. *Deva Jayarami*, 1926 Mad. 1123=52 M.L.J. 557 (*Held*, that the plaintiff born some years after the adoption could not, during his minority, be fixed with knowledge of the adoption, and under Art. 118 time did not run against him during his minority).

[3] *Ramchandra* v. *Narayan*, (1903) 27 Bom. 614.

In *Jagmohan Saran* v. *Deokinandan,*[4] where the action was in substance a suit for a declaration that a particular adoption was invalid, their Lordships of the Privy Council observed that the claim being made on the basis of this alleged adoption was known to the plaintiff in the suit more than six years before it was instituted, and that he himself had attained majority nearly nine years before the suit was commenced. It was therefore held barred under Art. 118.

**Actual knowledge of plaintiff.**

**1782.** (2) Under Art. 118, Limitation Act, the period of limitation begins when the adoption becomes *known* to the plaintiff. **The onus** rests on the defendants to prove clearly that the suit was barred by time by reason of the plaintiffs having knowledge of the adoption more than six years before the date of institution.[5] And mere registration of adoption deed is not by itself sufficient to fix plaintiff with knowledge.[6] But a plaintiff who has asserted over and over again the *factum* of an alleged adoption, who has on his own showing received valuable consideration in return for making such assertions, and who has, by reason of the setting up of the alleged adoption, caused the defendant to be deprived of all share in landed property of his natural father, is estopped from asserting that the adoption never in fact took place.[7] A suit for a declaration that an alleged adoption never in fact took place and that it was at any rate invalid, must be brought within six years from the date of plaintiff's knowledge.[8]

**Subsequent alienation not giving fresh cause of action.**

**1783.** The **Lahore High Court** has held in *Khushal Singh* v. *Kanda,*[9] that where an adoption remains unchallenged, and the right to impeach it is barred by limitation, a gift made subsequently in favour of the adopted son does not give the reversioners a fresh cause of action in that it does not involve any further denial of their rights than was involved in the adoption. Similarly, Wallis, J., held in *Bapayya* v. *Akamma,*[10] that a Hindu reversioner, who has allowed his right of suit to declare an alleged adoption invalid to become barred under Art. 118 of the Limitation Act is not entitled to sue for a declaration that a mortgage subsequently executed by the alleged adopted son in conjunction with the widow of the last male owner, by whom he was taken in adoption, is not binding on him. If the suit for a declaratory decree in respect of the *factum* of adoption is barred by time, the plaintiffs cannot elude the operation of Art. 118 by suing for a declaration that the gift made by the lady in favour of the adopted son should not bind him.[11] However, in *Joli* v. *Khazanee*,[12] a different line of argument was pursued. On the analogy of suits for possession not being barred under Art. 118, as held in *Kalyandappa* v. *Chanbasappa*,[13] it was held that a suit for declaration that an alienation by way of gift made by the adoptive father in favour of the alleged adopted son was invalid, is not governed by Art. 118 of the Limitation Act. This argument involves the possibility of evading the operation of Art. 118 of the Limitation Act, by merely confining the suit to for declaration to a prayer for invalidity of the alienation, apart from the invalidity of the adoption. This was done in *Semba Parayan* v. *Maral*,[14] where possession had continued with the widows of a deceased person, and no suit was brought by the alleged adopted son whom the authorities refused to recognise. A suit by the reversioners brought more than six years after the date of the adoption, but within two years of certain alienations made by one of the widows and the alleged adopted son, for a declaration that the transactions were invalid, and not binding on them, was held not barred under Art. 118, Limitation Act, there being no prayer in the suit relating to the adoption.

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[4] (1927) 106 I.C. 488=1927 P.C. 229=32 C.W.N. 153=53 M.L.J. 301 (P.C.).

[5] *Ghulam Muhd.* v. *Mirza,* (1924) 84 I.C. 174=5 Lah. 368=1925 Lah. 25.

[6] *Ibid.*

[7] *Udit Narayan Singh* v. *Randhir Singh,* 69 I.C. 971=45 All. 169=1923 All. 58=20 A.L.J. 945.

[8] *Bhoop Singh* v. *Khem Ram,* (1930) 121 I.C. 296=1930 Lah. 438; Relied in *Barot Naran* v. *Barot Jesang,* 25 Bom. 26=2 Bom.L.R. 495.

[9] (1920) 56 I.C. 931=1921 Lah. 389=5 L.L.J. 63; cf. *Chiragh Din* v. *Mehtab,* 15 Lah. 645=149 I.C. 986=1934 Lah. 274 (2) (Where the plaintiff had no knowledge of the deed of adoption until the gift made some eight years later, the period of six years should count from latter date).

[10] (1916) 36 I.C. 255 (Mad.).

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 119. | To obtain a declaration that an adoption is valid. | Six years. | When the rights of the adopted son, as such, are interfered with. |

### SYNOPSIS.

1784. Corresponding provision.
1785-87. **Scope of the article—Declaratory suits.**
1786. Not applicable to suits for possession.
1787. Applies to *factum* of adoption.
1788. Starting point of limitation.

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[11] *Bhoop Singh* v. *Khem Ram*, (1930) 121 I.C. 296=1930 Lah. 438.

[12] (1926) 96 I.C. 749=8 Lah. 48; also see *Sadhu Ram* v. *Bishandas*, 1929 Lah. 579.

[13] (1924) 51 I.A. 220=48 Bom. 411=46 M.L.J. 598 (P.C.).

[14] 1927 Mad. 674=102 I.C. 885=52 M.L.J. 711.

## NOTES.

1784. **CORRESPONDING PROVISIONS.**—This article is same as Art. 119 of the previous Act XV of 1877. For a previous history, *see* Ss. 1766-69, *ante,* under Art. 118.

**Suits for declaration only.**

1785. **SCOPE OF ARTICLE.**—This article, like Art. 118, is **confined to suits for declaration only: and is not applicable to suits for possession** even though the claim for possession is based on title alleged as an adopted son. The history of this article has been traced at length in paragraphs 1766-1772, *ante* and the change of law by splitting the old Art. 129 into present Arts. 118 and 119 in the Act of 1877, and giving a reduced period of six years applicable to suits of a declaratory nature, has been noticed in the judgments of their Lordships of the Privy Council, in *Muhd. Kumar Khan* v. *Muhd. Niazuddin,*[15] and in *Kalyandappa* v. *Chanbasappa*[16]; also in the dissentient judgment of Bhashyam Ayyangar, J., in the Madras Full Bench case of *Ratnamasary* v. *Akilandammal.*[17]

**Not applicable to suits for possession.**

1786. In *Lali* v. *Murlidhar,*[18] it was held by the **Allahabad High Court** that Art. 119 did not apply to a suit for possession of immoveable property in which the plaintiff claimed as adopted son of the last male owner of the property, and in which the plaintiff's adoption was denied by the defendant, and the plaintiff himself alleged that his right as adopted son had been interfered with more than six years before the institution of his suit. Article 144, and not Art. 119, applied to a suit for possession on title, and not merely for a declaration as to the validity of an adoption.[19] Similarly, the **Calcutta High Court** has held in *Jagannath Prasad* v. *Runjit Singh,*[20] that Art. 119 of Limitation Act applies only to a suit for a declaratory decree as to the validity of an adoption, and that a suit for possession of immoveable property was not barred under that article, notwithstanding that the plaintiff had to establish the validity of an adoption as the basis of his title. A **Full Bench** of the **Punjab Chief Court,** in *Arjan Singh* v. *Lachhman Singh,*[21] held that when a plaintiff sues for possession of immoveable property alleging that he is an adopted son of the last proprietor and his adoption is denied, the suit is governed, not by Art. 119, but by Art. 144 of the Limitation Act. The **Bombay High Court** has held in a recent case that the Privy Council decision in *Kalyandappa* v. *Chanbasappa,*[22] overruling the previous decisions of all the High Courts to the contrary on the question of interpretation of Art. 118, applies also to Art. 119, which is also a "suit to obtain a declaration" and Art. 119 is not applicable, therefore, to a suit to recover possession of property on the death of a Hindu widow on the strength of his adoption.[22-a]

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[15] (1911) 39 I.A. 19=39 Cal. 418=22 M.L.J. 240 (P.C.).

[16] (1924) 51 I.A. 220=48 Bom. 411=46 M.L.J. 598 (P.C.).

[17] (1902) 26 Mad. 291 (F.B.)—Per *Bhashyam Ayyangar, J.,* at pages 297 to 321: especially 309 to 314.

[18] (1901) 24 All. 195 [Followed 8 All. 644; 9 All. 253; 10 All. 485; 17 All. 167].

[19] *Chandania* v. *Salig Ram,* (1903) 26 All. 40.

[20] (1897) 25 Cal. 354 [Diss. 20 Mad. 40; Relied on 14 Cal. 401; 8 All. 644; 13 Bom. 160].

[21] 81 P.R. 1914 (F.B.) [N. F. 20 Mad. 40; 26 Mad. 291 (F.B.); 24 Bom. 260 (F.B.); 37 Bom. 513; Relied upon 25 Cal. 354; 27 Cal. 242; 24 All. 195; 26 All. 40; 96 P.R. 1908; 44 P.R. 1911; Followed 56 P.R. 1903 (F.B.); 30 Mad. 308; 28 All. 727 (P.C.); Expld. 39 Cal. 418=126 P.R. 1912 (P.C.)].

**Applies to factum and validity of adoption.**

**1787.** It has been observed by the **Bombay High Court,** in *Ningawa* v. *Ramappa,*[23] that Art. 119 applies to a suit

> "to obtain a declaration that an adoption is valid; and there are no words in it making it applicable to a suit for a declaration that an alleged adoption did take place. . . . . It is a legitimate inference to draw from the difference in the phraseology of the two articles (118 and 119), that Art. 119 is to be applied only where the question is not as to the *factum* but the validity of an adoption".

This view was relied upon in *Shivram* v. *Krishnabai,*[24] but these observations were dissented from in *Laxmana* v. *Ramappa,*[25] where it was held that suits in which either the *factum* or validity of an adoption is denied are governed by the provisions of Art. 119 of the Limitation Act. The decision of the **Madras High Court,** in *Ratnamasari* v. *Akilandammal,*[26] was agreed to, that there is no difference in point of principle between Arts. 118 and 119 of the Limitation Act. As pointed out by Bhashyam Ayyangar, J., in his judgment in the Madras Full Bench case,

> "unlike Art. 118, Art. 119 does not separately provide for a suit to obtain a declaration that an alleged adoption in fact took place, for the simple reason that the mere *factum* of adoption will not entitle one to a legal character unless the adoption is also valid. A plaintiff, therefore, will have to sue for a declaration that his adoption is valid, whether the *factum* itself is denied or the *factum* is admitted but the validity is challenged".

In *Bharma* v. *Balaram,*[27] it was held that a suit by an adopted son for a declaration that a decree which was passed on the basis that there was no adoption is not binding on him, is certainly not a suit for possession of property governed by the 12 years' rule, but is governed by Art. 119, Limitation Act, being virtually a suit for mere declaration that his adoption is valid, because he cannot get the declaration he asks for, without establishing the validity of his adoption.

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[22] (1924) 51 I.A. 220=48 Bom. 411=46 M.L.J. 598 (P.C.).

[22-a] *Bhagirathibai* v. *Appa Dada,* 1934 Bom. 110=36 Bom.L.R. 185=58 Bom. 280=149 I.C. 674; Relied on 48 Bom. 411 (P.C.).

[23] (1903) 28 Bom. 94 (100)=5 Bom.L.R. 708.

[24] 31 Bom. 80 (85).

[25] (1907) 32 Bom. 7 (9)=9 Bom.L.R. 1054.

[26] (1902) 26 Mad. 291.

[27] (1918) 43 Bom. 63 (65)=47 I.C. 639=20 Bom.L.R. 836.

### 1788. STARTING POINT OF LIMITATION.

**"Interference."**

—The **Allahabad High Court** has held that "the interference contemplated by Art. 119 is **interference by the defendant, and not interference by a third party** who was in no way connected with the defendant".[28] Accordingly, where the plaintiff claimed as an adopted son to recover from a person alleged by him to be wrongfully in possession thereof certain moveable and immoveable property which had belonged to his adoptive father, and it was asserted for the defendant that the rights of the plaintiff as an adopted son had been interfered with by his adoptive father more than six years before suit, it was held that the only interference with the rights of the plaintiff as an adopted son which could avail the defendant was the interference caused by the defendant herself taking possession of the property in dispute on the death of the widow of the adoptive father.[29]

The **Bombay High Court** takes the view that the interference mentioned in the article as a condition of its application so as to bar the plaintiff's right altogether is obviously an interference which **must amount to an absolute denial of the status held by the plaintiff, and an unconditional exclusion of him** from the enjoyment of his rights in virtue of that status. The article can have no application to a case where the facts suggest that the interference, such as it was, was intended to have no greater effect than that of postponing the right of the adopted son to succeed as heir to the property of his adoptive father.[30] This view has been followed by the Rangoon High Court in *Maung Gyi* v. *Maung On Gaing,*[31] where it was held that a mere denial of the status of the plaintiff as an adopted son does not amount to an interference with his rights as such adopted son within the meaning of Art. 119 of Sch. I of the Limitation Act. **The interference need not necessarily be in relation to the very property** sought to be recovered in the suit; an interference in relation to property other than that sued for would set time running.[32] An alienation, by means of a gift by the adoptive mother in favour of the daughter, is an interference with the rights of the adopted son.[33]

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[28] *Chandania* v. *Salig Ram,* (1903) 26 All. 40.

[29] *Ibid.*

[30] *Ningawa* v. *Ramappa,* (1903) 28 Bom. 94 (This has been overruled on the other point as to Art. 119 being applicable only when the question is not as to *factum,* but the validity of an adoption); see *Laxmana* v. *Ramappa,* (1907) 32 Bom. 7=9 Bom.L.R. 1054; also see *Girijabai* v. *Sadashiv,* 22 Bom. L.R. 974=58 I.C. 394.

[31] (1923) 74 I.C. 970=1924 Rang. 34=1 Rang. 186 (Article requires interference of an *active* nature *excluding* plaintiff from property).

[32] *Akilandammal* v. *Ratnamasari,* (1903) 13 M.L.J. 144.

[33] *Ibid.*

| Article. | Description of Suit. | Period of Limitation. | Time from which period begins to run. |
|---|---|---|---|
| 120. | Suit for which no period of limitation is provided for elsewhere in this schedule. | Six years. | When the right to sue accrues. |

### SYNOPSIS.

#### Title I: Residuary Article.

1789. Corresponding provision.
1790. Residuary article.
1791. Other general articles.

#### Title II: Scope and application.

**1792-1808. Application of article.**
1792. Suits under special or local laws.
1793. **Suits for accounts.**
1794. **Suits for injunction.**
1795. **Suits for declaration**—S. 42, Specific Relief Act.
1796. Declaration of title to immoveable property.
1796-A. Illustrative cases.
1797-1805. Declaration of invalidity of alienations.
1798. (1) Suits to set aside an instrument.
1799. (2) Suit by a creditor.
1800. (3) Suit for cancellation of a will.
1801. (4) Suit to set aside sales.
1802. (5) Declaration of invalidity of alienation of trust property.
1803. (6) Suit by reversioner to have alienation by a female declared void.
1804. (7) Suit by reversioners of a male proprietor.
1805. (8) Suit to avoid sale of ancestral property by Hindu father.
1806. Declaration as to erroneous entry in Revenue Records.
1807. Declaratory suit *re.* attachment by Magistrate.
1808. Declaratory suit: other cases.

#### Title III: Scope and application—(*Contd.*)

**1809-1852. Miscellaneous suits.**
1809. Suits for tax. [*See* Art. 6.]
1810. Suits for pre-emption. [*See* Art. 10.]
1811. Suits arising out of attachment before judgment. [*See* Art. 11.]
1812. Suits against an order not deciding a question of title. [*See* Art. 13.]
1813. Suits for declaration against official Act or Order. [*See* Art. 14.]
1814. Suits to recover damages resulting from a conspiracy. [*See* Art. 23.]
1815. Suit for recovery of money due on a decree assigned to plaintiff. [*See* Art. 29.]
1816. Suit to recover money wrongly distributed or paid out. [*See* Art. 29.]
1817. Suits for injunction removing encroachment on a public road, or shamilat. [*See* Art. 32.]
1818. Suits for compensation for acts other than torts, or breaches of contract. [*See* Art. 36.]
1819. Suit for proceeds of goods lost or acquired by conversion. [*See* Art. 48.]
1820. Suit for share of moveable property. [*See* Art. 49.]
1821. Suit for work and materials of building. [*See* Art. 52.]

1822. Suit for money lent by sale of property pledged. [*See* Arts. 57, 59.]

1823. Suit for contribution in respect of money paid by plaintiff. [*See* Art. 61.]

1824. Suit for account of the profits of joint property. [*See* Art. 62.]

1825. Suit for refund of money paid by plaintiff. [*See* Art. 62.]

1826. Suit to enforce obligations arising out of decrees, for accounts. [*See* Art. 64.]

1827. Suit on administration surety bond. [*See* Art. 68.]

1828. Suit upon a promissory note with special agreement. [*See* Art. 73.]

1829. Suit on bond hypothecating cattle. [*See* Art. 80.]

1830. Suit for account of outstanding collections by a divided member of Hindu family. [*See* Art. 89.]

1831. Suit to recover sale proceeds from an agent. [*See* Art. 89.]

1832. Suit for partnership accounts based on agreement to distribute profits. [*See* Art. 89.]

1833. Suit to set aside decree on ground of fraud or negligence of guardian. [*See* Art. 95.]

1834. Suit by auction-purchaser for refund of money on default of vendor. [*See* Art. 97.]

1835. Suit to recover remuneration as Dwaris of temple. [*See* Art. 102.]

1836. Suit for dissolution and accounts of a partnership. [*See* Art. 106.]

1837. Suit for mesne profits collected by a co-owner. [*See* Arts. 62 and 109.]

1838. Suit for rent against co-owner. [*See* Art. 110.]

1839. Suit for recovery of sum to adjust difference in partition. [*See* Art. 111.]

1840. Suit by liquidator for calls. [*See* Art. 112.]

1841. Suit for money payable under terms of an award. [*See* Art. 113.]

1842. Suit for compensation for breach of contract. [*See* Art. 115.]

1843. Suit for compensation for breach of registered contract. [*See* Art. 116.]

1844. Suit for share of intestate's estate. [*See* Art. 123.]

1845. Suit for non-hereditary office. [*See* Art. 124.]

1846. Suit by reversioner to have alienation by female declared void. [*See* Art. 125.]

1847. Suit by a Hindu to set aside his father's alienation. [*See* Art. 126.]

1848. Suit for declaration of right to maintenance. [*See* Art. 129.]

1849. Suit to establish a periodically recurring right. [*See* Art. 131.]

1850. Suit for money decree only on mortgage bonds.

1851. Suit by reversioners to recover moveable property on death of a Hindu female. [*See* Art. 141.]

1852. Suit for declaration of title to immoveable property. [*See* Arts. 142-144.]

### Title IV: Starting point of limitation.

1853. "Right to sue", meaning of.
1854-58. **Cause of action—When arises.**
1854. (*i*) Date of infringement of right.
1855. (*ii*) Certificate under Pensions Act.
1856. (*iii*) Date of confirmation of sale.
1857. (*iv*) Misfeasance of Directors of Companies.
1858. (*v*) Date of knowledge of right.
1859. **Recurring cause of action.**
1860. **Fresh cause of action.**

## NOTES.

**1789. CORRESPONDING PROVISIONS.**—This article corresponds to S. 1, Cl. (16) of Act XIV of 1859: and is same as Art. 118 of Act IX of 1871: and Art. 120 of Act XV of 1877.

**1790. RESIDUARY ARTICLE.**—Article 120 is of exceptional application, and before applying it we must be satisfied that no other provision of the Limitation Act can be applicable.[34] The scheme of the Limitation Act provides a general residuary article for all suits not covered by a specific article[35]; that is to say, the Indian Legislature has laid down a limit of time for all suits,[36] except those governed by S. 10 of the Limitation Act. The residuary article is applicable to every variety of suits not otherwise provided for.[37] It should be applied only as a last resort, if no other article is applicable.[38] The function of the residuary article is to provide for cases which could not be covered by the exact words used in both the columns one and three of an article.[39]

As a general principle of construction of statute, if there be two articles which may cover the case, the one, however, more general and the other more particular or specific, the more particular and specific article ought to be regarded as the one governing the case.[40] The rule is well-established that if there is no specific, or less general article applicable, this omnibus article applies.[41] There are numerous decisions to the effect that, unless it is clear that no other specific article is applicable, the Courts ought not to apply Art. 120 of the Limitation Act.[42] Recourse should not be had to this article unless other articles are clearly shown to be inapplicable.[43] In this connection, it may be noticed that some Courts have relied upon the words of their Lordships of the Privy Council in *Mahomed Riasat Ali* v. *Hasin Banu,*[44] that Art. 120 should be applied, unless it is clear that the suit is within some other article. These words are not understood, however, to lay down any rule contrary to that followed by all the High Courts in India, that Art. 120 is a residuary provision which cannot be applied unless the Court is satisfied that there is no other article specifically applicable to the case.[45] Art. 120 comes into operation only when no other article is applicable to a suit.[46] It should never be invoked if there is any other article in the schedule which upon reasonable interpretation of its language covers the particular suit with which the Court is dealing.[47] Wherever a specific article is shown not applicable in all its bearings, Art. 120 would apply.[48] If the plaintiff for any reason wishes to avoid the application of Art. 120, it is for him to show which other article fits his claim.[49] Where an attempt is made to secure a longer period of limitation under this article by drafting the plaint so as to evade a particular provision of the Limitation Act, with a lesser prescribed period,

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[34] *Kundun Lal* v. *Bansidhur,* (1880) 3 All. 170.

[35] *Amalur Venkayya* v. *Vissa Lakshminarasayya,* (1920) 58 I.C. 969 (974, 975).

[36] *Ibid.*

[37] *Narasimham* v. *Narayana Rao,* (1926) 92 I.C. 405=1926 Mad. 66; also see *Venkateswara* v. *Somasundaram,* 44 I.C. 551 (Mad.).

[38] *Sankunni Menon* v. *Govinda Menon,* (1912) 14 I.C. 254=37 Mad. 381; *Shamlal* v. *Banikamal,* (1912) 14 I.C. 19=208 P.W.R. 1912; *Asiatullah* v. *Saadatullah,* (1915) 26 I.C. 368 (Cal.).

[39] *Mulla Vittil Seeti* v. *Kunhi Pathumma,* (1913) 43 I.C. 31=40 Mad. 1040 (F.B.) (*per* Seshagiri Aiyar, J.).

[40] *Sharoop Dass Mondal* v. *Joggesour Roy,* (1899) 26 Cal. 564 (567) (F.B.); also see *Mahomed Wahif* v. *Mahomed Amir,* (1905) 32 Cal. 527 (532) and *Sankunni Menon* v. *Govinda Menon,* (1912) 37 Mad. 381.

[41] *Rai* v. *Sidakalli,* (1922) 65 I.C. 959 (Nag.); *Ramaseshayya* v. *T. Cotton Press,* (1924) 46 M.L.J. 563 s.c. on appeal (1925) 49 Mad. 468=50 M.L.J. 520 (F.B.); *Venkatachellam* v. *Narayana,* 26 I.C. 740=28 M.L.J. 140.

[42] *Kandaswamy Pillai* v. *Avyambal,* (1910) 7 I.C. 399=34 Mad. 167; *Basheshardas* v. *Diwan Chand,* 146 I.C. 939=1933 Lah. 615; *Balakrishnudu* v. *Narayanaswamy,* (1914) 22 I.C. 60=1914 M.W.N. 264;

> "it is open to question how far litigants should be encouraged to claim the benefit of the general Art. 120 by going out of their way to word their plaint so as to escape the application of another article (Art. 91); regard should undoubtedly be had to the essence of the suit rather than to the particular colouring sought to be put upon it by the plaintiff".[50]

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*Baijnath* v. *Ramadoss,* (1915) 26 I.C. 219 (220); *Gopalasami* v. *Nammalwar,* (1918) 48 I.C. 810=1919 M.W.N. 3; *Arunachellam* v. *Rajeswara,* (1925) 91 I.C. 338=1925 Mad. 1260; *Chiranjilal* v. *Shiblal,* (1926) 92 I.C. 994=1926 Lah. 242.

[43] *Govindasami* v. *The Municipal Council,* (1917) 42 I.C. 519=33 M.L.J. 577; *Lokenath Baidyadhur* v. *Johania Bibi,* (1911) 12 I.C. 305=14 C.L.J. 572; *Chatargun* v. *Shahzadi,* 1930 Oudh 395=6 Luck. 80=126 I.C. 682; *Mt. Babal Kumari* v. *Mulchand,* 152 I.C. 297=1934 Pat. 580.

[44] (1893) 21 Cal. 157=20 I.A. 155 (P.C.); Followed in *Ramdas* v. *Ajudhia Das,* (1921) 63 I.C. 685=14 S.L.R. 137; *Dhunraj* v. *Waru Bai,* (1915) 30 I.C. 960; also see *Janki Koer* v. *Domi Lal,* (1913) 18 C.W.N. 480 (483).

[45] *Ardikappa Chetty* v. *K. A. R. Kadappa,* (1916) 36 I.C. 418=9 Bur. L. T. 130.

[46] *Harnam Singh* v. *Kishen Chand,* (1919) 50 I.C. 6 (Punj.); *Udit Narain Singh* v. *Randhir Singh,* (1922) 69 I.C. 971=45 All. 169; *Narain Das* v. *The Municipal Committee, Delhi,* (1928) 108 I.C. 49 (Lah.).

[47] *Man Singh* v. *Ramnath,* (1923) 75 I.C. 922=1924 All. 828; *Chaturgun* v. *Shahzady,* 1930 Oudh 395=126 I.C. 682; *Sankunni* v. *Govinda,* 37 Mad. 381=14 I.C. 254; *Milkha Singh* v. *Fazi Din,* 145 I.C. 186=1933 Lah. 581; *Maung Po Nyun* v. *Ma Saw Tin,* 1931 Rang. 150.

[48] *Doraiswami* v. *Vaithilinga,* (1917) 41 I.C. 581 (Mad.).

[49] *Batul Begum* v. *Mansur Ali,* (1901) 24 All. 17=28 I.A. 248 (P.C.).

[50] *Qasim Beg* v. *Mt. Zia Beg,* (1915) 37 All. 640 (645)=29 I.C. 968 (*per* Piggot, J.).

**Other general articles.**

**1791.** There are **other general articles** (*e.g.*, Arts. 22, 36, 49, 61, 62, 65, 80, 115 and 144) and these must first be exhausted before a suit can be said to fall within the most general Art. 120, Limitation Act.[1] It was observed by Coutts-Trotter, C.J., in the **Madras Full Bench case** of *Ramaseshayya* v. *T. Cotton Press,*[2] that

> "the Indian Limitation Act is one of those unfortunate pieces of Indian Legislature which by trying to provide for everything conceivable very often ends by leaving out cases of the most glaring description".

After all, no Legislature and the ingenuity of no draftsman can provide in terms against all possible contingencies and that is the reason why residuary articles are inserted in the Limitation Act.[3] And, where the case is one for which no article specifically applicable is prescribed under the schedule, all we can do is to fall back on the omnibus Art. 120,[4] as has been noticed in the comments under various articles.

**Bengal Tenancy Act, S. 104 (H).**

**1792. SUITS UNDER SPECIAL OR LOCAL LAWS.**—(1) Art. 120 of Sch. I of the Limitation Act speaks of a suit for which no period of limitation is provided elsewhere in *this schedule.* If a suit falls under S. 104 (H) of the Bengal Tenancy Act, which provides for suits in Civil Courts by persons aggrieved by an entry of rent settled in a settlement rent-roll prepared under Ss. 104-A to 104-F, and incorporated in a record-of-rights finally published under S. 103-A, or by an omission to settle a rent for entry in such settlement roll, the period of limitation prescribed for such a suit is six months. Where no question as to entry of a rent settled or an omission to settle rent is concerned, the suit does not come under S. 104-H.[5] Where in a suit which purports to be under S. 104-H, and S. 111-A of the Bengal Tenancy Act, the reliefs claimed include relief falling under S. 104-A, it would be governed by special law of limitation provided by that section; but the **claim for other reliefs** which are **outside the scope of that section, and of the nature of declaratory reliefs** under S. 42 of the Specific Relief Act, as provided by the proviso to S. 111-A of the Bengal Tenancy Act, VIII of 1885, the period of limitation applicable is that provided by Art. 120 of Sch. I of the Limitation Act.[6] **The scheme** seems to be that matters brought at once (or within a strictly limited time) before the Revenue Officer are to be dealt with by him under the period provided in the Bengal Tenancy Act, while matters not so brought before the Revenue Officer are left to the ordinary law, and the Civil Courts.[7] Where the plaintiff complains that he has been **wrongly entered as a tenure-holder in the record-of-rights** prepared under S. 102, and wants a declaration that his status is not that of a tenure-holder, but is that of an occupancy raiyat, he claims to be in possession of such a right and the suit, therefore, comes under S. 111-A, which may be brought within six years.[8] A **cause of action for a declaratory suit under S. 111-B of Bengal Tenancy Act** arises on final publication of records-of-rights. But, as no suit under S. 111-B should be instituted within three months from the date of the certificate of final publication, the period of limitation is subsequently suspended for three months after the certificate is made.[9] Consequently, the plaintiffs are entitled to an extension of the period of limitation provided by Art. 120, Limitation Act, by three months under cl. (4), S. 111-B of the Bengal Tenancy Act.[10]

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[1] *See* Notes under Arts. 22, 36, 49, 61, 62, 65, 80, 115, *ante* and 144, *post.*

[2] 1926 Mad. 615 (618)=94 I.C. 515=49 Mad. 468=50 M.L.J. 520 (531)=1926 M.W.N. 450=24 L.W. 102 (F.B.).

[3] *Mulla Vittil Seeti* v. *Kunhi Pathumma,* (1913) 43 I.C. 31=40 Mad. 1040 (F.B.).

[4] *Rama Seshayya* v. *T. Cotton Press,* 1926 Mad. 615 (618)=94 I.C. 515=49 Mad. 468 (F.B.); also see *Rai* v. *Sidakalli,* (1922) 65 I.C. 959 (Nag.) and *Venkatachellam* v. *Narayana,* 26 I.C. 740 (Mad.).

[5] *Promodanath Roy* v. *Asir-ud-din,* (1911) 11 I.C. 262=15 C.W.N. 806; Approved in *Midnapore Zemindary Co.* v. *Secretary of State,* (1929) 56 I.A. 388=1929 P.C. 286=120 I.C. 56 (P.C.).

(2) Similarly, if the suit is brought under **municipal election rules** made in 1884, the special provision as to limitation made in those rules for a declaratory suit applies, but where the election is not held under the rules, the suit against validity of elections instituted in Civil Court would be governed by Art. 120 of the Limitation Act.[11]

(3) A suit by a Hindu to declare that a sale of ancestral land by his father does not bind him, has been held governed by Art. 120 of the Limitation Act, where both the alienation and the alienor's death occurred before the passing of the **Punjab Limitation** (Ancestral Land Alienation) **Act I of 1900.**[12]

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[6] *Rajani Kanta* v. *Secretary of State,* (1918) 47 I.C. 820=45 Cal. 645 (652).

[7] *Barhamdat* v. *Krishna Sahay,* (1913) 20 I.C. 910 (Cal.).

[8] *Promodanath Roy* v. *Asir-ud-din,* (1911) 11 I.C. 262=15 C.W.N. 806; Approved in *Midnapore Zemindary Co.* v. *Secretary of State,* (1929) 56 I.A. 388=1929 P.C. 286=120 I.C. 56 (P.C.).

[9] *Ashutosh Bhuiyan* v. *Radhikalal,* 1929 Cal. 481=56 Cal. 407=119 I.C. 121.

[10] *Ibid.,* 1929 Cal. 481 (482)=56 Cal. 407; Relied in *Jogendra Nath* v. *Baidyanath,* 1930 Cal. 767=130 I.C. 225=34 C.W.N. 621 (Limitation begins for a suit under S. 111-B, Bengal Tenancy Act, from date of final publication of record of rights); also see *Rajaninath* v. *Manaram,* 1919 Cal. 151=53 I.C. 968=23 C.W.N. 883 and *Proyat Kumar* v. *Balgobinda,* 1925 Cal. 518=86 I.C. 6=41 C.L.J. 31; cf. *Ahmed Hassein* v. *Digendra Narain,* 1935 Cal. 801=62 Cal. 969=61 C.L.J. 519.

[11] *Raghunandan Prasad* v. *Sheo Prasad,* (1913) 20 I.C. 490=35 All. 308.

[12] *Mangal Singh* v. *Mangal Singh,* (1916) 34 I.C. 253=15 P.W.R. 1916.

**1793. SUITS FOR ACCOUNTS.**—In dealing with the legislative changes in S. 10 of the Limitation Act (*vide* S. 351, *ante*), it has been pointed out that in view of the conflict of authority on the question of applicability of S. 10 of the Limitation Act, 1877, to suits for accounts between a *cestui que trust* and trustee, the present S. 10 of the Limitation Act, IX of 1908, introduces the words, *"or the proceeds thereof, or for an account of such property or proceeds"* after the words *"for the purpose* of following in his or their hands such property," and the second clause is a later addition to the section by the Indian Limitation (Amendment) Act I of 1929 which came into force only on 1st January, 1929.

**Of trust property.**

In *Baroda Prasad* v. *Gajendranath,*[13] it was held that S. 10 of Act XV of 1877 was limited to a suit for the purpose of following the trust property or the proceeds thereof, and that a suit for accounts, pure and simple, could not be treated as such suit. Similarly, a view was taken in some other cases, that a suit for account of the income and expenditure of the trust property was governed by Art. 120 of the Limitation Act.[14] But a different view was taken in some other cases that a suit against a trustee for the purpose of charging certain property with the trusts declared in respect of that property *and* for an account, is a suit to follow property, and as such, is not barred by any lapse of time.[15] Under the present Act, there is no longer any doubt that a suit for accounts in respect of trust property comes under S. 10 and there is no time bar to such a suit.[16] According to **Calcutta High Court**[17] and some **other High Courts,**[18] a *trustee de son tort* stands in the same position as an express trustee, and is liable to be sued as such. But this view is not shared by the **Allahabad**[19] and the **Lahore High Courts.**[20]

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[13] (1909) 9 C.L.J. 383=13 C.W.N. 557.

[14] *Saroda Pershad* v. *Brojonath,* (1880) 5 Cal. 910; *Advocate-General of Bombay* v. *Bai Punjabai,* (1894) 18 Bom. 551 (566, 567).

[15] *Hurro Coomaree* v. *Tarini Churn,* (1882) 8 Cal. 766; *Nistarini Dassi* v. *Nundo Lal Bose,* (1902) 30 Cal. 369 (384)=33 Cal. 180 (P.C.).

[16] *Dhanpat Singh* v. *Mohesh Nath,* (1920) 57 I.C. 805=24 C.W.N. 752; cf. *Ranga Pai* v. *Baba,* (1896) 20 Mad. 398 (402) (Question regarded as doubtful under Act XV of 1877).

[17] *Raja Peary Mohun* v. *Mandhar,* (1923) 74 I.C. 373=1924 Cal. 160; *Kshitish* v. *Radhika,* 35 Cal. 276; *Gopal Chandra* v. *Kartick,* 29 Cal. 716; *Sheo Shanker* v. *Ram,* 24 Cal. 77; also see *Dhanpat Singh* v. *Mohesh Nath,* (1920) 24 C.W.N. 752 (755)=57 I.C. 805.

[18] *Kuppan* v. *Munde Kothil,* (1912) 37 Mad. 373; *Khatry Saidi Begam* v. *Secretary of State,* (1925) 5 Pat. 539=94 I.C. 433 and *Moosabhai* v. *Yacoobhai,* (1904) 29 Bom. 227 (281).

[19] *Beharilal* v. *Shiv Narain,* (1924) 47 All. 17=1924 All. 884=22 A.L.J. 866.

[20] *Robson* v. *Administrator-General,* 1929 Lah. 753.

Section 10, however, is limited to cases where the property is vested in a trustee for a specific purpose, and when the trust is not for such specific purpose, Art. 120 will govern a suit for accounts.[21] In *Biswambar Halder* v. *Giribala Dasi*,[22] it was held that a suit for an account against a *karta* of a joint Hindu family does not come under S. 10 of the Limitation Act, but is governed as to limitation by Art. 120.

**1794. SUITS FOR INJUNCTION.**—Suits for injunction (except suits to restrain waste), and suits for the rectification of instruments have not been specially provided for. Examples of suits to which Art. 120 has been applied may be found in the following

*Illustrative cases.*

**Suits for perpetual injunction.**

(1) A suit for perpetual injunction, to restrain the defendant from preventing the plaintiff from entering a certain house, was held barred under Art. 120, where the defendant had been in exclusive possession for more than six years before suit.[23] A suit for the issue of a perpetual injunction restraining defendants from discharging rainwater on to the roof of the plaintiff's shop through a parnala[24]; a suit for perpetual injunction directing defendants to remove the chhappars, or thatched sheds erected in front of their house, and to restore the courtyard in its former condition[25]; and a suit for perpetual injunction directing defendant to remove an encroachment on common land, being essentially one for the issue of an injunction is governed by Art. 120 of the Limitation Act.[26]

(2) In *Mastan Singh* v. *Santa Singh*,[27] a Full Bench of the Lahore High Court has held that Art. 32 of the Limitation Act is not applicable to cases in which the parties are admittedly co-owners of a plot and had a common right to use it for a specific purpose, but which one of them has taken exclusive possession of, and diverted it to an unauthorized use. This has been followed in *Qarun* v. *Dewa Singh*,[28] where the plaintiff and defendants were some of the owners of the village shamilat on which the defendant had built certain construction, and it was held that plaintiff's suit for permanent injunction to have the construction removed was governed by Art. 120, and not by Art. 32.

(3) Similarly, in *Musaly* v. *Lakshmayya*,[29] it was ruled that a suit by one co-owner for an injunction restraining the other co-owners from obstructing a co-owner is governed by Art. 120, and not by Art. 32, Limitation Act.

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[21] *Annamalai Chettiar* v. *Muthukaruppan*, (1930) 58 I.A. 1=1931 P.C. 9=35 C.W.N. 145=54 C.L.J. 175 (P.C.).

[22] (1920) 58 I.C. 877=32 C.L.J. 25=25 C.W.N. 356.

[23] *Kanakasabai* v. *Muthu*, (1890) 13 Mad. 445.

[24] *Nur Mohammad* v. *Gauri Shanker*, (1920) 56 I.C. 1003=2 L.L.J. 463.

[25] *Lal Singh* v. *Hira Singh*, (1921) 60 I.C. 20=1921 Lah. 242=2 L.L.J. 463.

[26] *Chandu* v. *Gajju*, (1925) 88 I.C. 176=1925 Lah. 455=7 L.L.J. 228=26 P.L.R. 283; also see *Ganda Singh* v. *Nathu Ram*, 13 I.C. 661=151 P.L.R. 1912=77 P.W.R. 1912 and *Achar Singh* v. *Badhawa Singh*, 15 I.C. 285=124 P.R. 1912.

[27] 1933 Lah. 705=14 Lah. 267=145 I.C. 553 (F.B.).

[28] 1934 Lah. 701=35 P.L.R. 472.

[29] (1908) 18 M.L.J. 602.

(4) In *Gurdit Singh* v. *Hari Singh*,[30] the encroachment was on the public road; and Art. 120 was applied to a suit by a proprietor against another proprietor who had erected tharas on the village abadi.

(5) Where the disputed property was a public thoroughfare, and the plaintiffs were proprietors and the defendants occupancy tenants in the village, both of whom had however a common right to use the thoroughfare, Art. 120, and not Art. 32, was applied as the defendants could pass over the land merely as individuals or members of the community and could not be said to have a specific right of any kind peculiar to themselves.[31]

**Suits for mandatory injunction.**

(6) A suit for an injunction against the defendants directing them to close up the windows which they had opened in the joint wall, and for permission to the plaintiffs to do so at the defendants' costs; and to restrain the defendants from making any new openings, etc., in the said common wall, etc.[32]; or, a suit to remove the staircase which overhung the land in dispute[33]; or, a suit for removal of certain beams placed by the defendant on plaintiff's wall, comes within Art. 120, Limitation Act.[34]

(7) A suit by a landlord against his occupancy tenant for the demolition of certain constructions built by the latter on his occupancy lands without the permission of the former, and for an injunction is governed by Art. 120, Limitation Act.[35]

**S. 42 of Specific Relief Act.**

## 1795. DECLARATORY SUITS.—

Section 42 of the Specific Relief Act I of 1877 provides that

> "Any person entitled to any legal character, or to any right as to any property may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." . . . . "Provided, that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title omits to do so."

This section does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any *legal character* or to any *right as to any property*"; and, even then the Court has a discretion to grant this relief or not.[36] Provision has been made in the Limitation Act specially for **certain suits of a**

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[30] 1928 Lah. 792=110 I.C. 517.

[31] *Mian Pirthi* v. *Hans Raj*, 1928 Lah. 794=112 I.C. 381; cf. *Nand Ram* v. *Jaichand*, 1929 Lah. 186=112 I.C. 844 (Where the defendants had a real right in the common burial ground).

[32] *Imambai Kamruddin* v. *Rahimbai Usmanbai*, (1925) 87 I.C. 977 =1925 Bom. 373=49 Bom. 586=27 Bom. L. R. 503.

[33] *Hariram Kisniram* v. *Shivbakas*, (1918) 45 I.C. 592=42 Bom. 333=20 Bom. L. R. 327.

[34] *Mt. Kokla Kumar* v. *Kalian Mal*, (1923) 76 I.C. 585=1923 All. 452.

[35] *Piyarelal* v. *Bed Ram*, (1924) 78 I.C. 849=1924 All. 814.

[36] *Sreenarattan Mitter* v. *Kishensoondary*, (1873) L.R.I.A. Sup. 149 (162) (P.C.); also see *Sheoparsan* v. *Ramanudan*, (1916) 43 I.A. 91=43 Cal. 694 (P.C.) and *Joseph* v. *Calcutta Corporation*, (1916) 43 I.A. 243 (248) (P.C.).

**declaratory nature** in its Arts. 92, 93, 118, 119, 125 and 129. But, as a general rule, the suits for a declaration of the plaintiff's title, or right to property are governed by Art. 120 of the Limitation Act, which provides for a period of six years from the date of accrual of the cause of action or right to sue.[37]

**Declaration of title to immoveable property.**

1796. It was held in an early Calcutta case that the suit for a declaration of title to immoveable property is not subject to any limitation.[38] Another view held at one time was that twelve years' period was applicable to a suit for declaration of title to land as for a possessory suit.[39] This view is untenable, and it is now fully recognized that there is the widest possible difference between possessory suits falling under Art. 144, of the Limitation Act, and claims declaratory in their nature falling under S. 42 of the Specific Relief Act, which are governed by Art. 120 of the Limitation Act.[40] There is a common consensus of opinion that Art. 120 applies to all suits of a declaratory nature, where no consequential relief is sought.[41] The period of limitation for a suit for declaration, or for a declaration and injunction, is six years from the date of the invasion of plaintiff's right, each invasion giving a fresh cause of action, as long as the title of the plaintiff is not lost by adverse possession of the defendant.[42]

### 1796-A. ILLUSTRATIVE CASES.—

**Declaratory suit respecting grant of mineral rights.**

(1) A possessory suit is governed by Art. 144, but a declaratory suit respecting rights in immoveable property, *e.g.*, grant of mineral rights under a deed of putni settlement falls under Art. 120.[43]

**Declaration of right to actual possession.**

(2) A suit for declaration of right to, and of actual possession in immoveable property is governed by the limitation prescribed by Art. 120.[44] A suit for a decree declaring title to the land of which plaintiff alleged to have been put in actual possession of a share

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[37] *See* Ss. 1854-1858: **"Starting point of limitation".**

[38] *Pureejan Khatoon* v. *Bykunt,* (1867) 7 W.R. 96.

[39] *Mt. Doolhun* v. *Lall Beharee,* (1872) 19 W.R. 32.

[40] *See* Notes under Art. 144; also see *Satya Niranjan* v. *Ramlal,* (1924) 52 I.A. 109=4 Pat. 244=1925 P.C. 42 (P.C.).

[41] *Aftab Ali Khan* v. *Akbar Ali,* 1929 All. 529=121 I.C. 209=1929 A.L.J. 794; cf. *Moti Ram* v. *Devidas,* 1935 Pesh. 95=157 I.C. 345 (Consequential relief in the form of an injunction); also see *Mohabharat* v. *Abdul Hamid,* (1904) 1 C.L.J. 73; *Durga* v. *Haider Ali,* 7 All. 167; *Bhikaji* v. *Bandu,* 19 Bom. 43; *Tarknath Roy* v. *Syama Charan,* (1916) 36 I.C. 292; *Joy Narain Sen* v. *Suchitra,* (1922) 65 I.C. 8=1922 Cal. 8 and *Kalidebya* v. *Bhagaban Nanda,* 1 I.C. 810 (Cal.).

[42] *Muktakeshi Patrani* v. *Midnapore Zemindary Company,* 13 Pat. 517 =1934 Pat. 309; also see **"Starting point of limitation",** Ss. 1854-1858, *post.*

[43] *Satyanirunjan* v. *Ramlal,* (1925) 52 I.A. 209=4 Pat. 244=86 I.C. 289=1925 P.C. 42=6 P.L.T. 42 (P.C.).

[44] *Francis Legge* v. *Rambaran Singh,* (1897) 20 All. 35 (F.B.).

after the purchase is not a suit for specific performance.[45]

(3) Where *A* mortgaged plaintiff's property to *B*, and *B*, in execution of a decree or the mortgage bought it himself, a suit by the plaintiff in possession, against *A*, and *B*, to declare that plaintiff's right and possession were not affected by the sale, and that the defendant had not acquired any valid right thereunder, was held governed by Art. 120.[46]

**Declaration of title to property sold in execution.**

(4) A suit by reversioner for a declaration of his title to property sold in execution of a decree against a Hindu widow falls under Art. 120.[47]

**Declaration against Government.**

(5) This article has been applied to a suit against the Secretary of State for a declaration of his rights against the Government to have certain remissions made in the sum to which he was annually assessed.[48]

(6) A suit to set aside Government order excluding trees from *patta* was held to be governed by this article.[49]

(7) A suit for declaration of right regarding alluvial land, alleging that the order of the collector disposing of suit lands in favour of the second defendant was null and void, being really a suit for declaration and injunction against the Government that the grant of alluvial land should have been made to the plaintiffs under S. 63 of the Bombay Land Revenue Code, was held governed by Art. 120, and not by Art. 144 of the Limitation Act.[50]

**Declaration by co-sharer in possession.**

(8) A suit for declaration by a co-sharer in possession, must be brought under Art. 120, within six years from an attempt to oust him from possession.[1] Where the plaintiff is in joint possession of immoveable property, whether such possession be actual possession of his share of the whole or actual possession of a part coupled with constructive possession of the remainder, he is entitled to maintain a suit for declaratory relief with a view to remove a cloud on his title.[2]

**Declaration of title, and confirmation of possession.**

(9) A suit for declaration of title and confirmation of possession, where the plaintiff does not allege that he has been in any way disturbed in his possession by the defendant, the only cause of action relied on being an incorrect entry in the records, is governed by Art. 120, and not by Art. 144, Limitation Act.[3] But, where the cause of action arose when the defendants attempted to disturb the possession of the plaintiffs, the suit brought within 6 years of the cause of

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[45] *Futteh Singh* v. *Kharak Singh*, 88 P.R. 1882.

[46] *Mohabharat* v. *Abdul Hamid*, (1904) 1 C.L.J. 73.

[47] *Chhaganram* v. *Bai Motigavri*, (1890) 14 Bom. 512 (514).

[48] *Balakrishna* v. *The Secretary of State*, (1892) 16 Mad. 294=3 M.L.J. 98.

[49] *Kodoth Ambu Nair* v. *Secretary of State*, (1924) 80 I.C. 835=1924 P.C. 150=51 I.A. 257=47 Mad. 572=47 M.L.J. 35 (P.C.).

[50] *Damodar Narayan* v. *Secretary of State*, 55 Bom. 447=134 I.C. 716 =1931 Bom. 369=33 Bom.L.R. 772.

[1] *Paras Ram* v. *Chetandas*, 32 P.L.R. 731.

[2] *Joynarain Sen* v. *Suchitra*, (1922) 65 I.C. 8=1922 Cal. 8.

[3] *Abdul Gafur* v. *Abdul Jabar*, (1926) 97 I.C. 635=1927 Cal. 30.

action was within time, although the entry in records of rights was made more than 6 years of the suit.[4]

**Declaration of right as purchasers.**

(10) Article 120 has been applied to a suit for declaration of title to land purchased in auction against the defendant-mortgagee from judgment-debtor.[5] A suit by the purchasers of certain land who have obtained possession of the lands, for a declaration of their right to have the land registered in their name in the revenue records is governed by Art. 120.[6]

**Declaration of title to share of shamilat.**

(11) A suit for declaration of title to proportionate share of *shamilat* after rejection of application for partition is governed by Art. 120, Limitation Act.[7]

**Order under Land Registration Act.**

(12) An order under Land Registration Act refusing to register the applicant's name does not amount to a dispossession of the applicant and delivery of possession to the opposite party, when, therefore, the applicant *continues in possession,* no suit for recovery of possession lies at his instance, and a suit for mere declaration of title to property in one's possession is governed by Art. 120.[8] A prayer to set aside the order of revenue officer was treated as a surplusage where the Civil Court had no power to set aside an order passed under the Land Registration Act: and the suit for declaration was held governed by Art. 120.[9]

**Declaration that property not liable to sale in execution.**

(13) A suit for declaration that property is not liable to sale in execution of a mortgage-decree is governed by Art. 120, the plaintiff's cause of action accruing on the date on which attempt was made by the defendants to sell the property.[10]

**Declaration that plaintiffs are mutwallis.**

(14) A suit for a declaration that the plaintiffs are the *Mutwallis* of the trust property or a suit for possession of the office of *mutwalli* are both governed by Art. 120.[11] A suit for the removal of the defendant from the offices of *Imam and Mutwalli* in connection with a certain *Mosque,* on the ground of a change in his religious views in conflict with the beliefs of the founders and the congregation did not fall within the purview of Art. 142 or 144 but must be governed by Art. 120, Limitation Act.[12]

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[4] *Saraj Kumar Acharji* v. *Umedali,* (1921) 63 I.C. 954=25 C.W.N. 1022=35 C.L.J. 19 (Suit for recovery of possession on a declaration of title is governed by 12 years' rule).

[5] *Pachumuthu* v. *Chinnappan,* (1887) 10 Mad. 213 (Suit for declaration that mortgage was fraudulent, and without consideration).

[6] *Bhikaji* v. *Pandu,* 19 Bom. 43 (45); also see *Virasami* v. *Ramdas,* 15 Mad. 350 (Suit for mutation of names in revenue register).

[7] *Kalu Khan* v. *Umda,* 47 P.R. 1916.

[8] *Shyamanand* v. *Raj Narain,* 4 C.L.J. 568=11 C.W.N. 186; *Kali Debya* v. *Bhagoban,* 1 I.C. 810.

[9] *Luchman* v. *Kanchun,* 10 Cal. 525.

[10] *Mt. Imambandi* v. *Puran Prasad,* (1919) 52 I.C. 646=17 A.L.J. 973.

[11] *Abdul Alim* v. *Abdul Hamid,* 1930 All. 866=129 I.C. 375.

[12] *Yadali* v. *Mubarik Ali,* 53 P.R. 1909 (Starting point of limitation dates from such changes taking place for first time).

**Declaration that defendants were benamidars.**

(15) A suit for a declaration that the defendants had no interest as lessees of the land, but were only benamidars for the plaintiff falls under Art. 120, and not Art. 91, Limitation Act.[13]

**Suit by the beneficiary.**

(16) A suit by the beneficiary of a trust to call upon the trustee to convey to him is a right governed by Art. 120 and not Art. 144. It was pointed out by the Judicial Committee that the Indian Law makes no distinction between legal and equitable estates and the owner in case of trust property is the trustee, not the beneficiary.[14]

**Declaration of title to maintenance, under family custom.**

(17) Where a junior member of a family governed by rules of primogeniture brought a suit for a plot of land in lieu of maintenance on the basis of a family custom, it was held that Art. 129 was inapplicable, being restricted to a suit for maintenance in which the right is based on Hindu Law, and that the suit was governed by Art. 120, or Art. 144, according as the suit was for a declaration of right or for possession.[15]

**Declaration of invalidity of alienations.**

**1797.** A suit for a declaration of the invalidity of an alienation, and an injunction, is governed by Art. 120.[16]

**(1) Suit to set aside an instrument.**

**1798.** In *Basantmal* v. *Chidammilal*,[17] it was held that where the plaintiff does not want to have the instrument itself cancelled, or set aside, but his only interest is to have the relation of the defendant defined, the suit is virtually for a declaration governed by Art. 120, and not by Art. 91 of the Limitation Act. This was a suit for declaration that the defendant whose name appeared as a lessee in a lease had no interest under the lease but that his name appeared as benamidar for the plaintiff. Art. 91 does not apply where the plaintiff is not suing to cancel or set aside a sale of joint family property executed by other members of his family, but for a declaration that the sale-deed is void *ab initio*. The article applicable is Art. 120, and the period of six years begins from the time when the plaintiff came to know of sale-deed.[18] Where the plaintiff alleging that he was the proprietor of certain land, brought a suit against the defendant No. 2, who had wrongfully and fraudulently mortgaged it to Defendant No. 1: and the plaintiff claimed that the mortgage-deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings, it was held that the suit was not strictly one for the cancelment or setting aside of an instrument to which Art. 91 would apply, but rather one for a declaratory decree.[19]

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[13] *Basant* v. *Chiddammi*, 35 All. 149=18 I.C. 698=11 A.L.J. 106.

[14] *Rani Chatru Kumari Devi* v. *Mohan Bikram Shah*, (1931) 58 I.A. 279=10 Pat. 851=1931 P.C. 196=61 M.L.J. 78 (P.C.).

[15] *Parshotamsingh* v. *Balwantsingh*, 1929 Lah. 872=121 I.C. 428 =11 Lah. 99=31 P.L.R. 361.

[16] *Dattatraya Pandurang* v. *Lakshman Mahadev*, 33 Bom.L.R. 1418.

[17] (1913) 35 All. 149.

[18] *Dwarka Pershad* v. *Ramdebi*, (1924) 77 I.C. 329=1924 Oudh 120 (2)=27 O.C. 140=10 O.L.J. 360; also see *Din Dyal* v. *Harnarain*, 16 All. 73 (Suit by a member of joint family for maintenance of possession by cancelment of sale by another co-partner so far as it affects the plaintiff, held governed by Art. 120).

**(2) Suit by a creditor.**

**1799.** A suit by a creditor to avoid an alienation by his debtor as being fraudulent, is not governed by Art. 91 or 95, but falls under Art. 120 of the Limitation Act, the cause of action accruing from the date of plaintiff's knowledge of the alienation affecting his interests.[20] A suit by the plaintiff to follow the estate of their debor in the hands of the defendant and for a declaration that a mortgage executed by the debtor in favour of the defendant is void as against the creditors of the debtor falls under Art. 120.[21]

**(3) Suit for cancellation of a will.**

**1800.** Where the plaintiff was in possession of the land which was the subject of alienation by will in favour of the defendant followed by a mutation, it was held that the suit fell under S. 45, Land Revenue Act, and was governed by Art. 120, Limitation Act, and not by Sch. I, Art. 1 of Punjab Limitation Act.[22] Art. 120, Limitation Act, governs a suit by a landlord to avoid a transfer of occupancy right by a tenant, by will, and the period begins to run from the date of the testator's death.[23] Art. 91 does not appear to have any application to the case of a will, and a suit by testator's son contesting its validity was held to be governed by Art. 120, Limitation Act.[24] Where a suit is filed by certain reversioners for recovery of possession of property on the ground that a will executed by the deceased was invalid, the suit falls under Art. 120, Limitation Act, the starting point for period of limitation being the date when they came to know of the will.[25]

**(4) Suit to set aside sales.**

**1801.** Article 91 does not apply where the plaintiff is not suing to cancel or set aside a sale of joint family property executed by other members of his family, but for a declaration that the sale-deed is void *ab initio*. The period of six years under Art. 120, begins from the time when the plaintiff came to know of the sale-deed.[26] An unauthorised sale of minor's property by a guardian appointed under the Bengal Minors' Act, may be contested by the reversioners not entitled to immediate possession, and their suit would be governed by Art. 120, Limitation Act; the right to sue, however, does not accrue to the entire body of reversioners at the same time, but accrues to each reversioner separately on his birth.[27] In *Nagendra Nath Ghose* v. *Mohini Mohun Bose*,[28] it was held that Art. 120, and not Art. 91, applies to a suit to have a sale by guardian of some immoveable property belonging to a minor without the sanction of the Court set aside at the instance of a purchaser with the permission of the Court. Where the suit is to set aside a sale which is void *ab initio*, and not only voidable, Art. 91 will not apply, and the suit will be governed by Art. 120, Limitation Act.[29]

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[19] *Sabha Pandey* v. *Sahodra Bibi,* (1883) 5 All. 322.

[20] *Venkateswara* v. *Somasundaram,* 44 I.C. 551=7 L.W. 280=1918 M.W.N. 244; *Narasimham* v. *Narayana,* 1926 Mad. 66=92 I.C. 405; also see *Mi San Ma Khaung* v. *Shwe Ba,* 1923 Rang. 82=1 Bur.L.J. 106; *Parkash Narain* v. *Birendra Bikram,* 132 I.C. 51=8 O.W.N. 593=1931 Oudh 333=7 Luck. 131.

[21] *Greender* v. *Macintosh,* 4 Cal. 897.

[22] *Dalip Singh* v. *Mt. Tabi,* 15 Lah. 469=152 I.C. 100=36 P.L.R. 357=1934 Lah. 134.

[23] *Saparas* v. *Mt. Amiran,* 13 P.L.T. 40.

[24] *Sajid* v. *Ibadali,* (1895) 23 Cal. 1=22 I.A. 171 (P.C.); Followed in *Firoz* v. *Sultan,* 96 I.C. 835=1926 Lah. 635.

[25] *Jahana* v. *Mt. Hafizan,* I.R. 1932 Lah. 647.

**(5) Declaration of invalidity of alienation of trust-property.**

**1802.** A suit by the heir of the founder of a *wakf* for a declaration that an alienation of the *wakf* properties by the *mutwalli* is void, brought during the lifetime of the alienor, is governed by Art. 120, the cause of action starting from the date of the invalid transfer.[30] A suit for a declaration of the invalidity of alienation of trust property is governed by Art. 120, and not by Art. 134, which is restricted to a suit for recovery of possession of trust property.[31] A suit by worshippers of a temple for a declaration that a mortgage executed by the trustee of the temple properties is not binding on the temple is one governed by Art. 120, and time begins to run from the date of the fraudulent breach of trust becoming known to the plaintiffs.[32]

**(6) Suit by reversioner to have alienation by a female declared void.**

**1803.** A suit during the widow's lifetime, by a reversionary heir other than the presumptive heir to declare an alienation by a widow invalid is governed by Art. 120, and not by Art. 125, the latter article being restricted strictly to the nearest reversioner.[33] A suit for declaration in respect of a widow's alienation by remote reversioners will be governed by Art. 120: but the case would fall under Art. 125, where the plaintiffs are immediate reversioners. A suit for declaration by daughter's son of a Hindu in the lifetime of their mother is governed by Art. 120 of the Limitation Act, and not by Art. 125.[34] The period of limitation commences to run against all the reversioners from the date of the alienation[35]; and if a reversioner who is competent to contest an alienation by a widow, allows his suit to become time-barred, the remote reversioners, even though born after 12 years of the alienation, cannot invoke the aid of Art. 120, in their favour.[36] A suit for a declaration of the invalidity of a gift or mortgage executed by a widow in favour of her daughter, and the son of her daughter's brother-in-law was held governed by Art. 120, cause of action arising from the date of the alienations.[37] A suit by a son for a declaration that a sale by his father, and another sale by the widow of his father's brother, will not affect his reversionary interests is governed by Art. 120, and not by Art. 125 or 126, which apply only to a suit by the next reversioner.[38]

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[26] *Dwarka Pershad* v. *Ramdebi*, 1924 Oudh 120 (2)=10 O.L.J. 360 =27 O.C. 140=77 I.C. 329; also see *Din Dyal* v. *Harnarain*, 16 All. 73.

[27] *Das Ram Choudhry* v. *Tirath Nath Das*, (1924) 81 I.C. 522=1924 Cal. 481=51 Cal. 101.

[28] (1930) 34 C.W.N. 948=58 Cal. 128=1931 Cal. 131.

[29] *Shankarbhai* v. *Baisahib*, (1930) 54 Bom. 837=1930 Bom. 545 (*See* notes under Art. 91).

[30] *Muhd. Fahim Ul Haq* v. *Jagat Ballabh*, 2 Pat. 391=74 I.C. 403= 1923 Pat. 705=4 P.L.T. 675.

[31] *Venkatachella* v. *Collector*, 38 Mad. 1064 (1072).

[32] *Paruri Viswanadhan* v. *Pendela Narayana*, 112 I.C. 22=1928 Mad. 837=1928 M.W.N. 415; Relied on 30 I.C. 669=29 M.L.J. 574 and 22 I.C. 883=1914 M.W.N. 197.

[33] *Ramna* v. *Ananta*, 18 I.C. 710=24 M.L.J. 183.

**(7) Suit by reversioners of a male proprietor.**

**1804.** A suit by a reversionary heir, in the Punjab, for a declaration that a mortgage by the last owner would not bind the estate as against the reversioners, is not for interest capable of possession, but for a presumptive title to the property in case plaintiff survives the mortgagor, and can be brought only under Art. 120 of the Limitation Act.[39] Similarly, Art. 120, applies to a suit by the reversionary heirs to a *stanom* in Malabar for a declaration that a *kanom* executed by the present holder of the *stanom* in favour of the defendant is not binding on them, or on the *stanom*.[40] Likewise, a suit for a declaration that an alienation made by the *karnavan* of a tarwad property is not binding on the tarwad is governed by Art. 120, limitation starting from the date of the transfer.[41]

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[34] *Mt. Thakuri* v. *Mt. Ganashi,* (1916) 33 I.C. 161; *Suman Singh* v. *Uttam Chand,* (1920) 1 Lah. 69; also see *Abinash Chandra* v. *Harinath,* (1904) 32 Cal. 62; *Narayana* v. *Rama,* (1912) 38 Mad. 396; *Venkatarao* v. *Tulja Ram,* (1917) 38 I.C. 270 (Mad.); *Mt. Bal Kaur* v. *Mt. Har Kaur,* (1927) 108 I.C. 184=1928 Lah. 242.

[35] *Kunwar Bahadur* v. *Bindraban,* (1914) 37 All. 195.

[36] *Chall Gundla* v. *Madala Gopala,* (1918) 41 Mad. 659.

[37] *Jagrani* v. *Gaya,* 1933 All. 856=146 I.C. 977=1933 A.L.J. 1305.

[38] *Dev Raj* v. *Shivram,* (1914) 25 I.C. 463 (Pun.).

[39] *Chait Singh* v. *Jiwan Singh,* 111 P.R. 1884.

[40] *Purakan* v. *Parvathi,* (1892) 16 Mad. 138.

[41] *Ottapurakal* v. *Pallikal,* 33 Mad. 31; also see *Prasanna Venkatachella* v. *Collector of Trichinopoly,* (1916) 33 I.C. 45 (Mad.) (Suit for declaration that alienation is invalid falls under Art. 120, and the right to sue accrues at the completion of the document, not when the plaintiff obtains knowledge of the alienation).

**(8) Suit to avoid sale of ancestral property by Hindu father.**

**1805.** A suit by a Hindu son to declare that a sale of ancestral land by his father does not bind him is governed by Art. 120, Limitation Act, where both the alienation, and the alienor's death occurred before the passing of the Punjab Limitation (Ancestral Land Alienation) Act I of 1900.[42] Article 126 of Sch. I of the Limitation Act, is not applicable to a suit by a Hindu to set aside his father's alienation of ancestral property where the alienee never gets possession of the property under the alienation. In such a case the right of the son amounts merely to obtaining a declaration that the deed is invalid, and the suit will be governed by Art. 120.[43] Where the sons sued to set aside certain alienations made by a Hindu father relating to joint family property, it was held that the suit was governed by Art. 120, and not by Art. 126 of the Limitation Act.[44] A son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession.[45]

**(9) Declaration as to erroneous entry in Revenue Records.**

**1806.** A suit for a declaration that the entry in Record of Rights that a person is a tenure-holder is erroneous, and that he should be declared a raiyat, is within the proviso to S. 111-A, Bengal Tenancy Act, and is governed by Art. 120, Limitation Act.[46] The **Punjab Chief Court** held in two early cases, under Act XXXII of 1871, when the Civil Courts had jurisdiction in respect of suit for the correction of a settlement entry, that the plaintiff was entitled to a declaration of his proprietary right even if his right to demand a correction of the record was lost by lapse of time. Article 96 was not applied to such suits.[47] In *Natha Singh* v. *Sadiq Ali*,[48] where plaintiffs brought a suit against defendants for a declaration of proprietary right of certain land of which plaintiffs alleged themselves to be in possession, but which appeared in the revenue papers as the property of the defendants, it was held that the cause of action on which the plaintiffs sued was not the entry in revenue papers, that being not the act of defendants, but of a third person, *viz.*, the revenue authorities, and the plaintiff's cause of action with reference to S. 42 of the Specific Relief Act, and S. 45 of the Punjab Land Revenue Act, was the defendants taking advantage of the entry to oust plaintiffs from the land, and they would be entitled to a decree, if they could prove their allegations. A plaintiff is not bound to bring a declaratory suit at the first denial by defendant of plaintiff's title on the strength of revenue entries in the defendant's favour; but every fresh invasion of plaintiff's title gives him a fresh cause of action even if the right to demand correction of revenue entries is lost by limitation.[49] The cause of action for a *declaration* that the rent payable by the defendant is higher than what appears on the record of right is not a continuing cause of action, as the right for a declaration arose when the contrary assertion was first made, and plaintiffs had six years from the publication of the record-of-rights.[50] In *Profula Chandra* v. *Kshetra Lal,*[1] the plaintiffs sued for a declaration that certain lands were held by them rent-free under the defendant. It was alleged that the defendant landlord wrongfully got the lands recorded as liable to pay rent, and then fraudulently got rent assessed under S. 105, Bengal Tenancy Act. It was held that the suit was governed by Art. 120 and not by Art. 142 or 144. A suit for ejectment on the ground that the defendant was a tenant-at-will, cannot be regarded as a suit for correcting the Record-of-Rights, and may be brought after six years of the final publication of rights.[2] A suit for a declaration of title to certain land, for the correction of certain entries in a Record-of-Rights was held governed by Art. 120 of the Limitation Act, and the period of limitation commenced to run from the date of publication of record-of-rights.[3] Where in a suit for declaration of title and confirmation of possession, the plaintiff does not allege that his possession has been disturbed or threatened by the defendant, and the cause of action was for declaration that the entry into record-of-right was erroneous, Art. 120, and not Art. 144 of the Limitation Act applies.[4] A suit for the cancellation or amendment of certain entries made in the record-of-rights is not for setting aside any act or order of a Government

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[42] *Mangalsingh* v. *Mangalsingh*, (1916) 34 I.C. 253 (Pun.).

[43] *Bindeshri Upadhya* v. *Sital*, (1927) 106 I.C. 377=1927 All. 702=25 A.L.J. 734; Relied on *Murajali* v. *Ramaswami*, 45 I.C. 867=41 Mad. 650=34 M.L.J. 528=1918 M.W.N. 448.

[44] *Gobind Ram* v. *Gopichand*, 150 I.C. 963=1934 Lah. 397=36 P.L.R. 214.

[45] *Bindeshri Upadhya* v. *Sital*, (1927) 106 I.C. 377=1927 All. 702=25 A.L.J. 734.

[46] *Midnapore Zemindary Company* v. *Secretary of State*, 1929 P.C. 286=56 I.A. 388=47 M.L.J. 35 (P.C.); also see *Promoda Nath Roy* v. *Asiruddin Mandal*, (1911) 11 I.C. 262 (Cal.).

[47] *Taja* v. *Gulam*, (1879) 35 P.R. 1880 and *Nathu* v. *Buta*, (1881) 27 P.R. 1881.

[48] (1900) 20 P.R. 1900.

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[49] *Hakim Singh* v. *Waryaman,* 140 P.R. 1907=187 P.W.R. 1907; *Khem Singh* v. *Kesar Singh,* 7 I.C. 528=88 P.W.R. 1910=122 P.L.R. 1910; *Jahana* v. *Wali,* 53 I.C. 595=98 P.R. 1919; *Muhammad Hanif* v. *Ratan Chand,* (1922) 3 Lah. 43=67 I.C. 990; *Gokal Chand* v. *Hukam Chand,* (1918) 44 I.C. 912=72 P.L.R. 1918=73 P.W.R. 1918; also see *Bhikham Singh* v. *Bharat Indu,* (1927) 100 I.C. 45=1927 All. 296; Relied on *Sheopher Singh* v. *Deo Narain,* 17 I.C. 675=10 A.L.J. 413 and *Kali Prasad* v. *Harbans,* 50 I.C. 767=17 A.L.J. 588 (Cause of action on title denied in revenue proceedings).

[50] *Mohamed Mehdi Hasan* v. *Phul Kuar,* (1910) 5 I.C. 115 (Cal.).

[1] 1929 Cal. 417=49 C.L.J. 281.

[2] *Minai Naik* v. *Banchanidhi Sahu,* (1911) 9 I.C. 804 (2) (Cal.).

[3] *Jagat Narain Singh* v. *Udit Narain Singh,* (1913) 20 I.C. 262 (Cal.).

[4] *Abdul Gafur* v. *Abdul Jabbar,* 1927 Cal. 30=97 I.C. 635.

Officer, and does not fall within Art. 14 of the Limitation Act, but falls within Art. 120.[5] A suit under S. 83 of the Central Provinces Land Revenue Act is in the nature of a declaratory suit that an entry is erroneous,[6] according to Calcutta High Court, but Nagpur takes a different view.[7]

**(10) Declaratory suit re. attachment by Magistrate.**

**1807.** A suit for declaration of title to land attached, by a Magistrate, under S. 146, Criminal Procedure Code, is governed by Art. 120, and not by Art. 142 or 144 of the Limitation Act.[8] An order made under S. 146, Criminal Procedure Code is not an order respecting the possession of such property, because an order of attachment may be passed either when the Magistrate decides that none of the parties is in possession, or when he is unable to decide which of them is in possession.[9] When property is attached under S. 146, Criminal Procedure Code, it passes into legal custody for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrongdoer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revives in the eye of the law and the **constructive possession** of the land is thereafter, if anywhere, **in the true owner.**[10] Where in a proceeding under S. 145, Criminal Procedure Code, the land in dispute is attached by the Magistrate under S. 146, Criminal Procedure Code and a Receiver is appointed in respect of it, the parties being referred to a Civil Court for the determination of their rights, a suit subsequently brought by the plaintiff for a declaration that he was the owner of the land, falls under Art. 120 of the Limitation Act, and the right to sue accrues when the attachment is made, and not by any wrongful act of the defendant.[11] Consequently, that after the date of attachment by the Magistrate no *fresh* period of limitation began to run under S. 23, Limitation Act, there being no *continuing wrong* in such a case.[12] Case-law has been discussed in the Calcutta case of *Abinash Chandra* v. *Tarini Charan,*[13] under S. 145 (4), Criminal Procedure Code, showing that according to authorities the property passes into legal custody of Magistrate on attachment under S. 146, Criminal Procedure Code for the benefit of the rightful owner, and that the attachment does not amount to either dispossession of the owner or the discontinuance of his possession: but,

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[5] *Dasarathi Panda* v. *Satyabadi Ganutia,* (1912) 14 I.C. 50 (Cal.) and *Naboghan Badhai* v. *Raghu Nath,* (1915) 30 I.C. 61 (Cal.).

[6] *Nabogan Badhai* v. *Raghunath,* (1915) 30 I.C. 61 (Cal.).

[7] *Onkarlal* v. *Shaligram,* (1922) 65 I.C. 970 (Nag.).

[8] *Rajah of Venkatagiri* v. *Isakapalli,* (1902) 26 Mad. 410; *Pannalal* v. *Panchu,* (1922) 65 I.C. 200=26 C.W.N. 432=49 Cal. 544; Relied on *Brojendra Kishore* v. *Bharat Chandra,* 31 I.C. 242=20 C.W.N. 481=22 C.L.J. 283.

[9] *Goswami Ranchor Lalji* v. *Sri Girdhariji,* (1897) 20 All. 120=17 A.W.N. (1897) 214; Relied on *Akilandammal* v. *Periasami,* 1 Mad. 309.

[10] *Sarat Chandra* v. *Birbabati,* (1922) 66 I.C. 433=34 C.L.J. 302; *Pannalal* v. *Panchu,* 65 I.C. 200=26 C.W.N. 432.

[11] *Yeknath* v. *Babia,* (1925) 85 I.C. 631=20 N.L.R. 195=1925 Nag. 236.

"the objection of an attachment under S. 146, Criminal Procedure Code, is to hold the property in anticipation of an action in which the right or title to possession is to be declared by a competent Court, and the possession of the Court during such attachment should enure for the benefit of the party or person in whose favour a competent Court would make such a declaration".[14]

**(11) Declaratory suits: Other cases.**

**1808.** (1) A suit for **declaration and injunction by worshippers, of a temple,** (Digambaris) who preferred to worship in their own way, against other worshippers (Swetambaris) who had set up a different mode of worship at the temple, is governed by Art. 120; and it was held further, that the act complained of was a continuing wrong, as to which under S. 23, Limitation Act, a fresh period begins to run at every moment of the day on which the wrong continues.[15]

**Declaration that defendant is a benamidar.**

(2) A suit by *A* to obtain a declaration that a decree originally obtained by *B,* against *C,* and another, which had been purchased in the name of *D,* had really been purchased by the plaintiff for his own benefit, the cause of action alleged being the wrongful execution of the decree by *D,* is not a suit for relief on the ground of fraud within Art. 95, Limitation Act, but is governed by Art. 120.[16]

**Declaration that decree against plaintiff was passed by gross negligence or misconduct of his guardian *ad litem.***

(3) In cases where relief is sought by plaintiff against an adverse decree, on the ground of fraud, misconduct, mistake, etc., for example, where the plaintiff alleges that a decree was passed against him by gross negligence of his guardian *ad litem,* the limitation is made to commence under the third column of Art. 120, which is generally expressed, when the cause of action arises, *i.e.,* when the fraud, mistake, or misconduct which constitutes a part of the alleged cause of action becomes known to the plaintiff.[17]

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[12] *Yeknath* v. *Babia,* (1925) 85 I.C. 631=20 N.L.R. 195=1925 Nag. 236.

[13] 1926 Cal. 782=30 C.W.N. 541=95 I.C. 117; Relied on 26 Mad. 410=31 I.C. 242, *supra;* also see *Ramaswamy Ayyar* v. *Mathurasamy,* (1907) 30 Mad. 12=16 M.L.J. 541; *Beni Parshad* v. *Shabzada,* (1905) 32 Cal. 856; *Khagendra Narain* v. *Matangini Debi,* (1890) 17 Cal. 814=17 I.A. 62 (P.C.) (The Government is really in the position of a stakeholder).

[14] *Abinash Chander* v. *Tarini Charan,* 1926 Cal. 782 (786).

[15] *Hukum Chand* v. *Maharaj Bahadur,* 1933 P.C. 193=144 I.C. 346 =12 Pat. 681=14 P.L.T. 559=37 C.W.N. 1021 (1028) (P.C.).

[16] *Gour Mohun* v. *Dinonath Karmakar,* 25 Cal. 49=2 C.W.N. 76; also see *Basantlal* v. *Chidamani Lal,* (1913) 18 I.C. 698=35 All. 149.

[17] *Basavayya* v. *Majeti Bapanna,* (1929) 120 I.C. 880=1930 Mad.

**Declaration of title under direction of Revenue Court.**

(4) Where the plaintiff in a suit for ejectment in the Revenue Court is met by the plea, not raising any question of proprietary title, but that the plaintiff is not entitled to possession because of a lease set up by the defendant, and the Revenue Court directs the defendant to institute a suit in the Civil Court within a period of three months to establish his rights under the lease, a suit may be instituted by the defendant, under Art. 120 of the Limitation Act to remove the cloud cast on his title under the lease by the direction of the Revenue Court, notwithstanding that the period prescribed in the order of the Revenue Court had expired.[18]

**Declaration of right of a Mahomedan widow to customary life-interest.**

(5) A suit by a Mahomedan widow, against the brother of her deceased husband, for declaration of her right to possess for life the estate of the latter in accordance with local custom, is not a suit for a distributive share of property within the meaning of Art. 123, Limitation Act; and, is not a suit for specific moveables wrongly taken within the meaning of Art. 49, nor is any other article of the schedule applicable; consequently, such a suit falls under the residuary Art. 120 of the Limitation Act.[19] Art. 120 is applicable to suits for declaration of right of moveable property also.[20]

**Declaration as to invalidity of an order of forfeiture.**

(6) Where the plaintiff, a *talukdar,* being a defaulter in respect of the assessment payable to Government for a certain year, whose estate had been forfeited under the provisions of the Bombay Land Revenue Code (Bombay Act V of 1879) brought a suit against the Government to recover possession of the village, and for a declaration that the order of forfeiture was illegal and *ultra vires,* it was held that the suit was governed by Art. 120 of the Limitation Act.[21]

**Declaration against validity of elections.**

(7) Where a municipal election ought to have been held under the rules framed by the Government in 1910, but under a direction from Government it was held under rules which had been framed in 1884, and one of the rival candidates sued to have the election of the other declared void as contrary to law, it was held that the election not having been held under the rules of 1910, the special provision as to limitation made in those rules for a declaratory suit was inapplicable, and the suit was governed by Art. 120 of the Limitation Act.[22]

**Declaration of heirship.**

(8) The right to sue for a declaration of heirship to a *vatan* does not accrue until the death of the widow of the last male holder of the *vatan,* the widow having a vested interest in it as the nearest heir.[23] A suit to obtain a declaration that a person set up as the

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173=58 M.L.J. 349; Relied on *Venkateswara* v. *Somasundaram,* 44 I.C. 551=1918 M.W.N. 244; *Mamabi* v. *Kunhifappi,* 17 I.C. 337=38 Mad. 67; *Poruri* v. *Pendela,* 112 I.C. 22=1928 Mad. 837.

[18] *Surajmal* v. *Hira Kunwar,* (1915) 27 I.C. 511=37 All. 94 (96).

[19] *Mahomed Riasat Ali* v. *Hasin Banu,* 21 Cal. 157=20 I.A. 155 (P.C.).

[20] *Venkatagiri* v. *Isakapalli Subbiah,* 26 Mad. 410 (417).

[21] *Samaldas* v. *Secretary of State,* (1891) 16 Bom. 455.

[22] *Raghunandan Prasad* v. *Sheo Prasad,* (1913) 20 I.C. 490=35 All. 308=11 A.L.J. 349.

[23] *Ravji* v. *Sakuji,* 34 Bom. 321=12 Bom. L. R. 204=5 I.C. 964

son and heir of a deceased must be brought within the period prescribed by Art. 120 of Sch. I to the Limitation Act, and such period begins to run from the time when, to the knowledge of the plaintiff, the title of son and heir to the deceased is set up.[24] A suit for a declaration that plaintiff was the daughter, and heiress of *B*, was held within time under Art. 120, Limitation Act, where it was brought more than six years after the death of *B*, but within six years of the denial of plaintiff's status by the person appointed to officiate on behalf of Government in proceedings for certificate of heirship to *B*, with a view to get her name entered as a *vatandar* in place of her deceased father's.[25]

**Declaration that landlord not entitled to excess collection.**

**Declaration of periodically recurring right.**

(9) In a suit by the tenants for a declaration that the landlord was not entitled to collect excess rents for certain years, it was held that Art. 120, and not Art. 131, was applicable to the suits, the period of limitation commencing from the date of collection under Art. 120, Limitation Act.[26] A suit not only to establish a periodically recurring right (*viz.* a right to receive *malikana*), but also to establish a right to the property itself is governed by Art. 120.[27]

**Declaration of right by reversioners.**

(10) A suit for declaration of right by the reversionary heirs (*bandhus*) of a deceased to manage a dharmsala, held, governed by Art. 120, Limitation Act.[28]

**Declaration of invalidity of a marriage ceremony.**

(11) A suit by a Parsi female for a declaration that a marriage ceremony performed in her infancy did not create the status of husband and wife between her and the defendant, was held governed by Art. 120, Limitation Act, and the suit brought within three years of her attaining the majority was within time.[29] A suit for dissolution of marriage brought by persons, who are not governed by the Indian Divorce Act, is governed by Art. 120 of the Limitation Act, and the relief of declaration as to the divorce is also governed by the same article.[30]

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(It was not necessary to decide whether Art. 120, or Art. 141 applied—the further relief could not be asked for in a Civil Court, being enforceable only in the Revenue Department); cf. *Pratap Singh* v. *Raja Dattaji Rao*, 54 I.C. 300 (Nag.).

[24] *Pratap Singh* v. *Raja Dattaji Rao,* (1920) 54 I.C. 300 (Nag.).

[25] *Tukabai* v. *Vinayak Krishna,* (1890) 15 Bom. 422.

[26] *Madhabushi Achamma* v. *Narayanaswamy Naidu,* (1909) 33 Mad. 171=6 M.L.T. 268=3 I.C. 747=19 M.L.J. 734.

[27] *Secretary of State* v. *Kannapalli,* (1914) 37 Mad. 322=24 M.L.J. 365=18 I.C. 770 (Art. 131 not applicable); also see *Suryadatta* v. *Ekadohia,* 39 I.C. 522 (Rent fixed in perpetuity by a *shebait*) and *Gulam Ghouse Khan* v. *Jannia,* (1920) 58 I.C. 788=39 M.L.J. 492 (Right to receive an *yeomial* allowance by mutwalli of a mosque).

[28] *Bhagmal* v. *Bhagwandas,* (1917) 41 I.C. 636=11 P.R. 1918 (Starting point is from last owner's death).

[29] *Bai Shirinbhai* v. *Kharshedji,* (1896) 22 Bom. 430.

[30] *Muhammad Hamidullah* v. *Mt. Fakhra Jahan,* (1922) 65 I.C. 452 =8 O.L.J. 650; cf. *Brinda* v. *Kaunsilia,* 13 All. 126=A.W.N. (1891) 18 (Suit by a Hindu or Muhammadan husband for the recovery of wife and restitution of conjugal rights, held, governed by Art. 120, subject to S. 23, Limitation Act).

**Declaration of title to a share in moveable property.**

(12) A suit for a declaration that the plaintiff is entitled to an 8-anna share in certain moveable property and for recovery of possession thereof from the defendant wrongfully withholding the same is governed by Art. 120, and not by Art. 49 or 62.[31]

(13) Art. 134 of Limitation Act will not apply to a suit for a mere declaratory decree. In order to apply the article there must be a prayer for recovery of possession. To a mere declaratory suit, Art. 120 would apply.[31-a]

**1809. SUITS FOR TAX, ETC.**—(*See* **Art. 6.**) **A suit for recovery of instalments of profession tax** under the provisions of the Towns Improvement Act, 1871, is not a suit for recovery of a penalty, or forfeiture, and is not governed by Art. 6, but falls under Art. 120 of the Limitation Act.[32] Similarly, a **suit to recover surplus sale proceeds of a sale for arrears of Government revenue** is governed by Art. 120.[33]

**1810. SUITS FOR PRE-EMPTION.**—(*See* notes under **Art. 10, Ss. 986-992.**) A right of pre-emption arises only when a sale is completed.[34] Where the sale had not taken place, and a suit was brought by a landlord claiming pre-emption under S. 41 of the Central Provinces Tenancy Act, Art. 120 of the Limitation Act was applied.[35]

Art. 120, and not Art. 10, applies where there is no registered instrument of sale, and the sale is in respect of property not admitting of physical possession being taken, *e.g.*, in the case of a sale of an undivided share in a joint holding,[36] or of an undivided share in a field transferred under a foreclosure decree,[37] or a baibilwafa mortgage, or a mortgage by conditional sale of a fractional share of an undivided mahal.[38] A sale of fractional shares of a Zemindari estate situate in several *khatas* is not capable of physical possession being taken, and a suit in respect of such a sale has to be brought within one year from the date of registration of sale deed,[39] and Art. 120 applies when there is no registered instrument of sale, in respect of property not admitting of physical possession.[40] Similarly, a suit for pre-emption in respect of an oral sale of a share in joint and undivided property, which does not admit of physical possession, is governed by Art. 120 of the Limitation Act.[41] An undivided share in shamilat or common land does not admit of physical possession,[42] and likewise property in possession of tenants is not capable of physical possession being taken in the sense contemplated by Art. 10 of the Act[43]: and, if an instrument of sale, whether in the first instance the sale is an absolute or a conditional one is immaterial,[44] has been unregistered the second alternative position in Art. 10 does not apply, and that being so, the suit for pre-emption can be governed only by Art. 120 of the Limitation Act.

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[31] *Swarnamoyee* v. *Probodhchandra,* (1932) 36 C.W.N. 758=55 C.L.J. 420.

[31-a] *Chidambaranatha* v. *Nallasiva Mudaliar,* (1917) 41 Mad. 124.

[32] *President, Municipal Committee, Guntur* v. *Srikakulapu,* (1881) 3 Mad. 124.

[33] *Secretary of State* v. *Abdul Bari,* (1892) 20 Cal. 51 (F.B.).

[34] *Ragho* v. *Sakharam,* 68 I.C. 715=1922 Nag. 200.

[35] *Rai* v. *Saida Kali,* (1922) 65 I.C. 959 (Nag.).

[36] *Nath Prasad* v. *Ram Palatan,* 4 All. 218=2 A.W.N. (1882) 28 (F.B.).

[37] *Balwant* v. *Sheodas,* (1927) 99 I.C. 659=1927 Nag. 64=9 N.L.J. 205; also see *Batul* v. *Mansur,* 24 All. 17 (P.C.) (Property foreclosed being an undivided share in certain villages) and *Ali Gauhar* v. *Jawahir,* 30 P.R. 1892 (Title acquired by foreclosure proceedings in respect of an undivided share).

[38] *Ashikali* v. *Mathura Kandu,* 5 All. 187=2 A.W.N. (1882) 212.

An **equity of redemption** is an incorporeal or intangible right, which does not admit of physical possession, and if the sale-deed is not registered, the case will be governed by Art. 120, as no period of limitation is elsewhere provided in the Act for pre-emption on sale of an equity of redemption.[45] A suit for pre-emption against a mortgagee-purchaser in respct of property already in his possession and now sold to him by unregistered sale deed falls under Art. 120 of the Limitation Act.[46] When even a part of the property sold is already mortgaged with possession to the vendee, the sale of the whole of the property is not capable of physical possession being taken at the time of the sale,[47] and the second part of Art. 10 provides that if there is no deed of sale at all, or there is a deed but the same is not registered, then Art. 120 is applicable, except in Punjab where S. 30 of the Punjab Pre-emption Act I of 1913 now makes a special provision.[48] A **claim**

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[39] *Umraobeg* v. *Mukhtarbeg,* (1919) 50 I.C. 80=17 A.L.J. 269; *Sohan* v. *Himmat,* 61 P.R. 1885.

[40] *Achutananda* v. *Bibi Bibi,* (1922) 1 Pat. 578=69 I.C. 669 (Unregistered sale in execution of a decree followed by symbolical possession); also see *Mamabi* v. *Kunhifappi,* 38 Mad. 67=23 M.L.J. 607=17 I.C. 337 (Ottidar himself in possession).

[41] *Kishenchand* v. *Kehr Singh,* 14 P.R. 1904.

[42] *Jowala Singh* v. *Tek Chand,* 23 P.R. 1882; *Sheoji Singh* v. *Sheoji Singh,* 129 P.R. 1906; *Harchand* v. *Mehbubkhan,* 13 P.L.R. 1900.

[43] *See* S. 990, *ante,* p. 1047; also see *Matadin* v. *Mt. Mithana,* 102 I.C. 22=1927 Oudh 212; and *Shiam Sundar* v. *Amandt Begum,* (1887) 9 All. 234; *Raja Raghuraj* v. *Raj Raghunath,* (1900) 3 O.C. 184.

[44] *Khunda* v. *Chunilal,* 87 P.R. 1893.

[45] *Jawala Sahai* v. *Allahditta,* 90 P.R. 1886.

[46] *Gaffar Khan* v. *Sattar,* 160 P.R. 1889; also see *Nga Shwe Dok* v. *Nga Nu,* (1909) U.B.R. (1909) 7=4 I.C. 754.

[47] *See* S. 992, *ante.*

[48] *See* S. 993, *ante*; *Darabali* v. *Hussain,* 32 P.L.R. 473.

**by one pre-emptor against another** for the determination of the question as to who has the better title is not a suit for pre-emption within the meaning of Art. 10, and will be governed by Art. 120, Limitation Act.[49] A suit to pre-empt a lease is governed by Art. 120 and not by Art. 10, and limitation starts from the date of the execution of the lease.[50] A **perpetual lease** is not a sale, within the meaning of Art. 10, and a suit to enforce a right of pre-lease can only be governed by Art. 120 of the Limitation Act.[1] Art. 10 applies only in respect of the first sale, and takes no cognizance of the **second vendee** to whom the subject of the first sale has been transferred subsequently to the date of that sale: and the limitation as regards the second vendee is six years from the time of transfer to second vendee.[2] Where a first purchaser sells property to a second purchaser before the filing of a pre-emption suit and the suit against the former is filed within one year of the date of the original sale but the latter is subsequently impleaded as a defendant after the said period, the suit against the latter is governed not by Art. 10, but by Art. 120, Sch. I, Limitation Act, that is to say, the limitation against the second purchaser is six years.[3] Where the property is capable of physical possession, but such possession is not taken under the sale, the vendor himself being out of posession, and being incapable of giving possession, Art. 120 will be the proper article for the pre-emption suit.[4]

**1811. SUITS ARISING OUT OF ATTACHMENT BEFORE JUDGMENT.**—(*See* notes under **Art. 11,** Limitation Act.) Art. 11 is limited to "claim orders", on a claim preferred to, or an objection made to the *attachment* of property attached in *execution of a decree.*[5] The Madras High Court held in *Vellayan* v. *Sivagnanam,*[6] that an attachment made before judgment assumes the character of an attachment in execution when an order is passed for the sale of the attached property. The Full Bench ruling in *Arunachallam Chetty* v. *Periasami Servai,*[7] is an authority for the proposition "that an attachment before judgment followed by a decree, and an order for sale is to be deemed by virtue of O. 38, R. 8, Civil Procedure Code, to amount to an "attachment in execution" within the meaning of Art. 11. Claim orders on petitions presented after that stage will have to be set aside within one year. Similarly, the majority of the Full Bench in the case of *Meyappa* v. *Chidambaram,*[8] held that the words "property attached in execution" in O. 21, R. 57, Civil Procedure Code, include "property attached before judgment", when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale, so that if the execution petition is dismissed for the decree-holder's default, the attachment before judgment comes to an end. But, cases not governed by Art. 11 must be governed by Art. 120, as observed by Wallis, C.J., in *Arunachallam* v. *Periasami.*[9] The Patna High Court has held recently that although the provisions of O. 21, Rr. 58 to 63 may be applied to claims or objections made in attachment before judgment, no period of limitation is prescribed by R. 63 of O. 21, Civil Procedure Code, and in the absence of a special provision made for suits of this nature arising out of objections to attachment before judgment, Art. 120 will apply to such suits.[10]

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[49] *Durga* v. *Haidar Ali,* (1884) 7 All. 167; *Ilahi Bux* v. *Muhd. Rabnawaz,* 80 P.R. 1912=14 I.C. 328; *Mutsadda* v. *Hamira,* 11 P.R. 1893; *Ram Pershad* v. *Ganga Datt,* 20 P.R. 1908.

[50] *Gopal* v. *Lachmi,* 1926 All. 549=95 I.C. 138.

[1] *Mukhal* v. *Hira Nand,* 62 I.C. 884=1921 All. 154=19 A.L.J. 442.

[2] *Fazal Husain* v. *Malik,* 49 P.R. 1914=25 I.C. 443; *Hari Ram* v. *Allah Ditta,* 17 P.R. 1915=186 P.L.R. 1915=28 I.C. 695; Followed *Karmdad* v. *Ali Muhammad,* 31 P.R. 1913 (F.B.).

[3] *Razwand Singh* v. *Dukchhor,* (1914) 24 I.C. 116 (Oudh); Followed 31 P.R. 1913 (F.B.).

[4] *Velayudham Pillai* v. *Thina Velayudham,* 1921 Mad. 554=62 I.C. 27.

[5] *See* **S. 999: "Scope of Art. 11".**

[6] 79 I.C. 917=1925 Mad. 49=34 M.L.T. 193.

[7] 70 I.C. 439 (443)=44 Mad. 902 (F.B.).

**1812. SUIT AGAINST AN ORDER NOT DECIDING A QUESTION OF TITLE.**—(*See* **Art. 13.**) Orders passed under Ch. VII of the Presidency Small Cause Courts Act (Ss. 41 to 49), do not decide questions of title, and a suit against an order under that chapter does not require to be altered or set aside, under Art. 13 of the Limitation Act. Such a suit would be governed by Art. 120 or Art. 144 of the Limitation Act.[11]

**1813. SUIT FOR DECLARATION AGAINST OFFICIAL ACT OR ORDER.**—(*See* notes under **Art. 14.**) Art. 14 of the Limitation Act is not applicable, where though plaint contains prayer for setting aside an official act or order, the main relief is declaration, to which Art. 120 of the Limitation Act applies. Where plaintiff sued for a declaration of title to proportionate share of shamilat area after rejection of an application for partition of *shamilat* by the Revenue Officer, it was held that the Revenue Officer not having jurisdiction did not profess to decide the question of title arising in the case and the suit was therefore not one for setting aside his order to which Art. 14 might apply, and that the claim was governed by Art. 120 of the Limitation Act.[12] A suit for a declaration that an allotment made by the Collector under the

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[8] (1923) 47 Mad. 483=46 M.L.J. 415 (F.B.).

[9] 70 I.C. 439 (443)=44 Mad. 902 (F.B.).

[10] *Mt. Babbal Kumari* v. *Mulchand,* (1934) 152 I.C. 297=1934 Pat. 580.

[11] *Mir Hyder Ali* v. *Amiruddin,* 1929 Mad. 69=56 M.L.J. 199=115 I.C. 504.

[12] *Kalukhan* v. *Kunda,* 47 P.R. 1916=150 P.L.R. 1916.

Bengal Estates Partition Act is not legally valid, is not governed by Art. 14, but by Art. 120 of the Limitation Act.[13] A suit to set aside an order of Government excluding certain lands from a rough *patta,* and to obtain a declaration of plaintiff's right to obtain a grant subject to certain conditions, is governed by Art. 120 and not by Art. 14.[14] A suit for declaration that a certain tenure held by defendants under the plaintiffs is not permanently settled, the article applicable is Art. 120, and limitation begins to run from the date of the final publication of the record of rights and not from the date when the certificate of publication was signed.[15] Where on the death of a Hindu widow, a suit was filed by the next reversioners that they were entitled to get the lands left by her, and that the defendants with whom the lands had been settled by the *prodhan* were not entitled to retain them under the guise of a settlement, it was held that the suit was not one for setting aside the order of the sub-divisional officer and was governed by Art. 120.[16] It was held by the Nagpur Judicial Commissioner's Court in *Bala* v. *Girdhar,*[17] that before Art. 14 of Sch. I to the Limitation Act can apply to a suit, it must be necessary under the law to set aside the order sough to be impeached in the suit. The article applicable is Art. 120 where the incidental effect merely of the plaintiff's suit was to nullify an order passed by a Government officer.

**1814. SUIT TO RECOVER DAMAGES RESULTING FROM A CONSPIRACY.**—(See **Art. 23.**) A criminal conspiracy is indictable and gives rise to a civil liability if special damage has been suffered by the plantiff. This is illustrated by the case of *Quinn* v. *Leathem,*[18] where one of the Courts charged as a separate cause of action was that the defendants unlawfully and maliciously conspired together and with others to do the various acts complained of in the other Courts with intent to injure the plaintiff and that by reason of the conspiracy the plaintiff was injured and damaged in his trade and business. A suit to recover damages resulting from conspiracy falls within Art. 36 or Art. 120 of the Limitation Act, 1908, and not within Art. 23.[19]

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[13] *Jitendra Gopal Roy* v. *Matangini,* (1919) 49 I.C. 965 (Cal.).

[14] *Kudoth Ambu Nair* v. *Secretary of State,* 1924 P.C. 150=47 M.L.J. 35=51 I.A. 257=47 Mad. 572=80 I.C. 835 (P.C.).

[15] *Prodot Kumar Tagore* v. *Bal Gobinda,* 1925 Cal. 518 (2)=86 I. C. 6=41 C.L.J. 31.

[16] *Haro Mandal* v. *Dhiranath Das,* (1925) 90 I.C. 691=1925 Pat. 784=7 P.L.T. 67.

[17] 1927 Nag. 159=100 I.C. 4.

[18] 1901 A.C. 495=70 L.J.P.C. 76=85 L.T. 289.

[19] *Peary Mohan Das* v. *D. Weston,* 13 I.C. 721 (775) (Cal.).

**1815. SUIT FOR RECOVERY OF MONEY DUE ON A DECREE ASSIGNED TO PLAINTIFF.**—(*See* **Art. 29.**) A suit for recovery of money due on a decree assigned to plaintiff which the plaintiff was barred from collecting against the assignors decree-holders who received the amount and entered satisfaction does not fall under Arts. 29, 49 or 62, and is governed by Art. 120, Limitation Act.[20]

**1816. SUIT TO RECOVER MONEY WRONGLY DISTRIBUTED OR PAID OUT.**—(See **Art. 29.**) Where a debt is attached by Court and the amount deposited by the debtor in Court, is paid out to the attaching creditor, Art. 29 of the Limitation Act is inapplicable, because that article applies only where the Court through its officers, is able to reduce the property to its possession, and does so on the motion of the judgment-creditor; secondly, this article applies to amounts *seized* under legal process, and not to amount paid into Court voluntarily by the debtor: and, further a debt is not moveable property for purposes of Art. 29. In any case, the suit by claimant to recover the amount paid out to the attaching creditor, is not a suit for compensation for *wrongful seizure* of moveable property: and such a suit might fall under Art. 62, or Art. 120 of the Limitation Act.[21], Similarly, where the attaching creditor of certain property over which another person claimed a lien obtained a declaratory decree that the property was not subject to a lien, and the proceeds of the attached property were rateably distributed among several creditors of the judgment-debtor; and the decree being reversed on appeal, the plaintiff sued the creditors to recover the sums paid over to them in satisfaction of his lien, held that Art. 120, and not Arts. 29 or 36 governed the suit.[22]

**1817-1818. SUITS FOR COMPENSATION FOR ACTS OTHER THAN TORTS, OR BREACHES OF CONTRACT.** (*See* **Art. 36.**) Where plaintiffs and the defendants were co-sharers in a joint estate, and the defendants took possession of, and exclusively occupied and cultivated some of the joint-lands, a **suit by the other joint-tenants for compensation in respect of the exclusive use and benefit enjoyed by the defendants** of the lands in their possession, did not fall under Art. 115, as a breach of any contract express or implied, nor could Art. 36 be made applicable, there being no act of malfeasance, misfeasance or non-feasance within the meaning of that article, and Art. 120 was the only article applicable.[23] Similarly, a **suit by one co-sharer**

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[20] *Ramasawmy Chettiar* v. *Hari Krishna,* (1911) 10 I.C. 658=2 M. W.N. 220=9 M.L.T. 465.

[21] *Yellammal* v. *Ayyappa Naick,* (1912) 16 I.C. 914=23 M.L.J. 519.

[22] *Ram Narain* v. *Brij Bombeylal,* (1917) 39 I.C. 532=39 All. 322.

[23] *Robert Watson & Co.* v. *Ramchand Dutt,* (1896) 23 Cal. 799.

**against another to recover his share in the profits** of a ferry is governed by Art. 120, and not by Art. 36 or 115 of the Limitation Act.[24] Likewise, **a suit** by plaintiff **to recover a specific sum** of money **belonging to the plaintiff,** in the hands of a third person, which had been ***applied*** **by the defendant for his own use,** benefit and enjoyment, was held governed not by Arts. 36 or 62, but by Art. 120, of the Limitation Act.[25]

A **claim by the Liquidator** of a company **against the Directors for misapplication of the company's funds,** under S. 235 of the Company's Act of 1913, is not covered by Art. 36 of the Limitation Act, the claim not being independent of contract: and such a claim does not fall under Art. 115 or 116, which deal with claims of compensation made in respect of a specific breach of a specific contract made by one or more individuals with the person making the claim: and according to **Allahabad**[26] and **Bombay High Courts,**[27] Art. 120 is the only article applicable to the suit for any misfeasance against a director of a bank or company. This view is not shared by the **Lahore High Court,**[28] which has applied Art. 36 to an application under S. 235 of the Company's Act of 1913, to recover compensation from an ex-Director of a company in respect of an alleged act of misfeasance or breach of trust, and the **Madras High Court** has preferred to follow the Lahore High Court, holding that the directors of companies are not trustees for the purpose of S. 10 of the Limitation Act, and can plead limitation under Art. 36, as a defence to an action by the liquidator under S. 235 of the Companies Act for an order compelling them to pay certain amounts by way of compensation in respect of their act of misfeasance.[29]

**1819. SUITS FOR PROCEEDS OF GOODS LOST OR ACQUIRED BY CONVERSION.**—See **Art. 48.** A suit to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and finding them in the hands of the defendant, to make him responsible for the amount was held to fall under the residuary Art. (118 of Act IX of 1871) 120, Limitation Act.[30]

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[24] *Kishun Deyal Singh* v. *Kishun Deo Jha,* (1916) 35 I.C. 430=1 P.L.J. 69.

[25] *Mt. Rajakumar* v. *Fateh Bahadurlal,* (1917) 38 I.C. 525 (Pat.).

[26] *The Union Bank, Allahabad* (In Liquidation), 1925 All. 519=88 I.C. 785=47 All. 669.

[27] *Govind Narayan Kakade* v. *Rangnath Gopal,* (1930) 127 I.C. 305 =1930 Bom. 572=54 Bom. 256=32 Bom.L.R. 232.

[28] *Bank of Multan* v. *Hukamchand,* 1923 Lah. 58=71 I.C. 899; *Bhim Singh* v. *Basheshar Nath,* 100 I.C. 907=8 Lah. 167=1927 Lah. 433=28 P.L.R. 363.

[29] *Narasimha Iyengar* v. *The Official Assignee of Madras,* (1930) 128 I.C. 477=1930 M.W.N. 966=1931 Mad. 58=54 Mad. 153=60 M.L.J. 280.

**1820. SUIT FOR SHARE OF MOVEABLE PROPERTY.**—(*See* **Art. 49.**) A suit for partition of moveables of a Mohammadan falls under Art. 120, and not Art. 49, not being a suit for specific moveable property.[31] The period of limitation contained in Arts. 49 and 123 of Sch. I, Limitation Act, are inapplicable to a suit by a person suing as the heir of a deceased for a share of the property left by the latter. Such a suit must be brought within the period prescribed by Art. 120 of the Limitation Act.[32]

**1821. SUIT FOR WORK AND MATERIALS OF BUILDINGS.**—(*See* **Arts. 52 and 56.**) Where the contract is to supply not only labour, but also materials and to hand over a building, neither Art. 52, nor Art. 56, can be applied to the suit for work done and material of buildings supplied by the contractor.

> "The one does not cover the price of work done, and the other does not cover the price of materials supplied. There is no other article specifically applicable, and hence the only article which can be applied is Art. 120."[33]

The correctness of this rule was not affirmed by the **Full Bench** of the **Lahore High Court** in *Mahomed Ghasita* v. *Sirajuddin,*[34] where the defendant contracts a buiding, and employed plaintiff sub-contractor to supply certain materials for, and to do certain work, in connection with the building, for which he was to be paid a consolidated price for both materials supplied and the work done, it was held that the suit combining the two claims which were indivisible, was governed by Art. 115 of the Limitation Act.

**1822. SUIT FOR MONEY LENT BY SALE OF PROPERTY PLEDGED.**—(*See* **Arts. 57, 59.**) Where plaintiff lent money on the pledge of jewels, and suit to recover the amount by sale of property pledged, the claim was held governed by Art. 120, but the claim to proceed against the debtor personally would be governed by Art. 57 of the Limitation Act.[35] Where a bond hypothecates certain cattle as security for the loan and the creditor sues to enforce the bond as a lien on the cattle, and does not ask for a personal decree against the debtor, the limitation applicable to the suit is that contained in Art. 120 of the Limitation Act.[36] Where plaintiff sued for return of goods delivered with interest in kind, Art. 115 or Art. 120 was held applicable.[37] Where a person who is acting as agent for two principals employs money belonging to one of them for the benefit of the other, the case is not one of a loan, as the lender and borrower are the same person: and a suit, therefore, **by the principal whose money has been used for the benefit of the other principal** to recover the money is governed not by Art. 59, but by Art. 120, and limitation begins to run from the date when the money is demanded by the plaintiff.[38] In *Bengal National Bank* v. *Jatindra Nath Mazumdar*,[39] where the defendants had opened an overdraft account with the plaintiff bank, and the bank made advances of money to enable the defendants to purchase materials and collected bills on commission which were credited to defendant's account, a suit to recover balance due was; it was held that Arts. 57 or 59, 60 or 85 did not apply to the suit, and the case must fall under Art. 120 of the Limitation Act.

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[30] *Gooroodas* v. *Ram Narain,* (1884) 10 Cal. 860=11 I.A. 59 (P.C.).

[31] *Mt. Basir Unnissa* v. *Abdul Rahman,* (1922) 44 All. 244=1922 All. 525.

[32] *Ramdas* v. *Ajudhiadas,* (1921) 63 I.C. 685=14 S.L.R. 137.

[33] *Radhakishan* v. *Basantlal,* (1914) 22 I.C. 576=103 P.R. 1913=81 P.L.R. 1914=252 P.W.R. 1913.

[34] (1922) 66 I.C. 490=2 Lah. 376 (F.B.).

[35] *Mahalinga Nadar* v. *Ganapathi,* 27 Mad. 528 (F.B.); also see and cf. *Saiyid Alikhan* v. *Debi Prasad,* (1901) 24 All. 251 (F.B.) (Suit to recover balance of debt after accounting for the proceeds of the sale of the articles pledged is governed by Art. 57) and *Percy* v. *Fisher,* 156 I.C. 531=37 Bom.L.R. 165=1935 Bom. 213 (To same effect).

**1823. SUIT FOR CONTRIBUTION IN RESPECT OF MONEY PAID BY PLAINTIFF.**—(*See* **Art. 61.**) A suit for recovery of defendant's share of the expenses which the plaintiff did not intend to incur gratuitously, and which the defendant jointly liable for the expenses of filling up a tank refused to contribute, was held to fall under Art. 120.[40] A suit by a landlord to recover from the tenant the cess actually paid by him must be instituted within the period prescribed by Art. 120, and not by Art. 61, which latter applies to cases of money paid by the plaintiff on behalf of the defendant.[41] And, as stated in *Viswanatha Vijia* v. *Orr*,[42] that article is inapplicable to a case, where there was at the time of payment no question of any immediate benefit being conferred on defendant by it.[43] Where the plaintiff sued to recover from defendant the amount of fine paid by him for the use of land belonging to the plaintiff for non-agricultural purposes by the defendant, it was held that Art. 120, and not Art. 61 applied to the case. The plaintiff did not pay this money for the defendant.[44] A suit by a tenant who deposits the amount of a rent-decree against his co-tenants and thereby prevents the sale of the tenancy; against the co-tenants for contribution joining thereto the landlord as a defendant, with a prayer that if the landlord had already received from the co-tenants the amount of rent payable by them, a decree may be made against him for the refund of the amount, is governed, in so far as the landlord is concerned, not by Art. 61, but by Art. 120 of the Limitation Act.[45] Where partnership results in a loss and a principal partner having had to bear his share of it, sues his sub-partner for the recovery of the portion which the latter is bound to contribute, under the special contract between them, the suit is not governed by Art. 106, or Art. 61 but by Art. 120 of the Limitation Act.[46] The language of Art. 61 is that it applies to a suit for money payable to plaintiff for money paid for the defendant. And, where the defendant was the trustee of a temple and the plaintiffs who succeeded him brought a suit to recover from the defendant a certain sum of money which the latter had taken from the temple funds for the expenses of a litigation to remove him from trusteeship and to have a scheme framed, it was held that neither Art. 61, nor 62 applied to the case, which was, therefore, governed by Art. 120.[47] In a suit against debutter estate by the legal representatives of a deceased shebait for the recovery of amounts alleged to have been spent by him out of his personal estate for the purposes of the trust, Art. 120 was held to govern it.[48] Where mortgagor leaves money with mortgagee for payment to prior creditor, but mortgagee fails to make the payment, and the mortgagor is forced to pay, a suit by the mortgagor to recover that money from the mortgagee is not governed by Art. 61, inasmuch as the payment made is not payment made for the defendant.[49]

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[36] *Deoki Nandon* v. *Gapua*, (1918) 46 I.C. 373=40 All. 512.

[37] *Sohan Singh* v. *Muhammaddin*, 56 I.C. 162=1922 Lah. 271 (1).

[38] *Jainpur Sugar Factory* v. *The Upper India Rice Mills*, (1926) 98 I.C. 1010=1927 All. 173.

[39] 1929 Cal. 714=56 Cal. 556=121 I.C. 741=33 C.W.N. 412.

[40] *Upendra Krishna Mondal* v. *Naba Krishna*, (1921) 62 I.C. 615=25 C.W.N. 813=1921 Cal. 93.

[41] *Rajeswara Muthuramalinga* v. *Mahalinga Raju*, (1919) 52 I.C. 468=9 L.W. 287.

[42] 45 I.C. 786 (793).

[43] *Sundara Aiyar* v. *Ananthapadbhanabha*, (1922) 70 I.C. 405=1923 Mad. 64=43 M.L.J. 271.

[44] *Parnamachand* v. *Kashinath Deoram*, 1922 Bom. 257 (1).

**1824. SUIT FOR ACCOUNT OF THE PROFITS OF JOINT PROPERTY.**—(*See* **Art. 62,** *ante.*) Art. 62 of the Limitation Act does not apply to a **claim for an account against a trustee,** where the defendant is not holding under an express trust, and the claim against him is an equitable claim, it is governed by Art. 120 of the Limitation Act, the cause of action arising from a denial or infringement of the right claimed.[50] Where a member of a Hindu family to whom the *karta* of the family had assigned a mortgage bond on partition, but the same had been repaid in fact to the karta, and the action was brought by the member on the mortgage with an alternative claim for a money decree against the *karta,* it was held that this being merely a case of conversion by the *karta,* or a case where having held the money for many years from the date of the partition he must be said to hold it in trust for the plaintiff, in which event Art. 120 would apply and not Art. 62.[1] Where, in a land acquisition case, the Government had paid money to one who was apparently entitled to it, a suit by a person who had also got interest in the land and claimed the money paid by the Government was held governed by Art. 120, and not by Art. 17 or 62.[2] Where certain mortgaged property having been acquired compulsorily, the mortgagee sued to recover the compensation paid to the mortgagor, the suit was held governed by Art. 120, and not by Art. 62 of the Act.[3] Where plaintiff and defendant entered into a written agreement of **partnership, undertaking to finance certain litigation and to share the profits,** and the plaintiff sued for accounts of transactions against the defendant who had realised the amounts so advanced partly in cash, and partly in the shape of immoveable properties, it was held that neither Art. 62, nor Art. 106 applied to the case, but that Art. 113 or 120 could both apply, the suit being in time under either article.[4] Article 62 contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received, as soon as it is received by the defendant. Where the defendant collected certain subscriptions for payment to a District Board by way of contribution for the purpose of constructing a bridge over a river, the **claim in respect of the subscriptions,** which were payable only when definite steps had been taken towards the construction of the bridge, was held governed by Art. 120 and not Art. 62 of the Limitation Act.[5] Where plaintiff had obtained a partition decree in respect of certain joint properties, but no partition had been effected between the parties in spite of the decree, a **suit for mesne profits** by the plaintiff was held governed by Art. 120, and it did not come under Art. 109, as the possession of the defendant at the date of suit was that of co-owners, and as such defendants were lawfully entitled to receive rents and profits nor did the case fall under Art. 62 as none of the co-owners were entitled in respect of undivided land to any specific part:[6] where the plaintiff, who was entitled to a particular share in a certain *jagir* sued the manager thereof to recover his share of the profits after an account being taken of what was received by the defendant, and what he lawfully spent: it was held that the suit was governed by Art. 120.[7] A **suit by ward,** not in respect of specific sums said to have been received by the defendant as his guardian, but for accounts of profits made by the defendant while he was guardian, did not fall under Art. 62, nor was it covered by Arts. 89 and 90 of the Limitation Act, as the relation between the guardian and ward *inter se,* could not be accurately described as the legal relation of principal and agent, that ordinarily for the purposes of the Limitation Act, the guardian of a minor is not a trustee, unless he comes within S. 10 of the Act; and the suit was governed by Art. 120.[8] A suit by minor against his guardian for account and for money found to be due, falls under Art. 120, time beginning to run from the date of the termination of the guardian's appointment.[9] In India, suits between a *cestui que trust,* and a trustee for an account are governed solely by the Limitation Act, and unless they fall within the exemption of S. 10 are liable to become barred by some one or other of the articles in Sch. I of the Act. If the object of the suit is not to recover any property *in specie,* but **to have an account of defendant's stewardship,** which means an account of the moneys received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, it must be brought within six years from the time when the plaintiff had first a right to demand it.[10] In *Parsotam Rao Tantia* v. *Radhabai,*[11] where the management of certain property belonging to three brothers, not forming a joint Hindu family, was entrusted to one member who received the rents and profits of the estate and invested and otherwise dealt with them, and the widow of a deceased brother sued him for actual partition, it was held that the claim not being for recovery of a specific sum was not covered by Art. 62, but the **money** having been **received by the defendant in his capacity of manager** (though not the managing member of a joint Hindu family), Article 120 applied to the claim. In a suit for partition of moveable and immoveable property and cash left by the parties' father, it was held that the **claim for a share of the cash** forming part of the estate to be divided between the co-sharers was not governed by Arts. 62, 49, or 123, and that the residuary provision contained in Art. 120 was accordingly applicable.[12] Similarly, in

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[45] *Annada Mohun* v. *Maniruddin,* (1916) 36 I.C. 392.

[46] (Lingamallu) *Seenayya* v. *Ramalingayya,* (1934) 148 I.C. 204=57 Mad. 347.

[47] *Krishna Kudwa* v. *Mulki Sri Venkataramana temple,* (1934) 152 I.C. 345=1934 Mad. 542.

[48] *Peary Mohun Mukherjee* v. *Norendranath,* (1909) 37 I.A. 27=37 Cal. 229 (P.C.).

[49] *Zaitun Aheer* v. *Sat Ram,* 1931 All. 549 (2)=1931 A.L.J. 533=133 I.C. 615=53 All. 702.

[50] *Eliza Martin,* In the goods of, 1935 Cal. 511=62 Cal. 120=157 I.C. 936; also see *Annamalai Chettiar* v. *Muthukaruppan,* 58 I.A. 1=8 Rang. 645=130 I.C. 609=1931 P.C. 9=60 M.L.J. 1 (P.C.) (Article 62 not applied to an equitable claim against a trustee liable to account).

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[1] *Narsingh Pande* v. *Mathuranath,* 1935 Pat. 159=156 I.C. 887.

[2] *Somasingh* v. *Jaigobind,* 1935 Pat. 42.

[3] *Ladli Prasad* v. *Nizamuddin Khan,* (1920) 54 I.C. 535 (Oudh.).

[4] *Kasturchand* v. *Harigovind,* 1934 Bom. 491=36 Bom.L.R. 1068.

[5] *District Board of Ramnad* v. *Mahamed Ibrahim Sahib,* 1933 Mad. 524=143 I.C. 496=64 M.L.J. 574.

[6] *Maing Po Nyun* v. *Ma Saw Tin,* 1931 Rang. 150=131 I.C. 511.

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[7] *Subba Row* v. *Ram Row,* (1916) 32 I.C. 899=30 M.L.J. 341=40 Mad. 291.

[8] *Sher Ali Khan* v. *Khwaja Muhammad Khan,* 84 P.R. 1891.

[9] *Mt. Fazal Nishan* v. *Muhammadji,* 33 P.R. 1897.

[10] *Saroda Pershad Chattopadhya* v. *Brojonath Bhuttacharjee,* 5 Cal. 910=6 C.L.R. 195.

[11] 37 All. 318=13 A.L.J. 407=28 I.C. 953.

[12] *Muhd. Hamidullah Khan* v. *Muhd. Majidullah Khan,* 92 P.R. 1917 =40 I.C. 374.

*Abdul Rahiman* v. *Pathumal Bibi,*[13] where a Mahomedan lady claimed **partition** against her co-heirs, including the relief in respect of the amount of a mortgage-debt due to the deceased collected by the defendant, Art. 120, and not Art. 62 was applied, and the right to sue was held to have accrued from day to day. Where under a partition deed, it was arranged that the plaintiff, minor, and the senior co-parcener, were to enjoy their share of the property jointly, but it was the duty of the defendant, as manager, to account for the money received, and to pay the kist and other expenses, and to maintain the minor, it was held that Art. 120, and not Art. 62, applied to the suit brought by the minor against the senior co-parcener for money received.[14] Where the plaintiffs demand an account of the profits of a joint property under the management of one co-sharer, and the sum due to the plaintiffs can only be ascertained after taking account not only of the rent received but of the expenses incurred in the management, it cannot be said that there is any particular sum "had and received" on plaintiffs' behalf by the manager within the meaning of Art. 62.[15] Where there has been no division of shares beteen tenants, and as one tenant in common, plaintiff sues against another tenant-in-common for the recovery of money received by him in excess of his share, Art. 120 and not Art. 62, will govern the suit.[16] A **suit by one co-sharer against another,** for a share of the rent collected by the latter, in respect of land held by the co-sharers not separately but jointly is governed by Art. 120, and Arts. 62, or 48, or 49 or 109 are inapplicable.[17] The period of limitation applicable to a suit against a co-sharer landlord to recover a share of the rent realised by him is contained in Art. 120 of Sch. I, to the Limitation Act.[18]

**1825. Suits for refund of money paid by plaintiff.**—In a suit for refund of money legally collected by the Municipality but wrongfully refused to be refunded, it was held that Art. 62 was inapplicable, and the claim fell under Art. 120,[19] Where an association of more than twenty members, not registered under the Companies Act, was an illegal one by reason of sub-S. (2) of S. 4 of the Companies Act, a suit for the return of the subscriptions paid was not a suit for money received, by the defendant for the plaintiff's use within Art. 62 of Limitation Act, but was governed by Art. 120.[20] A suit for refund of subscription given for a specific purpose, of founding a college for a particular community, which became impossible by the passing of a University Act, was held maintainable, and the suit was governed by Art. 120, Limitation Act.[21] In *Anantaram Bhattacharjee* v. *Hem Chandra Kar,*[22] where the property in dispute between the owners of two neighbouring estates was attached under S. 146 of the Criminal Procedure Code, and pending a suit for establishment of right to these lands, the defendant had withdrawn from the Collectorate certain moneys representing his share of the profits of the lands attached as appertaining to his mauza, a suit by the plaintiffs for recovery of the sum withdrawn by the defendant, on the allegation that the lands which had been attached being in their mauza, the money in the Collectorate was their money, it was held that Art. 120, and not Art. 62, applied. Where plaintiffs sued for specific performance of a contract of mortgage with possession in default of redemption within three years, and this suit was dismissed, a decree being passed for possession in defendant's cross-suit for possession of the land under an oral mortgage; and the plaintiffs then filed a **suit for refund of the money,** it was held that Art. 120 applied, and that the cause of action arose after the dismissal of the suit for specific performance.[23] When the question is whether Art. 62 applies or not, the point to be decided is for whose use did the party making the payment intend the money. Where on a sale of *patni* in a rent decree, the surplus was withdrawn by a creditor of one patnidar, and the sale being subsequently set aside, the Zemindar was made to pay whole of the purchase-money, a suit by the Zemindar against the creditor was held governed by Art. 120, and not Art. 62, Limitation Act.[24] Where a creditor of an insolvent obtained a decree against him and attached a debt due to the insolvent by the plaintiff, and the plaintiff paid off his debt and obtained a release; subsequently, the Receiver of the insolvent's estate sued the plaintiff for the debt and having obtained a decree got payment of the debt, and the plaintiff then brought a **suit to recover the money** which he had paid to the creditor of the insolvent, it was held that the suit was governed either by Art. 97 or by Art. 120, Limitation Act.[25]

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[13] 32 I.C. 83=19 M.L.T. 88=30 M.L.J. 104.

[14] *Venkata Reddi* v. *Kappur Reddi,* 1921 Mad. 353.

[15] *Mahomedbhai Husseinbhai* v. *Ismail Haji Halimbhai,* (1911) 12 I.C. 586 (Bom.).

[16] *Suraj Narain Singh* v. *Narbada Prasad,* 45 I.C. 99=1929 Oudh 83 =4 Luck. 265.

[17] *Bhubaneswar* v. *Dwarkanath,* (1921) 34 C.L.J. 508=1921 Cal. 77 =66 I.C. 876.

[18] *Ibid.*

[19] *The Municipal Board of Ghazipur* v. *Deokinandan Prasad,* 36 All. 555=25 I.C. 943=12 A.L.J. 952.

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[20] *U Sein Po* v. *U Phyu,* (1929) 120 I.C. 902=1930 Rang. 21.

[21] *Audesh Singh* v. *Commissioner, Lucknow,* 1934 Oudh 329=150 I.C. 713.

[22] 1923 Cal. 379=50 Cal. 475.

[23] *Mg Pa Kin* v. *Mg Po Oh,* 1925 Rang. 373=4 Bur.L.J. 160=92 I.C. 736.

[24] *Shiba Kumari Debi* v. *Mt. Daksha Bala,* 1928 Cal. 296=47 C.L.J. 369=110 I.C. 49; also see and cf. *Harihar Misser* v. *Syed Mohamed,* (1916) 20 C.W.N. 983=37 I.C. 30=1 Pat.L.J. 374=2 Pat.L.W. 401.

[25] *Balkishendas Dhanpat Rai* v. *Devisaran, etc.,* (1921) 62 I.C. 929 =1922 Lah. 103.

**1826. SUITS TO ENFORCE OBLIGATIONS ARISING OUT OF DECREES FOR ACCOUNTS.**—(*See* **Art. 64.**) Where the parties to a suit agreed to compromise their disputes, and obtain a declaratory decree in the suit, and a decree embodied in terms of the compromise deed provided *inter alia* that accounts should be looked into and the amounts found due should be paid, and a subsequent suit was brought by one of the parties within six years of the date of the declaratory decree to recover from the other party moneys due by the latter on the basis of the accounts, it was held that the suit being one to enforce obligations arising out of decrees, and the registered surrender deed being only a step towards obtaining that decree, it was impossible to apply Art. 116 to the facts of this case; neither was it an ordinary suit upon accounts falling under Art. 64, and only Art. 120 could be applied to the claim.[26] Where a partnership is dissolved, and there is subsequently an adjustment of accounts, the suit for the recovery of the amount on the unsigned adjusted account is not governed by Art. 64, but by Art. 115, or Art. 120 of the Limitation Act.[27]

**1827. SUIT ON ADMINISTRATION SURETY-BOND.**—(*See* **Art. 68.**) An administration security bond under S. 78 of the Administration Act is not a bond subject to a condition as contemplated in Art. 68 of Sch. I to the Limitation Act; but the obligation to sue under an administration bond is liable to be enforced at once, and can only be avoided by the sureties showing that the conditions laid down in the bond have been fully carried out, or carried out as far as possible up to the time of the suit. The right to sue on such a bond would accrue on failure of the administrator to comply with any of the conditions or on the administrator putting it out of his power to comply with them. And the suit would not be governed by Art. 68, but Art. 120 should be applied.[28]

**1828. SUIT UPON A PROMISSORY NOTE WITH SPECIAL AGREEMENT.**—(*See* **Art. 73.**) A suit upon a promissory note not containing merely "a promise to pay on demand," but its terms containing a special agreement to pay *"at any time within six years on demand,"* was not covered by Art. 73 of the Limitation Act, but it was held to fall within Art. 120, there being no period of limitation specially provided for a suit based upon such an agreement.[29]

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[26] *Arunachalam Chettiar* v. *Rajeswara Sethupati,* (1925) 91 I.C. 338 =1925 Mad. 1260; Followed *Periasami Mudaliar* v. *Seetharam Chettiar,* 27 Mad. 243=14 M.L.J. 84 (F.B.).

[27] *Madhowdas Ramdas* v. *Santramdas,* 1933 Sindh 324=27 S.L.R. 308.

[28] *Ho Pu* v. *Ma Thein Yin,* (1920) 56 I.C. 968 (L.B.); also see *Kantee Chandra Mukerji* v. *Ali Nabi,* 33 All. 414=8 A.L.J. 199=9 I.C. 935 (Period of limitation held to be six years, though article applicable not mentioned).

[29] *Sanjivi Reddi* v. *Kama Erranba,* 6 Mad. 290.

**1829. SUIT ON BOND HYPOTHECATING CATTLE.**—(*See* **Art. 80.**) Where a bond hypothecates certain cattle as security for the loan and the creditor sues to enforce the bond as a lien on the cattle, and does not ask for a personal decree against the debtor, the article applicable to the suit is Art. 120 of the Limitation Act, and not Art. 80.[30]

**1830. SUIT FOR ACCOUNT OF OUTSTANDING COLLECTIONS BY A DIVIDED MEMBER OF HINDU FAMILY.**—(*See* **Art. 89.**) Where money has been recovered by one of several persons interested therein as tenants-in-common, *e.g.*, by a member of a Hindu family after partition in respect of money which was left undivided, Art. 62 is inapplicable.[31] An action lies in such cases for account to recover what the defendant has received in excess of his share, and Art. 120, applies to such cases.[32] Similarly, a suit by one member asking for his share of the rents and profits of the immoveable property after the taking of accounts is governed by Art. 120, and not by Art. 127 of the Limitation Act, which latter is for a share of property which is the property of a joint family at the date of suit and appears to be in terms inapplicable to property which by reason of a division prior to suit has ceased to be the property of a joint family, and is held by the members of the family as tenants-in-common.[33] There is no contract of agency in such cases, unless the collection was made with the consent of all concerned, in which case the collecting member might be held to be an agent of the other co-owners.[34] Where at a partition between members of a joint Hindu family, a portion of the family property is left undivided with the senior member of the family with a view to the property being realized and its proceeds divided, there may be sufficient grounds to infer that the member receiving the moneys, and rents and profits received them as the agent of the other members of the family, in which case Art. 89 would apply[35]; but if there is no express or implied contract of agency, and Art. 89 does not apply, the proper remedy would be a suit for account which would be governed by Art. 120.[36]

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[30] *Deoki Nandan* v. *Gapua,* (1918) 46 I.C. 373=40 All. 512=16 A.L.J. 449; Relied on *Mahalinga Nadar* v. *Ganapathi,* 27 Mad. 528=13 M.L.J. 445 (F.B.) and *Nim Chand* v. *Jagabundhu,* 22 Cal. 21=11 Ind. Dec. (N.S.) 15.

[31] *Yerukola* v. *Yerukola,* 45 Mad. 648=1922 Mad. 150 (F.B.); Not followed *Arunachala* v. *Ramasami,* (1883) 6 Mad. 402; *Tellis* v. *Saldhana,* (1887) 10 Mad. 69; *Vaidyanatha Aiyar* v. *Aiyasami,* (1909) 32 Mad. 191; also see *Mahomed Wahib* v. *Mahomed Ameer,* (1905) 32 Cal. 527.

[32] *Khudersa Hajee Bappu* v. *Puthen Veetil,* (1911) 34 Mad. 511; *Marian Beeviammal* v. *Kadir Meera,* (1915) 29 I.C. 275; *Abdul Rahiman* v. *Pathammal Bivi,* (1919) 30 M.L.J. 104; *Segu Chidambaramma* v. *Segu Balayya,* (1911) 2 M.W.N. 467; *Mader* v. *Kader Maideen,* (1916) 39 Mad. 54; *Subba Row* v. *Rama Row,* (1917) 40 Mad. 291; *Yerukola* v. *Yerukola,* 45 Mad. 648=1922 Mad. 150 (F.B.).

[33] *Yerukola* v. *Yerukola,* 45 Mad. 648=1922 Mad. 150 (F.B.); Relied on *Robert Watson & Co.* v. *Ramchand Dutt,* (1901) 28 Cal. 799; also see *Amme Rahim* v. *Zia Ahmad,* (1891) 13 All. 282; *Banoo Tewary* v. *Doona Tewary,* (1897) 24 Cal. 308 and *Bhavrao* v. *Rakhmin,* (1899) 23 Bom. 137.

[34] *Yerukola* v. *Yerukola,* 45 Mad. 648=1922 Mad. 150 (F.B.); also see *Na Ayyakutti* v. *Sigappi Achi,* 114 I.C. 364=1928 Mad. 1236.

**1831. SUIT TO RECOVER SALE PROCEEDS FROM AGENT.**—(*See* **Art. 89.**) Where the principal brings a suit against his agent to follow the sale-proceeds of the goods in his hands, the period of limitation applicable would be six years under Art. 120, and Art. 89 is inapplicable.[37]

**1832. SUIT FOR PARTNERSHIP ACCOUNTS BASED ON AGREEMENT TO DISTRIBUTE PROFITS.**—(*See* **Art. 89.**) A suit for accounts based on an express agreement to distribute profits would not be governed by Art. 89, inasmuch as an individual partner cannot be regarded as an agent of another individual partner. Art. 116 is also inapplicable to such a suit, being a suit for account, which can hardly be treated as one for compensation for breach of an agreement. Accordingly, where a suit was brought by some of the partners against the managing partners, seeking to compel the partners to discharge the obligations undertaken by them under the agreement of partnership and to render account of the profits to be divided, the suit not being provided for by Arts. 89 or 116, was held governed by the residuary Art. 120, Limitation Act.[38]

**1833. SUIT TO SET ASIDE DECREE ON GROUND OF GROSS NEGLIGENCE OF THE GUARDIAN OF A MINOR.**—(*See* **Art. 95.**) A suit by a minor to declare that a decree passed against him is null and void on the ground that the guardian *ad litem* was guilty of gross negligence is governed by Art. 120, Limitation Act. Art. 95, which refers to a suit to set aside a decree obtained by fraud is not applicable to such a suit.[39]

**1834. SUIT BY AUCTION-PURCHASER FOR REFUND OF MONEY FOR DEFAULT ON PART OF VENDOR.**—(*See* **Art. 97.**) A suit brought by an auction-purchaser to recover money from the defendant who had, after the sale and the deposit of the money in Court and before the sale was set aside on appeal, attached that sum in execution of his decree against the judgment-debtor as representing the surplus sale-proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, is governed by Art. 120 of the Limitation Act. Arts. 62 and 97 contemplate a suit brought by one of the contracting parties against the other to recover the money which has been paid at the sale which owing to the default on the part of the vendor has become infructuous.[40] Where the decree-holder certifies to the Court the payments of the amounts made to him by the judgment-debtor in his previous applications for execution, but fails to give credit for the amounts in his final application for execution and executes the decree for the full amount, Art. 97 does not apply to a suit brought for the recovery of the amount realized in excess of the amount due, Art. 115 may apply, but in all probability the case is governed by Art. 120.[41]

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[35] *Gabu* v. *Zipen,* (1920) 22 Bom.L.R. 1289=59 I.C. 357; *Govinddas* v. *Ganpatdas,* 1928 Bom. 365.

[36] *Govinddas Rajaramdas* v. *Ganpatdas Narothamdas,* 1928 Bom. 365 =113 I.C. 173.

[37] *Azamali* v. *Shamsher Ali,* 1927 Oudh 574 (1)=106 I.C. 35.

[38] *Binjraj* v. *Kisanlal,* 1933 Nag. 127=141 I.C. 277 (2).

[39] *Mathura Singh* v. *Rama Rudra,* 14 Pat. 824=16 Pat. 484.

**1835. SUIT TO RECOVER REMUNERATION AS DWARIS OF TEMPLE.**—(*See* **Art. 102.**) A suit by the dwaris of a temple for recovery of certain dues claimed by them as payable as remuneration in respect of their services in connection with the temple is not a suit covered by S. 10, Limitation Act. Such a suit is not a suit for wages under Art. 102, the payments made being almost entirely payments made in kind. It does not fall under Art. 131 also which includes merely a suit to establish a right. Accordingly the general Art. 120 applies.[42]

**1836. SUIT FOR DISSOLUTION AND ACCOUNTS OF A PARTNERSHIP.**—(*See* **Art. 106.**) Art. 106, reates to a suit for an account and share of the profits of a *dissolved* partnership, while Art. 120 governs a suit for dissolution and accounts of a subsisting partnership.[43] Art. 106 contemplates suits between partners *inter se* and does not apply to an action by a partner against the sub-partner. Such an action is governed by Art. 120.[44] A suit for partnership accounts based on express agreement to distribute profits every year is governed by Art. 120, and not by Arts. 89 or 116.[45] A suit which is virtually for dissolution of a partnership, though in form one for accounts, is governed by Art. 120, and not by Art. 106 of the Limitation Act.[46]

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[40] *Amritalal Bagchi* v. *Jogendralal,* (1912) 15 I.C. 707=40 Cal. 187; Relied on *Nilakanta* v. *Imamsahib,* 16 Mad. 361.

[41] *Karm Elahi* v. *Hari Ram,* 1933 Lah. 112=140 I.C. 472=33 P.L.R. 1084.

[42] *Sri Sri Baidyanath Jiu* v. *Har Dutt Dwari,* 1926 Pat. 205=5 Pat. 249.

[43] *Srinivasalu Naidu* v. *Ramakrishna,* 144 I.C. 573=1933 Mad. 353 (2)=37 L.W. 288; cf. *Karam Chand* v. *Basheshamath,* 1932 Lah. 519=138 I.C. 375 (Suit for rendition of accounts of a dissolved partnership).

[44] *Seenayya* v. *Ramalingayya,* 57 Mad. 347=1933 M.W.N. 1382=38 L.W. 858=65 M.L.J. 789=1934 Mad. 12=148 I.C. 204.

[45] *Binjraj* v. *Kisanlal,* 1933 Nag. 127=141 I.C. 227.

[46] *Narayanaswamy Mudali* v. *Ganghadara Mudali,* (1918) 48 I.C. 89.

**1837. SUIT FOR MESNE PROFITS COLLECTED BY A CO-OWNER.**—(*See* **Arts. 62 and 109.**) Where plaintiffs obtained a decree for partition of their share of the joint properties and mesne profits, against the defendants, but no partition had been effected between them, a suit for plaintiff's share of the rents and profits received by the defendants as co-owners in possession, could not be governed by Art. 109, as the profits could not be said to have been "wrongfully received" by them, nor could Art. 62 apply to the case, inasmuch as none of the co-owners being entitled to any specific part, the rents received by the defendants were not money payable by them to the plaintiffs as money received for their use within the meaning of Art. 62; and the residuary Art. 120, was the only article applicable.[47] Article 109 is inapplicable to a suit for share of profits by members of a joint family against purchaser of another member's interest in property.[48] A suit by a tenant-in-common against another for an account of the profits collected by the latter and for recovery of the plaintiff's share thereof is governed by Art. 120, and not by Art. 62 of the Limitation Act.[49] A claim by an heir to recover the profits of his share to which he is entitled subsequent to the death of the intestate is not governed by Art. 123, or Art. 109 of Sch. I to the Limitation Act, as the occupation of the co-heir would not be wrongful. Such a claim would be governed by Art. 120.[50] Where a person prevents his co-tenants from obtaining from the field such profits as it is capable of yielding and takes possession of the whole field as his own he is liable to account for the mesne profits. Article applicable to such a suit is Art. 120, and not Art. 109.[1]

**1838. SUIT FOR RENT AGAINST CO-OWNER.**—(*See* **Art. 110.**) Where defendants, the owners of the moiety of a house, rented the other moiety from its owners, the plaintiffs, for a specified period, but continued in possession after expiry of the term without the assent of the plaintiffs and without paying any rent, and the plaintiffs sued for recovery of arrears of rent, it was held that subsequent to the expiry of the term the defendant's possession of the rented portion was as co-owners, and not as tenants on sufferance, or holding over, and that as, after expiry of the term, the relatiosship between the parties was not based on an express or implied contract, Art. 120 and not Arts. 110 or 115 of the Limitation Act applied.[2]

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[47] *Maung Po Nyun* v. *Ma Saw Tin,* 1931 Rang. 150=131 I.C. 511.

[48] *Siddalinga* v. *Bhimana,* 156 I.C. 640=41 L.W. 138=1935 M.W.N. 107=1935 Mad. 731=61 M.L.J. 487.

[49] *Suraj Narain Singh* v. *Narbada Prasad,* 115 I.C. 99=1929 Oudh 83=4 Luck. 265=5 O.W.N. 1122; Relied on *Subba Row* v. *Rama Rao,* (1916) 32 I.C. 899=40 Mad. 291=30 M.L.J. 341 and *Yerukola* v. *Yerukola,* (1922) 71 I.C. 177=1922 Mad. 150=45 Mad. 648=42 M.L.J. 507 (F.B.).

[50] *Maung Po Kin* v. *Maung Shwe Bya,* (1923) 76 I.C. 855 (861)=1 Rang. 405=1924 Rang. 155; Relied on *Robert Watson & Co.* v. *Ram Chand Dutt,* 23 Cal. 799; *Madar Sahib* v. *Kader Moideen Sahib,* 33 I.C. 705=39 Mad. 54.

[1] *Budhilal* v. *Mokham Chand,* 1928 Nag. 65 (1)=105 I.C. 777; Followed *Yerukola* v. *Yerukola,* 1922 Mad. 150=45 Mad. 648 (F.B.); *See* Art. 62 and S. 1824, *ante*; **"Suit for accounts of the profits of joint property".**

**1839. SUIT FOR RECOVERY OF SUM TO ADJUST DIFFERENCE IN PARTITION.**—(*See* **Art. 111.**) A suit for the recovery of a sum of money fixed to be paid by one co-sharer to another to adjust the difference between the prices of the properties which fell to their respective shares in partition is governed for purposes of limitation by Art. 120 and not by Art. 111 of the Limitation Act.[3] Where plaintiff acting as the guardian of two minor girls sold a certain property, stipulating that the sale amount should remain with the vendee who was to pay it to the minors on their attaining majority, and subsequently plaintiff, as reversioner of the deceased girls, became entitled to the whole purchase-money and sued for the same, it was held that Art. 111 did not apply, because the plaintiff was not the vendor of the property, and that the suit was governed by Art. 120, the period of limitation commencing from the date of the death of the younger girl.[4]

**1840. SUIT BY LIQUIDATOR FOR CALLS.**—(*See* **Art. 112.**) Where the directors of a company made a call upon its shareholders, but the company being ordered to be wound up by the Court, an Official Liquidator was appointed, who filed a suit against a shareholder to recover (along with other calls) the amount of the call made by the Directors, it was held that the suit as to this part of the claim being brought, not by the company, but by the liquidator, Art. 120, and not Art. 112, Limitation Act, applied.[5] In *Harchand Rai* v. *Ranglal,*[6] it was held by the Punjab Chief Court, following the Bombay view, that a suit, by the liquidators of a certain public company, for money due to the company in respect of unpaid calls on shares, was not governed by Art. 112, or by any article other than Art. 120, and having been instituted within six years of the first default and of the forfeiture of the shares, was within limitation.

**1841. SUIT FOR RECOVERY OF MONEY PAYABLE UNDER TERMS OF AN AWARD.**—(*See* **Art. 113.**) Where an arbitration award provided that the defendant should pay to the plaintiff a certain amount by a given date, and that in case of his failure to do so, the plaintiff would be entitled to recover the same with interest, and the defendant having made default, the plaintiff brought a suit to recover the amount with interest, it was held that the suit was not a suit for specific performance of a contract, and was not governed by Art. 113 of the Limitation Act, but that it was governed either by Art. 116, or Art. 120 of the Limitation Act.[7] In *Harbhojmal* v. *Diwan Chand*,[8] the **Punjab Chief Court** has applied Art. 120 of the Limitation Act to a suit based on an award, holding that neither Art. 113, nor 115 is applicable, even although the award is signed by the parties. The **Bombay High Court**, has held that a suit to enforce an award is not a suit for specific performance within Art. 113, but comes under Art. 120.[9] The view taken by **Calcutta**,[10] and **Madras**[11] High Court has been that suits to enforce awards are governed by Art. 120, and not Art. 113. The Sind Judicial Commissioner's Court has followed this view.[12] The **Allahabad High Court** has conflicting decisions on the point. In the case of *Sukho Ram* v. *Ram Sukhdas*,[13] it was held that a suit for money based on an award of arbitrators, which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced, and that Art. 113 is applicable to such a suit. Again, in *Raghubar Dial* v. *Madan Mohanlal*,[14] the view taken was that a suit for money under similar circumstances is a suit for the specific performance of a contract. But this view has been dissented from by Mookerjee, J., in *Bhajahari Saha* v. *Beharylal Basak*,[15] where the true effect of an award of arbitrators appointed by parties to settle their disputes is explained, as merging and extinguishing all claims embraced in the submission, and that its force is derived from its being a conclusive judgment between the parties, and not a contract within the meaning of Art. 113, Limitation Act. However, as observed in *Ma Bibi* v. *Abdul Hameed Khan,*[16] by the Rangoon High Court, "it cannot be said that all suits, irrespective of their nature, which are based on an award must be governed by Art. 120." The Calcutta decision above noticed applied Art. 142, or 144, Limitation Act to a suit for recovery of possession of land brought on an award by an arbitrator declaring the plaintiff's right to the land.[17] This case was followed in the Upper Burma case of *Maung Ne Deen* v. *Maung Cho.*[18]

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[2] *Madar Sahib* v. *Kader Moideen Sahib,* 33 I.C. 705=39 Mad. 54.

[3] *Gurdas Mal* v. *Baijnath,* (1928) 111 I.C. 29=1928 Lah. 662.

[4] *Gulab* v. *Mt. Sarwar Jan,* 1933 Lah. 860=15 Lah. 35=35 P.L.R. 161=147 I.C. 269.

[5] *The Parell S. and W. Company* (in liquidation) v. *Manek Haji,* (1886) 10 Bom. 483.

[6] 70 P.R. 1903; also see *Karam Chand* v. *The Jullandhar Bank, Ltd., in liquidation,* 1927 Lah. 543=102 I.C. 705.

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[7] *Kuldip Dube* v. *Mahant Dube*, (1911) 11 I.C. 705=34 All. 43.

[8] 32 I.C. 88=102 P.R. 1915; also see *Kartar Singh* v. *Bhagat Singh*, 1921 Lah. 71=2 Lah. 320 (Art. 120).

[9] *Nanalal Lallubhai* v. *Chhotalal Narsidas*, 1925 Bom. 519=49 Bom. 693=91 I.C. 1032; also see *Rajimal Girdharlal* v. *Maruti Shivram*, 1921 Bom. 389=45 Bom. 329.

[10] *Bhajhari Saha Banikya* v. *Beharylal Basak*, (1906) 33 Cal. 881=4 C.L.J. 162 (Art. 144 applied to suit for possession of land on basis of award).

[11] *Sornavalli Ammal* v. *Muthayya Sastrigal*, (1900) 23 Mad. 593.

[12] *Khubchand Bhikchand* v. *Jethanand Santdas*, 1929 Sind 168=117 I.C. 153; Relied on *Somajimal* v. *Todmal*, (1913) 6 S.L.R. 148=19 I.C. 376.

[13] (1883) 5 All. 263.

[14] (1893) 16 All. 3 (Art. 113 applied); Compare *Sheo Narain* v. *Beni Madho*, (1901) 23 All. 285.

[15] (1906) 33 Cal. 881=4 C.L.J. 162.

1842. **SUIT FOR COMPENSATION FOR BREACH OF CONTRACT.**—(*See* **Art. 115.**) A **suit based on trust created by will** falls under Art. 120, or Art. 123 and not under Art. 115 of the Limitation Act.[19] Article 115 is not strictly applicable to a misfeasance in the nature of a breach of trust. The liability of a Director of a Bank is of a person whose relations with the company are not independent of contract and who occupies the position of a *quasi*-trustee. A **suit,** therefore, **for any misfeasance against a Director** would not fall under Art. 36; nor would it fall under Art. 115 or 116, for the suit is not for a specific breach of any specific contract with the person making the claim, *i.e.,* the liquidator, but would fall under the residuary Art. 120.[20] A suit to enforce award, is governed by Art. 120, and neither Art. 113 nor Art. 115, Limitation Act is applicable to such a suit.[21] When the Court orders the defendant to pay money to the plaintiff, which the former ought to have paid under the terms of an **award** but had not paid, the Court is not really enforcing specific performance at all but is directing payment of compensation for non-compliance with the terms of the award and the case would be governed by Art. 120 of the Limitation Act. The question whether Art. 115, or 116, is applicable would depend on the facts of the particular case.[22] Where there is no question of breach of contract or compensation payable for such breach, but parties were to look into the accounts of each other to equalize the profit, each trading independently of the other, and a suit is brought to take such an account, and to ascertain who owes whom, and give a decree for the amount payable, the suit cannot be treated as a suit for compensation, and it does not fall under Art. 115. The general Art. 120, would, therefore, apply.[23] The relation constituted between the shareholder and the company on a declaration of a dividend by the company is not a contractual relation in the sanse contemplated by Arts. 115 and 116 in respect of the dividend. Accordingly, **a suit by a shareholder of a limited company for recovery of arrears of dividend** is a claim for debt and is governed by Art. 120. It is not a claim arising out of contract within the meaning of Art. 115.[24]

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[16] 1929 Rang. 275.

[17] 33 Cal. 881=4 C.L.J. 162, *supra.*

[18] 1923 Rang. 108.

[19] *Mt. Ali Begam* v. *Ismail Hussain,* 1929 Lah. 834.

[20] *Govind Narayan Kakade* v. *Rangnath Gopal,* (1930) 127 I.C. 305=54 Bom. 226=32 Bom.L.R. 232; Followed, *The Union Bank, Allahabad, Ltd.,* 88 I.C. 785=47 All. 669 (673)=23 A.L.J. 473=1925 All. 519.

[21] *Khubchand Bhikchand* v. *Jethanand Santdas,* 117 I.C. 153=1929 Sind 168=23 S.L.R. 417 [Also *see* Notes under **S. 1841**].

[22] *Hardhian Singh* v. *Delhi Cloth and General Mills Co., Ltd.,* (1912) 16 I.C. 804=32 P.R. 1913.

**1843. SUIT FOR COMPENSATION FOR BREACH OF REGISTERED CONTRACT.—(*See* Art. 116.)** Where an agreement was entered into between an uncle and his nephews that their earnings should be put into a common fund, which fund should be utilized for family requirements, and a suit was brought for the plaintiff's share of the accumulated surplus funds, for the division of which no provision had been made in the agreement, it was held that the claim was governed by Art. 120, and not by Art. 116, Limitation Act. The title of the plaintiffs, nephews, was not based on contract, express or implied, but arose out of the fact that they were contributors to a common fund, which the Court was now asked to distribute. The claim was one which the Court must deal on equitable principles, and apart from any question of partnership or of contract. Also, that the question was not one relating to joint-family property, within the meaning of Art. 127.[25] The word "contract" in Art. 116 does not include an award; and a suit for recovery of money due under an award is governed by Art. 120 of the Limitation Act, the suit being one for compensation for breach of the obligation imposed by the award and not for specific performance of the award.[26]

**1844. SUIT FOR SHARE OF INTESTATE'S ESTATE.—(*See* Art. 123.)** Article 123 applies only when the suit is for the share of an estate which it is the legal duty of the defendant to distribute. In the case of a Mahomedan dying intestate, the estate is at once vested in the heirs as tenants-in-common, and there is no one charged by law with its distribution. Accordingly, a suit by a Mahomedan for a share of his wife's property in the possession of another sharer is, for purposes of limitation, governed by Art. 120 of the Limitation Act, when property is moveable, and by Art. 144, when it is immoveable.[27] Where a Mahomedan widow brought a suit for declaration of her right to inherit the entire property left by her deceased husband, and for recovery of possession of the same from the defendant, the brother of the deceased, it was held that Art. 120, Limitation Act was applicable to this suit, which was not a suit for a distributive share of property within the meaning of Art. 123 of the same; and was not a suit for specific moveables wrongly taken within the meaning of Art. 49, nor was any other article of the schedule applicable.[28] Article 123 has no application to suits in which the defendant is not a person who is under an obligation to distribute the estate.[29]

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[23] *Rachapudi Bhavanarayana* v. *Kolla Venkayya,* 1927 Mad. 775.

[24] *Rama Seshayya* v. *T. Cotton Press,* 1926 Mad. 615=94 I.C. 515=49 Mad. 468=50 M.L.J. 520 (F.B.).

[25] *The Commercial Bank of India* v. *Allavoodeen,* (1900) 23 Mad. 583 (592).

[26] *Somjimal Tillumal* v. *Tolomal Jethanand,* (1913) 19 I.C. 376=6 S.L.R. 148; Followed in *Khub Chand Bhikchand* v. *Jethanand Santdas,* 1929 Sind 168=117 I.C. 153 (*See* notes under Art. 113 and also S. **1841,** *ante*).

**1845. SUIT FOR DECLARATION OR POSSESSION CONCERNING NON-HEREDITARY OFFICE.**—(*See* **Art. 124.**) Article 124, applies to a claim to an office and property attached to it, if the office is hereditary. Where the office is not hereditary, Art. 120 is the only article applicable.[30] The office of mutwalliship not being a hereditary one, a suit to oust a person from his office as mutwalli is regulated by Art. 120 of the Act.[31] Where the members of a *Devasthanam* Committee appointed under Act XX of 1863 sued for a declaration that the suit temple was subject to the control of the committee and for an injunction directing defendant to produce for their inspection all the temple properties and accounts; it was held that the suit was not one for possession of an hereditary office, and, therefore, Art. 124 did not apply: and the suit as framed fell under Art. 120 of the Limitation Act, as Art. 144 also could not be applied, there being no prayer for possession of any immoveable property or any interest therein.[32] A claim for a decree for possession of certain property and a *dharmasala,* which was subsequently amended to a suit for declaration to the effect that the plaintiffs were entitled to be managers and supervisors of the *dharmasala* was held to be governed by Art. 120.[33] A claim to remove the defendant from the management of the worship and service performed at a temple; to remove the power and contract of the defendant from the properties belonging to the temple; and to be declared authorised to appoint a second manager for the purpose of carrying out the object of the endowment, is not a suit falling under S. 10 of the Limitation Act. Their Lordships of the Privy Council felt some difficulty in ascertaining the exact nature of the suit, owing to the obscurity with which the plaintiff's title was stated in the plaint, and considered

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[27] *Khadersa Hajee Bappu* v. *Puthen Veetil,* (1910) 6 I.C. 50=34 Mad. 511 (F.B.); Relied on *Umardaraz* v. *Wilayatali,* 19 All. 169 P.R.; *Kasim* v. *Ayishamma,* 15 Mad. 60=1 M.L.J. 754.

[28] *Mahomed Riasatali* v. *Hasin Banu,* 21 Cal. 157=20 I.A. 155 (P.C.).

[29] *Ma Pwa Thin* v. *U Nyo,* 12 Rang. 409=152 I.C. 768=1934 Rang. 318; cf. *Srinathji* v. *Panna Kunwar,* 1934 A.L.J. 230=3 A.W.R. 397.

[30] *Kassim Hassan* v. *Huzra Begum,* 32 C.L.J. 151=60 I.C. 165.

[31] *Debendranath* v. *Sheik Sefatulla,* 1927 Cal. 130=99 I.C. 205=44 C.L.J. 339=31 C.W.N. 184.

[32] *Charapattada Siddalinga* v. *Sondur Ramachandra,* (1916) 35 I.C. 646=4 L.W. 186.

[33] *Bhagmal* v. *Bhagwandas,* (1917) 41 I.C. 636=125 P.W.R. 1917.

> "that it may fall within Art. 123 or Art. 145, . . . . but if it does not fall within either of those sections, then the case is caught by the general Art. 118 (Act IX of 1871) which provides for every case that is not previously provided for in the Act".[34]

**1846. SUIT BY A REVERSIONER TO HAVE THE ALIENATION BY THE FEMALE DECLARED VOID.**—*See* notes under Art. 125. Also *see* S. 1805, *ante*: **Declaration of invalidity of alienations.**

**1847. SUIT BY A HINDU TO SET ASIDE HIS FATHER'S ALIENATION.**—*See* Ss. 1797-1805. Declaration of invalidity of alienations; *also see* notes under Art. 126, *post.*

**1848. SUIT FOR DECLARATION OF RIGHT TO MAINTENANCE.**—*See* S. 1796, *ante*: Declaratory suits: *also see* notes under Art. 129, *post.*

**1849. SUIT TO ESTABLISH A PERIODICALLY RECURRING RIGHT.**—*See* notes under Art. 131; *also see* **declaratory suits:** S. 1796, *ante.*

**1850. SUIT FOR MONEY DECREE ONLY, ON MORTGAGE BONDS.**—(*See* **Art. 132**). Where the plaintiff asks for **a money decree only** and does not seek to enforce a charge on immoveable property, Art. 132 does not apply.[35] A **Hindu widow's maintenance** is not a charge on her husband's properties and a suit to recover arrears of maintenance is not governed by Art. 132.[36] A **suit on a mortgage-bond executed for a loan** not of money but **of paddy** is governed by Art. 116, or Art. 120, and not by Art. 132 of the Limitation Act.[37] However, a suit to recover the *value* of any agricultural or other produce the right to receive which is secured by a charge on immoveable property is governed by Art. 132.[38] A decree for sale obtained on the basis of a mortgage by the mortgagee is moveable property and a **suit to enforce a hypothecation of such a decree** is governed by Art. 120 of the Limitation Act,[39] but where the moveable property which was mortgaged or charged in the first instance had been converted into immoveable property, the mortgagee was held entitled not only to the benefit of the new security, but also to the benefit of the larger period of limitation under Art. 132 of the Limitation Act.[40] Where the legal representatives of a deceased *shebait* brought **a suit to recover the amounts,** which the ***shebait*** was **compelled to spend out of his private funds** in protecting the *debutter* estate and performing his obligations as *shebait,* it was held by the Judicial Committee that the period of limitation was six years from the death of the *shebait.*[41] This has been followed in *Kaliba Mavulvija* v. *Saran Bivi Saila.*[42] by the **Madras High Court,** where the plaintiff, appointed by the District Judge as a **trustee** of a mosque during the minority of the defendants **sued for recovery of the sums advanced** by him **to the trust,** and not recovered before he gave up possession under a decree obtained by the minor on attaining his majority, Art. 120 and not 132 was applied. An executor has only a right of retainer and no charge on the properties not in his possession, which at one time formed part of the estate. Article 120 of the Limitation Act, therefore, applies to **claims of executors for money spent on behalf of the estate.**[43] Where property, mortgaged by a father for purposes not connected with the joint-family, devolves upon the sons by survivorship, there is no charge on it enforceable against the sons.[44] Accordingly, it follows that one member of a joint-family cannot deal with his share in the property of the joint-family so as to create a charge which will survive him.[45] A **suit by the holder of a bond to enforce his security against the sons of the surety** after the death of the father, is, therefore, governed not by Art. 132, but by Art. 120 of the Limitation Act.[46]

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[34] *Balwant Rao* v. *Puran Mal,* (1883) 6 All. 1=10 I.A. 90=13 C.L.R. 39 (P.C.).

[35] *Srinathji* v. *Panna Kunwar,* 1934 A.L.J. 230=3 A.W.R. 397.

[36] *Saraswati* v. *Sheoratan,* 12 Pat. 869.

[37] *Kandarpa* v. *Sridhar,* (1918) 44 I.C. 518 (Cal.).

[38] *See* Art. 132 (*b*); also see *Kandarpa* v. *Sridhar,* (1918) 44 I.C. 518 (Cal.) and *Indranarain* v. *Dwijabar,* (1919) 47 Cal. 125=23 C.W.N. 949 (Compare *Rashbehari* v. *Kunjubehari,* (1915) 24 C.L.J. 348—No longer good law).

A turn of worship at a temple is not an interest in immoveable property. Therefore, a **suit to enforce a mortgage of a turn of worship** is not governed by Art. 132, but by Art. 120, Limitation Act.[47] Where a third party has advanced money to the mort-

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[39] *Mt. Jamnadevi* v. *Lala Ram,* (1917) 37 I.C. 4=39 All. 74.

[40] *Ibid.*

[41] *Peary Mohun Mukerji* v. *Norendra Nath Mukerji,* (1910) 5 I.C. 404=14 C.W.N. 261=7 A.L.J. 125=7 M.L.T. 63=37 I.A. 27=20 M.L.J. 171=37 Cal. 229 (P.C.).

[42] (1915) 28 I.C. 290=38 Mad. 260.

[43] *Chidambara Mudaliar* v. *Krishnaswami Pillai,* (1915) 28 I.C. 221=39 Mad. 365=28 M.L.J. 285.

[44] *Bidya Prosad Singh* v. *Bhupnarain Singh,* 29 I.C. 629=19 C.W.N. 849=21 C.L.J. 543=42 Cal. 1068 (F.B.).

[45] *Jowala Prasad* v. *Protap Udai Nath,* (1917) 37 I.C. 184=1 P.L.J. 497.

[46] *Ibid.*

[47] *Narasingh Bana Goswami* v. *Prolhadman Tevari,* (1918) 46 Cal.

**gagor** to pay off the mortgage on the understanding that a further mortgage would be executed by the mortgagor, the third party has **no legal title to the property,** though he may have an **equitable right to claim a declaration** in his favour. Article 132 cannot apply to a suit where plaintiff is not enforcing a charge in existence and recognised at the date of the suit, and the only article which can apply to a suit of this nature is Art. 120 of the Limitation Act.[48]

**1851. SUIT BY REVERSIONER TO RECOVER MOVEABLE PROPERTY ON DEATH OF A HINDU FEMALE.**—(*See* **Art. 141.**) It was ruled by the Judicial Committee in *Runchor Das* v. *Parvati Bai,*[49] reversing on this point the decision of the Bombay High Court in *Vundravandas* v. *Cursondas,*[50] that a suit by a Hindu reversioner to recover *moveable property* on the death of a Hindu female is governed by Art. 120 of the schedule to the Limitation Act, and that limitation begins to run from the death of the female; whereas in the case of immoveable property, the period is, under Art. 141, twelve years from the date when the female dies.[1] Where a testator died leaving two widows to whom he made specific bequests, and he bequeathed the residue of the property, moveable and immoveable, to trustees for *dharm,* and a suit was brought by the reversioners, on the death of the surviving widow to have the bequest set aside and for administration of the estate, Art. 144 had no application to the case, and the limitation applicable to the moveables was under Art. 120, and to immoveables under Art. 141 of the Limitation Act.[2] In *Mt. Jaggo Bai* v. *Utsava Lal,*[3] following the above ruling, their Lordships of the Privy Council held Art. 120 as the relevant article as regards the plaintiff's title to *malikana* in lieu of which the widow had released certain villages to the Government.

**1852. SUIT FOR DECLARATION OF TITLE TO IMMOVEABLE PROPERTY.**—(*See* **Arts. 142, 144**); *also see* Ss. 1795, 1796, *ante;* and **Declaration as to erroneous entry in Revenue records, S. 1806,** *ante* **and Declaratory suit** *re.* **attachment by Magistrates, S. 1807,** *ante.*

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455=22 C.W.N. 994=47 I.C. 25; Relied on *Jato Kar* v. *Makund Deb,* 11 I.C. 884=39 Cal. 227 (230).

[48] *Chhotalal Karsandas* v. *Vishnu Ganesh Gokhale,* 1921 Bom. 182=45 Bom. 597=23 Bom.L.R. 84=60 I.C. 903.

[49] (1899) 23 Bom. 725=26 I.A. 71 (P.C.).

[50] (1897) 21 Bom. 646.

[1] *Pramath Nath* v. *Bhuban Mohan,* 1922 Cal. 321 (328)=49 Cal. 45=33 C.L.J. 421=25 C.W.N. 585.

[2] *Runchordas* v. *Parvatibai,* (1899) 23 Bom. 725=26 I.A. 71 (P.C.).

[3] 1929 P.C. 166=56 I.A. 267=51 All. 439.

**1853. STARTING POINT OF LIMITATION.**—(1) The third column of Art. 120 gives the starting point of limitation as the time *"when the right to sue accrues"*. The expression "right to sue" means right "to seek relief", consistently with the etymology of the word "sue" which in Wharton's Law Lexicon is defined as meaning

**"Right to sue" meaning of.**

> "to prosecute by law, to claim a civil right by means of legal procedure".[4]

Generally speaking "the right to sue accrues" whenever a person becomes clothed with a legal character entitling him to a relief which a Court of law is competent to grant[5]; that is, when the cause of action arises.[6] The phrase **"cause of action"** is to be understood in its most comprehensive sense of comprising the entire set of facts that give rise to an enforceable claim, that is, including both the *right,* and its *infringement.*[7] (2) The "right to sue" mentioned in the third column of Art. 120 means the **right to sue of the plaintiff himself or of some one through whom he claims,** not a right of somebody else to sue through whom the plaintiff does not claim.[8] The expression means the right to bring the particular suit with reference to which the plea of limitation is raised.[9] Under Art. 120 there can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.[10] In the case of a pledge to secure moneys advanced as loans, a suit on the security is governed by Art. 120, Limitation Act, and a suit filed more than six years after the date of the pledge will be barred by limitation. The right to sue on the security in default of payment is simultaneous with the right to sue on the loan.[11]

**1854. CAUSE OF ACTION WHEN ARISES.**—As noticed above, it has been held by the Judicial Committee in *Mt. Bolo* v. *Mt. Koklan,*[12] that infringement of the right asserted in

**Date of infringement of right.**

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[4] *Gopal* v. *Ram Chandra,* (1902) 26 Bom. 597 (603).

[5] *Abdul Rahim* v. *Barira,* (1921) 61 I.C. 807 (809)=6 P.L.J. 273=2 P.L.T. 556.

[6] *Muhd. Hamidullah* v. *Mt. Fakhar Jehan,* (1922) 65 I.C. 452 (454) (Oudh).

[7] *Haramoni* v. *Haricharan,* (1895) 22 Cal. 833 (839, 840).

[8] *Bhagwanta* v. *Sukhi,* (1899) 22 All. 33 (F.B.).

[9] *Gobinda Narayan Singh* v. *Shamlal Singh,* 1931 P.C. 89=58 I.A. 125=131 I.C. 753 (P.C.).

[10] *Annamalai Chettiar* v. *Muthukaruppan,* 1931 P.C. 9=130 I.C. 609 =8 Rang. 645=60 M.L.J. 1 (P.C.).

[11] *Percy Fisher* v. *Ardeshir,* 1935 Bom. 213=37 Bom.L.R. 165=156 I.C. 531.

[12] 1930 P.C. 270=127 I.C. 737=11 Lah. 657=34 C.W.N. 1169 (P.C.); also see *Radha Madhab* v. *Rajendar Prasad,* 1933 Pat. 250=12 Pat. 727 =14 P.L.T. 258.

the suit, or at least, a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted constitutes in general the right to sue under Art. 120 of the Limitation Act. Where the plaintiff sued as trustee for a declaration that the mortgage-decree in the former suit was not binding on the trust property, and there was no right to infringe the plaintiff's right before the mortgage suit was instituted, it was held that limitation commenced to run from the date of the mortgage suit.[13] Where a party sues for a declaration relating to an entry in a record of rights, the suit is governed by Art. 120, and time commences to run from the infringement of plaintiff's right.[14] The interpretation to be placed upon the expression *"when the right to sue accrues"* in Art. 120 to a large extent depends on the particular facts of the case to which the article is to be applied and the relief sought.[15] In a suit by a person whose application for correction of *jamabandi* has been dismissed by the Revenue Court, the starting point for declaration of title is the date of the order of the Revenue Court.[16] Similarly, where a Court of competent jurisdiction gives a finding against a person on the basis of which a wrong entry is made in revenue records, a suit to establish title must be brought within six years of that finding having been given to the knowledge of the plaintiff.[17] Vide also A.I.R. 1936 Pat 535, 1935 Oudh 181 & 1938 Pesh 28

**(ii) Certificate under Pensions Act.**

**1855.** Where a suit was brought for a declaration of right to the *malikana* amount, the suit was governed by Art. 120 of the Limitation Act, but there was no right of action at all in respect of such a subject-matter until a certificate had been obtained under the Pensions Act, 1871, the period of limitation could not begin to run before the grant of the certificate.[18]

**(iii) Date of confirmation of sale.**

**1856.** In the case of a customary right to sue for the payment of *Zaricha haran* dues to the owner of site, right to sue accrues on the confirmation of the sale, and not on the date of the auction-sale.[19]

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[13] *Kandasami Pillai* v. *Munisami Mudaliar,* 137 I.C. 707=1932 Mad. 589=35 L.W. 350=1932 M.W.N. 321.

[14] *Birendranath Roy* v. *Surendranath Tagore,* 58 C.L.J. 120.

[15] *Mahomed Umar* v. *Mahomed Ibrahim,* 1933 Lah. 270=143 I.C. 725 =34 P.L.R. 598.

[16] *Bhagwati Prasad* v. *Chanbarja,* (1924) 11 O.W.N. 1297.

[17] *Bir Deb* v. *Ishurn Dutt,* 18 R.D. 689=16 L.R. 122 (Rev.).

[18] *Mt. Jaggobai* v. *Utsavlal,* 1929 P.C. 166 (169)=51 All. 439=56 I. A. 267=57 M.L.J. 160 (P.C.).

[19] *(Maharaja) Deo Das* v. *Mahesh Ram,* 1931 All. 25=130 I.C. 12 =1930 A.L.J. 1284.

**(iv) Misfeasance of Directors of Companies.**

1857. There is no doubt that for certain purposes new rights may be conferred by the winding up of a company; but it does not follow that the right of a liquidator to enforce against the Directors a claim based upon their misfeasance, is a case of a new right by reason of the winding up. The period starts from the date of the misfeasance.[20]

**(v) Date of knowledge of right.**

1858. In a suit by plaintiff for a declaration that fraud was practised by defendant in procuring the entry of his name in the revenue papers, the cause of action would arise when the fraud became known to the plaintiff.[21] In a **suit under S. 53 of the Transfer of Property Act,** which falls under Art. 120, Limitation Act. *"the right to sue"* does not accrue on the date of the transfer (alienation).[22] Venkatasubba Rao, J., was of opinion that the right to sue accrues when a creditor exercises his option of avoiding a fraudulent alienation; but this view was not shared by Madhavan Nair, J., who held that the starting point in such a case is the date on which the circumstances entitling the creditor to have the transfer avoided, first became known to him.[23] Similarly, a suit by the worshippers of a temple to declare mortgage by trustee not binding, which is based on fraud, is governed by Art. 120, and time begins to run not from the date of alienation but from the date when the fraudulest breach of trust becomes known to the plaintiffs.[24] In a case where plaintiff's cause of action consists in a denial of his title by the defendant the right to sue does not accrue until he is aware of that denial, or of the defendant's interference with his rights.[25] The **Allahabad High Court** has held in the case of *Mahabir Rai* v. *Sarju Prasad,*[26] that the denial of title referred to in S. 42 of the Specific Relief Act must be communicated to the person in order to give him a cause of action. A claim or statement denying title not communicated to the owner cannot set the statute of Limitation against him. In *Dattatraya Gopal* v. *Ramachandra Vishnu*,[27] it was held that though the defendants had denied the plaintiff's title in 1888 before the survey officer in a proceeding to which the plaintiffs were not parties, the cause of action for plaintiff's suit for declaration, filed in 1896, did not accrue in 1888, but in the year 1892 when the defendants opposed the petition put in by the plaintiffs to the survey officer to review his order of 1888 passed *ex parte*. The learned Judges were of opinion that time must be counted only from the date when the plaintiffs had notice of the entries in the survey officer's register of 1888, and that the conduct and denial of the plaintiff's title must somehow affect the plaintiffs before the right to sue accrues. In *Mamabai* v. *Acharath*,[28] where Art. 120 was applied to a suit for pre-emption by an *ottidar* under the customary law of Malabar, it was held that the right to sue to enforce the plaintiff's right to pre-emption accrued only when he had knowledge of the sale of the land by the mortgagor to a third person. Sadasiva Aiyar, J., in his referring order to the Full Bench in the case of *Peria Aiya Ambalan* v. *Shanmugasundaram*,[29] was inclined to think that,

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[20] *Narasimha Iyengar* v. *Official Assignee of Madras,* 1931 Mad. 58=54 Mad. 153=128 I.C. 477=60 M.L.J. 280; Followed *Bhim Singh* v. *Bashesharnath,* 1927 Lah. 433=100 I.C. 907=8 Lah. 167; *cf.* In the matter of *Union Bank, Allahabad,* 1925 All. 519=88 I.C. 785=47 All. 669.

[21] *Bhagat Ram* v. *Paras Ram,* 148 I.C. 776=1934 Lah. 574; also see *Kali Debya* v. *Bhagaban Nanda,* (1909) 1 I.C. 810 (C.) (Plaintiff kept from the knowledge of his right to sue, by the fraud of the defendant, may claim the benefit of S. 18, Limitation Act).

[22] *Narasimha* v. *Narain Rao,* (1926) 92 I.C. 405=1926 Mad. 66=22 L.W. 592.

[23] *Ibid.,* 92 I.C. 405 (406) (Per *Subba Row, J.*) and 92 I.C. 405 (409) —Per *Madhavan Nair, J.*; Relied on *Venkateswara Aiyar* v. *Somasundaram,* 44 I.C. 551=7 L.W. 280=1918 M.W.N. 224.

[24] *Viswanadhan* v. *Narayana Doss,* (1928) 112 I.C. 22=1928 Mad. 837=28 L.W. 224.

[25] *Muruga Chetty* v. *Rajaswamy,* (1915) 30 I.C. 669=29 M.L.J. 574=2 L.W. 813 and *Thirumala Rao* v. *Kadakar,* (1914) 22 I.C. 883=1 L.W. 134=1914 M.W.N. 197.

[26] (1917) 43 I.C. 175 (All.).

> "where the right to sue for the declaration of title to immoveable property accrues by reason of a mere denial of title behind the plaintiff's back by the defendant, whether the denial is made orally, or by writing, or by an act before a public officer, the plaintiff's right to sue could not be held to accrue till he gets knowledge of such denial".

In the **Allahabad Full Bench** case of *Faqira* v. *Hardewa*,[30] Mukerji and Ashworth, JJ., held, that where no fact had been alleged or proved, which established that previous to the filing of the application for partition the fact had been brought to the notice of the plaintiffs that there was a wrong entry in the *khewat*, and that advantage of that wrong entry was likely to be taken by the defendants, the right to sue on the alleged wrong entry in *khewat* accrued to the plaintiffs on the filing of the application for partition and not earlier. Where there was a mere denial of title by the defendant, not followed or accompanied by any overt act casting a cloud upon the title of the plaintiff as a co-sharer in certain property, it was considered that mere denial alone did not give rise to a cause of action for a declaratory suit.[31] Where lands were conveyed to temple servants by a *sanad* under the Bombay Summary

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[27] 24 Bom. 533 (538).

[28] 17 I.C. 337=23 M.L.J. 607=12 M.L.T. 535=1912 M.W.N. 1217.

[29] (1914) 22 I.C. 615=38 Mad. 903=26 M.L.J. 140 (F.B.).

[30] (1927) 50 All. 559=1928 All. 172 (F.B.).

[31] *Joynarain Sen Ukil* v. *Suchitra Debya*, (1922) 65 I.C. 8 (12)= 1922 Cal. 8=33 C.L.J. 592=26 C.W.N. 206.

Settlement Act, the lands being described in the *sanad* as the private property of the holders, the mere fact of the *sanad* having been granted would not constitute a cause of action upon which to maintain a suit for declaration of title that the lands are really *devasthan* lands, and not private property.[32] The **Nagpur Judicial Commissioner's Court** has held in *Pratap Singh* v. *Raja Dattaji Rao,*[33] that a suit to obtain a declaration that a person set up as the son and heir of a deceased is not the rightful heir must be brought within the period prescribed by Art. 120 of the Limitation Act; and such period begins to run from the time when, to the knowledge of plaintiff, the title of son and heir to the deceased is set up.

Again, where in a suit falling under Art. 120, Limitation Act, the cause of action is not merely the passing of an adverse decree against the plaintiff, but in addition to it, the fact that such decree was passed by reason of the misconduct or gross negligence of his guardian *ad litem,* limitation does not begin to run the moment the decree was passed, but only when the facts entitling the plaintiff to have the decree set aside, became known to him.[34] The right to sue in such a case accrues not on the date of decree, but only on the date when the decree comes to the knowledge of the plaintiff, or when there was a clear and unequivocal threat to infringe the plaintiff's rights by executing the decree.[35] The starting point of limitation under Art. 120, is, therefore, the date on which the circumstances entitling the plaintiff to have his interests guarded first comes to his knowledge and from which date a right to sue accrues to him.[36]

**1859. RECURRING CAUSE OF ACTION.**—(1) The *"right to sue accrues"*, when the *final* act of the series which constitutes a cause of action is done or happens.[37] The phrase is interpreted as meaning "the right to sue *first* accrues," unless the case is one where Art. 120, and S. 23 of the Limitation Act may have to be simultaneously applied to determine whether or not the suit is barred by limitation.[38] As observed in *Ghulam Hussain* v. *Saifullakhan*,[39]

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[32] *Vithal Dhondji* v. *Suryaji Ramchandra,* (1923) 75 I.C. 617=1922 Bom. 438=24 Bom.L.R. 902.

[33] (1920) 54 I.C. 300 (Nag.).

[34] *Basavayya* v. *Majeti Bapanna Row,* (1929) 120 I.C. 880=30 L.W. 911=1930 Mad. 173=58 M.L.J. 349.

[35] *Saddashivappa* v. *Sangappa,* 1931 Bom. 500=134 I.C. 1221=33 Bom.L.R. 1033; Relied on *Mt. Bolo* v. *Koklan,* 1930 P.C. 270=127 I.C. 737=57 I.A. 325=11 Lah. 657 (P.C.).

[36] *Lalsingh* v. *Jaichand,* 1931 Lah. 70 (2)=12 Lah. 262=130 I.C. 778=31 P.L.R. 1014; Relied on 1926 Mad. 66=92 I.C. 405 and 44 I.C. 551=1918 M.W.N. 224; also see *Jaimal Singh* v. *Chand Singh,* (1925) 91 I.C. 605 (Lah.) (Any subsequent denial which is only a reiteration of the denial does not constitute a fresh invasion giving a fresh cause of action).

[37] *Salima* v. *Sheikh,* (1895) 18 All. 131 (137).

> "to hold otherwise would amount to this, that a plaintiff in such a case could always renew limitation at will; he could at any time go to his opponent and say: 'Do you still deny my claim?' and getting the answer he expected could come into Court, basing his suit on the repeated denial. Article 120 would then become a mere farce".

Limitation for a suit for declaration of title to a property commences from the date of the *first* denial of plaintiff's title. Any subsequent denial is only a reiteration of the denial and not a fresh invasion giving a fresh cause of action.[40] Where the suit is based on a wrong or injury which is in the nature of a completed act, that is, where the wrong is not a continuing one in the eye of the law, limitation begins to run from the date of the wrong. However, in suits for partition, administration, and the like suits which do not necessarily arise out of any wrongful act on the part of the defendant, there is a **recurring cause of action.**[41] The cause of action for a suit for restitution of conjugal rights, for instance, is founded on a breach of the contract of marriage, and as observed in *Binda* v. *Kaunsilia*,[42] the breach continues so long as the person of the wife is withheld from the husband and he is denied the undoubted legal right of her conjugal society.[43] But, S. 23 of the Limitation Act is **not applicable to a suit in respect of the relief of declaration as to the divorce, and for a dissolution of marriage** governed by Art. 120 of the Limitation Act.[44] A suit for the construction of a will is governed by Art. 120 of the Limitation Act, but the right to obtain construction of a will does not accrue from the death of the testator, or the date of probate of will, being a continuing right.[45]

**1860. FRESH CAUSE OF ACTION.**—In a suit by party in possession for declaration of title to immoveable property, the limitation applicable to the suit is that provided by Art. 120 of the Limitation Act, and time only begins to run when the right to sue accrues.[46] But the difficulty experienced is to define when the right to sue originates, regard being had to all the facts and circumstances of each particular case, and

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[38] *Abdul Rahman* v. *Muhaidin Pathumal,* (1916) 32 I.C. 83 (85) =30 M.L.J. 104.

[39] 42 I.C. 346=79 P.R. 1917=140 P.W.R. 1917.

[40] *Jaimal Singh* v. *Chand Singh,* 91 I.C. 605 (Lah.).

[41] *Abdul Rahman* v. *Muhaidin Pathumal,* 32 I.C. 83 (85)=30 M.L.J. 104; Relied on *Mohabharat* v. *Abdul Hamid,* 1 C.L.J. 73 (76).

[42] 13 All. 126=A.W.N. (1891) 18.

[43] *Muhd. Hamidullah* v. *Fakhro Jahan,* (1922) 65 I. C. 452 (454) (Oudh).

[44] *Ibid.*

[45] *Ramkamal* v. *Syam Sunder,* (1923) 75 I.C. 41=1924 Cal. 411.

[46] *Mohabharat* v. *Abdul Hamid Khan,* 1 C.L.J. 73; also see *Shyamanand* v. *Raj Narain Das,* 4 C.L.J. 568=11 C.W.N. 186; *Kali Debya* v.

"there has been **some divergence of judicial opinion** on the question whether there may or may not be instances of successive accruals of causes of action for relief by way of declaration".[47]

Thus it has been held by the **Allahabad High Court** in *Akbar Khan* v. *Turaban,*[48] that the fact that the defendants had successfully resisted plaintiff's attempt to have the *khewat* entries corrected did not give plaintiffs a fresh cause of action: and that the refusal to have the entry corrected was only a continuation of the original cause of action. This was relied upon by the **Madras High Court** in *Thirumala Row* v. *Kadekar,*[49] where it was ruled that when a plaintiff brings a declaratory suit on the ground that the defendant has denied his title, there is only one cause of action which accrues from the date of knowledge in the plaintiff that the defendant denied his title. Similarly, it had been held in *Rajah of Venkatagiri* v. *Isakapalli Subbiah,*[50] that a wrongful denial, by the defendant of the plaintiff's title and possession was not continuing wrong within the meaning of S. 23 of the Limitation Act. This is not reconcilable with the view held in *Annantarazu* v. *Narayanarazu,*[1] that though the wrongful *attachment* in execution gives a cause of action for a declaratory suit, the *sale* gives a fresh cause of action as, till then, the title in the property does not pass from the owner.

**Allahabad.**

The **Allahabad** High Court has held in *Sheopher Singh* v. *Deo Narain Singh,*[2] that where the Collector's order that the settlement entries against the plaintiff's undisturbed possession should be corrected, was set aside by the Commissioner on appeal, the appellate order gave the plaintiff a fresh cause of action for the declaration of their right: and this view was followed in *Allah Jilai* v. *Umrao Hussain,*[3] where the plaintiff's application to the Revenue Court for correction of the village papers recording them as tenants was rejected in 1904, but they had remained in possession, and subsequently having been assessed with rent, on the application of defendants, the plaintiffs sued for a declaration of their proprietary title in 1912, and their suit was held not

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*Bhagaban,* 1 I.C. 810 (Cal.); *Tarak Nath* v. *Shyama Charan,* 36 I.C. 292; *Hulada Prasad* v. *Kalidas,* 24 I.C. 899=42 Cal. 536=20 C.L.J. 312=19 C. W.N. 542.

[47] *Joynarain Sen Ukil* v. *Suchitra,* (1927) 65 I.C. 8 (Cal.) (Per *Mookerjee, J.*)

[48] (1909) 1 I.C. 557 (All.); cf. *Ilahi Baksh* v. *Harnam Singh,* (1898) A.W.N. 215 and *Robert Skinner* v. *Shankerlal,* (1909) 1 I.C. 556 (Where there was a fresh invasion of plaintiff's right); Dist. and N.F. in *Aftab Ali* v. *Akbar Ali,* 1922 All. 529=121 I.C. 209.

[49] 22 I.C. 883=1914 M.W.N. 197=1 L.W. 134.

[50] (1902) 26 Mad. 410.

[1] (1912) 13 I.C. 96=36 Mad. 383=22 M.L.J. 108; Relied on *Narasimha Row* v. *Ganga Ram,* 18 M.L.J. 590=4 M.L.T. 271.

[2] (1912) 17 I.C. 675=10 A.L.J. 413.

[3] (1914) 24 I.C. 535=36 All. 492=12 A.L.J. 810.

barred by limitation. A person in possession is entitled to pass by an invasion of his right to the property and is not, by his forbearance debarred from a future suit on a future occasion affording a fresh independent cause of action.[4] The **Allahabad** decisions in *Ilahi Baksh* v. *Harnam Singh,*[5] and *Robert Skinner* v. *Shanker Lal,*[6] are generally relied upon as authorities for the view that a plaintiff seeking a declaration is entitled to sue upon each successive invasion of his right other illustrations of the application of this principle are to be found in *Bhikam Singh* v. *Bharat Indu,*[7] and *Mt. Salamat Begam* v. *Sheik Ikram.*[8] It is thus clear that where the title of a person who is seeking to have certain revenue entries corrected is disputed in the revenue proceedings, this furnishes him with a new cause of action to maintain a suit for declaration of title; and an owner in possession of property acquires a fresh cause of action on every occasion on which his rights are denied, disputed, or interfered with. A fresh cause of action may arise to a plaintiff and he may bring a suit even though a prior cause of action had arisen to him beyond the period of six years.[9]

**Patna.**

The **Patna** cases in *Brij Behari* v. *Sheo Shanker,*[10] and *Ramji Ram* v. *Sadhu Saran,*[11] support the above view. The rule was laid down in *Latafat Hussain* v. *Kalekar Nandsingh,*[12] that where there are two consecutive finally published record of rights, it is competent to a party aggrieved by the later record to ask for a declaration in respect of the second entry without first displacing the prejudicial entry in the earlier record. Limitation for a suit for the correction of an entry in record of rights is six years from date of final publication of the record of rights.[13]

**Punjab.**

The **Punjab Chief Court** and the **Lahore High Court** have repeatedly held in several cases that a plaintiff is not bound to bring a declaratory suit at the first denial, by defendant, of plaintiff's title on the strength of revenue entries in the defendant's favour.[14] As a matter of law a person is entitled to pass by an invasion of a right to property, and is not, by his forbearance, debarred from a future suit for a future invasion. And an incorrect entry repeated in second settlement constitutes a fresh cause of action.[15]

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[4] *Mahabir Rai* v. *Sarju Prasad,* (1917) 43 I.C. 175 (All.).

[5] A.W.N. (1898) 215.

[6] 1 I.C. 556=5 A.L.J. 638 (N.)=31 All. 10 (N.).

[7] (1927) 100 I.C. 45=1927 All. 296; Relied on *Sheophar Singh* v. *Deo Narain,* 17 I.C. 675=10 A.L.J. 413 and *Kali Prasad* v. *Harbans,* 50 I.C. 767=17 A.L.J. 588 (Cause of action on title denied in revenue proceedings).

[8] 1933 All. 663=145 I.C. 728.

[9] *Prajapati* v. *Jodh Singh,* (1934) 150 I.C. 814=1934 All. 539; and *Shiamlal* v. *Mahomed Ali,* 1935 All. 174=153 I.C. 73; *Gulzari Lal* v. *Maqbool,* (1921) 62 I.C. 695; also see and cf. *Gajadhar* v. *Hari,* (1925) 47 All. 416.

[10] 39 I.C. 85=2 P.L.J. 124=1 P.L.W. 434.

[11] 41 I.C. 11=2 P.L.J. 493; also see *Allauddin* v. *Zaifan Nissa,* (1917) 41 I.C. 199.

[12] (1918) 45 I.C. 432=1918 Pat. 225=3 P.L.J. 361=48 P.L.W. 308.

[13] *Abay Charan* v. *Ibrahim Mian,* 1933 Pat. 698 (2).

The **Punjab Chief Court** held in *Hakim Singh* v. *Waryaman,*[16] that a suit for declaration of his title to immoveable property by a person in possession as proprietor is not barred if brought within six years from the time when the defendant attempts to oust him from the land, although a right to sue the defendant who had been recorded as owner of the property in settlement record had already accrued and become barred. Similarly, in *Gokal Chand* v. *Hukam Chand,*[17] it was held that a declaratory suit brought by a plaintiff who has all along been in enjoyment of the property is not barred simply because an entry adverse to his rights was made or because he came to know of that entry more than six years prior to the institution of the suit. That, even if the right to demand correction of the revenue entries is lost by limitation, the plaintiff is entitled to a declaration of his proprietary title dating his cause of action from the time when the defendant attempts to oust the plaintiff from the property. The **Lahore High Court** has followed the above view in *Muhd. Hanif* v. *Ratan Chand,*[18] where it was held that a person continuing in joint possession of certain *shamilat* land, whose title had been first denied in 1895, was allowed a fresh cause of action in 1915, when fresh partition proceedings were started in respect of these plots, and the plaintiff's right to a share in the shamilat was again denied. Again, in *Ghulam Rasul* v. *Rahim Baksh,*[19] it was held that where an application made by the plaintiffs for correction of the entries in the Revenue Records were dismissed in 1916 and the plaintiffs filed a suit for declaration only in 1924, but the revenue officer had made a direction for partition of the occupancy rights within six years of the date of suit, there was a fresh invasion of the

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[14] *Hakim Singh* v. *Waryaman,* 140 P.R. 1907 and *Muhd. Hanif* v. *Ratanchand,* (1922) 67 I.C. 990=3 Lah. 43.

[15] *Khem Singh* v. *Kesar Singh,* 7 I.C. 528=122 P.L.R. 1910.

[16] 140 P.R. 1907=187 P.W.R. 1907; Followed in *Jahana* v. *Wali,* (1919) 53 I.C. 595=98 P.R. 1919; *Muhd. Hanif* v. *Ratan Chand,* 3 Lah. 43=67 I.C. 990.

[17] (1918) 44 I.C. 912=72 P.L.R. 1918=73 P.W.R. 1918.

[18] 3 Lah. 43=67 I.C. 990.

[19] (1929) 122 I.C. 225=1930 Lah. 284=11 L.L.J. 530; Relied on *Hakim Singh* v. *Waryaman,* 140 P.R. 1907=187 P.W.R. 1907; *Khemsingh* v. *Kesarsingh,* 7 I.C. 528=88 P.W.R. 1910; and *Muhd. Hanif* v. *Ratan Chand,* 53 I.C. 595=98 P.R. 1919.

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plaintiff's rights when the Revenue Officer made the direction for partition and the suit was not, therefore, barred. The **Calcutta High Court** held in *Muhd. Mehdi Hasan* v. *Phul Kuar,*[20] that the cause of action for a declaration that the rent payable by the defendant is higher than what appears on the record of right is not a continuing cause of action, as the right for a declaration arose when the contrary assertion was first made, and plaintiff had six years from the publication of the record of rights. A suit for ejectment on the ground that the defendant was a tenant-at-will cannot be regarded as a suit for correcting the record of rights, and may be brought after six years of the *final* publication of rights.[21] A suit for declaration of title to certain land, for the correction of entries in a record of rights, was held governed by Art. 120 of the Limitation Act, and the period of limitation commenced to run from the date of publication of record of rights.[22] There is no article of the Limitation Act specifically applicable to a suit for declaration of title to immoveable property, but the current of recent decisions is in favour of the applicability of Art. 120 to such suits.[23] Where there is a fresh invasion of the plaintiff's right,[24] or in the case of a continuing wrong, there is a fresh cause of action.[25]

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[20] (1910) 5 I.C. 115 (Cal.).

[21] *Minai Naik* v. *Banchanidhi,* (1911) 9 I.C. 804 (Cal.).

[22] *Jagat Narain Singh* v. *Udit Narain,* (1913) 20 I.C. 262 (Cal.).

[23] *Tarak Nath* v. *Syama Charan,* (1916) 36 I.C. 292 (296) (Cal.).

[24] *Ibid.*; Relied on *Robert Skinner* v. *Shankerlal,* 1 I.C. 556=31 All. 10 (N.)=5 A.L.J. 638 (N.).

[25] *Ibid.,* 36 I.C. 292 (296) (Cal.); Relied on *Brojendra Kishore Roy* v. *Bharat Chandra,* 31 I.C. 242=2 C.W.N. 481=22 C.L.J. 283.

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